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Senate Select Committee on Ministerial Discretion in Migration Matters

Report

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Executive Summary

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

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

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

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

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

Accountability issues surrounding the conduct of the inquiry

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

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

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

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

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

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

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

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

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

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

DIMIA suggested that there were three main reasons for the increase in the use of ministerial discretion since 1996-97. First, the Government has chosen to deal with onshore applications for visas on a case-by-case basis rather than by establishing special visa categories. Second, there have been more requests as the workload and decisions made by the tribunals have increased significantly. Third, there is greater public awareness of the existence and processes of the exercise of discretion. DIMIA also suggested that judicial review has influenced the number and timing of requests.

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

The sole accountability mechanism in cases where the discretionary power is used to grant a visa is a requirement that the minister table statements in parliament on a six-monthly basis. According to the legislation, these statements must set out the minister's reasons for thinking intervention is in the public interest. While the statements made under section 351 go some way to providing case specific reasons for ministerial intervention, those made under section 417 since 1998 provide no case specific reasons beyond reference to the 'public interest'. The majority of witnesses to this inquiry argued that the ministerial statements under section 417 contain insufficient information to judge how the power is being used.

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

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

The Committee makes several recommendations that address the current 'black hole' in the accountability of the minister's discretionary powers. It recommends that the minister's tabling statements under sections 351 and 417 meet the legislative requirement that the minister provide reasons why a decision to intervene is in the public interest. It also recommends that tabling statements give an indication of how the case was brought to the minister's attention – by an approach from the visa applicant, by a representative on behalf of the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department or in some other way. The Committee believes that these practical measures go some distance in enabling parliament to scrutinise the use of the discretionary powers.

Ministerial guidelines and decision making within DIMIA

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

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

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

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

Ministerial discretion and the experience of applicants

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

The Committee makes a series of recommendations to address these deficiencies, namely that DIMIA create an information sheet and application form in appropriate languages that explains the ministerial guidelines and application process, and that a consultative process be established between DIMIA and applicants for ministerial intervention where applicants are shown and can comment upon information that is central to the outcome of their case – for example, the draft submission to be placed before the minister, and reasons for an unfavourable decision on a first request for ministerial intervention.

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

Representations to the minister

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

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

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

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

Ministerial discretion under minister Ruddock

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

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

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

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

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

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

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

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

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

International humanitarian obligations

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

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

The Committee heard from a number of refugee advocacy groups that protection from refoulement should not be left solely to the minister's discretionary powers under sections 351 and 417 of the Migration Act, given that the powers are non-compellable, non-reviewable and non-delegable. The Committee also heard from witnesses that reliance on the discretionary powers places considerable burden on Australia's migration system and results in non-Convention asylum seekers being detained for extended periods in order to request the minister's intervention at the end of a determination process which is not relevant to them.

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

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

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

The future of ministerial discretion in migration matters

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

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

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

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

The Committee recommends that the government consider establishing an independent committee as part of the ministerial intervention process to improve the equity and transparency of the process and restore public confidence in the system. The purpose of the committee would be to review DIMIA's submissions and schedules and recommend to the minister cases which it believes should receive ministerial intervention.

In assessing the appropriateness of the ministerial discretion powers, the Committee is concerned that vesting a non-delegable, non-reviewable and non-compellable discretion with the immigration minister without an adequate accountability mechanism creates both the possibility and perception of corruption. At a minimum, the Committee wants to see external scrutiny of decision making made an integral part of the ministerial discretion system. This should bring a greater degree of transparency into the decision making process and reduce the scope for corruption of the system.

Recommendations

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, including (but not limited to):

- **the number of cases referred to the minister for consideration in schedule and submission format respectively;**
- **reasons for the exercise of the discretion, as required by the legislation;**
- **numbers of cases on humanitarian grounds (for example, those meeting Australia's international obligations) and on non-humanitarian grounds (for example, close ties);**
- **the nationality of those granted intervention;**
- **numbers of requests received; and**
- **the number of cases referred by the merits review tribunals and the outcome of these referrals. (para 3.54)**

Recommendation 2

The Committee recommends that DIMIA establish a procedure of routine auditing of its internal submission process. The audits should address areas previously identified by the Commonwealth Ombudsman, namely identifying ways to improve departmental processes for handling cases, and ensuring that claims are processed in a timely way and case officers consider all of the available material relevant to each case. (para 4.67)

Recommendation 3

The Committee recommends that the Commonwealth Ombudsman carry out an annual audit of the consistency of DIMIA's application of the ministerial and administrative guidelines on the operation of the minister's discretionary powers. The audit should include a sample of cases to determine whether the criteria set out in the guidelines are being applied, and to identify any inconsistency in the approach of different case officers. (para 4.70)

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. (para 4.84)

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. (para 4.85)

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. (para 5.9)

Recommendation 7

The Committee recommends that coverage of the Immigration Application Advice and Assistance (IAAAS) scheme 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. (para. 5.12)

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. (para. 5.18)**

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 (para 5.35)**

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. (para 5.44)

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. (para 5.53)

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. (para 6.71)

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 risk. (para 6.74)

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. (para 6.75)

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. (para 7.53)

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. (para 7.54)

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 exceptional or unforseen cases. (para 7.71)

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. (para 8.29)

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 ICCPR. (para 8.82)

Recommendation 20

The Committee recommends that the ministerial intervention powers are retained as the ultimate safety net in the migration system, provided that steps are taken to improve the transparency and accountability of their operation in line with the findings and other recommendations of this report. (para 9.73)

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. (para 9.77)

List of Abbreviations

ABBREVIATION	MEANING
AAT	Administrative Appeals Tribunal
AEC	Australian Electoral Commission
AFP	Australian Federal Police
ASAS	Asylum Seekers Assistance Scheme
ASP	Asylum Seekers Project
CAAIP	Committee to Advise on Australia's Immigration Policies
CAT	Convention Against Torture
CCJDP	Catholic Commission for Justice, Development and Peace
CLA	Christopher Levingston & Associates
CROC	Convention on the Rights of the Child
DIMA	Department of Immigration and Multicultural Affairs (now DIMIA)
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
DLO	Departmental liaison officer
EXCOM	Executive Committee (of the United Nations High Commissioner for Refugees)
HREOC	Human Rights and Equal Opportunity Commission
IAAAS	Immigration Application Advice and Assistance Scheme
IARC	Immigration Advice and Rights Centre

ICCPR	International Covenant on Civil and Political Rights
IRT	Immigration Review Tribunal
LAC	Legal Aid Commission
MARA	Migration Agents Registration Authority
MIA	Migration Institute of Australia
MIRO	Migration Internal Review Office
MIU	Ministerial Intervention Unit
MRT	Migration Review Tribunal
MSI	Migration Series Instruction
NGO	Non-government organisation
PCMS	Parliamentary Correspondence Management System
Refugee Convention	Convention Relating to the Status of Refugees
RRT	Refugee Review Tribunal
SBICLS	South Brisbane Immigration and Community Legal Service
UNCAT	United Nations Committee Against Torture
UNHCR	United Nations High Commissioner for Refugees

Introduction

Terms of reference

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

a) the use made by the Minister for Immigration of the discretionary powers available under sections 351 and 417 of the Migration Act 1958 since the provisions were inserted in the legislation;

b) the appropriateness of these discretionary ministerial powers within the broader migration application, decision-making, and review and appeal processes;

c) the operation of these discretionary provisions by ministers, in particular what criteria and other considerations applied where ministers substituted a more favourable decision; and

d) the appropriateness of the ministerial discretionary powers continuing to exist in their current form, and what conditions or criteria should attach to those powers.

Background to the inquiry

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

Conduct of the inquiry

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

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

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

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

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

Structure of the report

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

Background –Chapters 1 and 2

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

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

Use of the powers – Chapter 3

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

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

Operation of the powers – Chapters 4 to 7

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

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

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

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

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

Ministerial discretion and Australia's international obligations – Chapter 8

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

Appropriateness of the current form of the powers – Chapter 9

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

Chapter 1

Ministerial discretion – background issues and problems experienced during the inquiry

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

1.2 During the course of parliamentary debates surrounding the allegations the then Shadow Minister for Immigration, Ms Julia Gillard MP, and Mr Laurie Ferguson MP, raised a number of specific allegations about the possible misuse by Mr Ruddock of his ministerial discretion powers under the Migration Act. The accusations related to instances where the minister was alleged to have granted visas to individuals in exchange for cash donations to the Liberal Party of up to $100,000 by the individuals concerned or by those acting on their behalf.[1]

1.3 The allegations were fuelled in part by media speculation that the immigration minister's strong connection with Australia's Lebanese community influenced his use of the discretionary powers on more than one occasion.[2] At the time the allegations were debated in parliament, they received an air of authenticity in the print media under two eye-catching headlines which soon became catch-all phrases to describe an unfolding political controversy for the Howard Government – the 'cash-for-visa' scandal and 'visagate'.[3]

1.4 This chapter provides a brief overview of allegations raised in parliament against the former Minister for Immigration, Mr Ruddock. The Committee believes that grasping the nature and gravity of the allegations is important because they gave rise to a range of issues relating to the minister's discretionary powers which, in turn, guided the Committee's efforts to investigate the allegations.

1.5 The chapter briefly considers the parliamentary debates on the allegations, in particular the censure motions moved against the immigration minister and the

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1 Allegations of visas being issued in exchange for cash donations to the Liberal Party were first raised in the House of Representatives by Mr Laurie Ferguson MP on 28 May 2003, *House Hansard*, p.15199

2 Andrew Clennell, 'Merciful Ruddock gives more rejected migrants a lifeline', *Sydney Morning Herald*, 31 January 2001 and Andrew Clennell, 'Outrage as Ruddock opens door to Lebanese outcasts', *Sydney Morning Herald*, 2 April 2001

3 See, for example, Mark Riley, 'Ruddock's cash-for-visa quagmire deepens', *Sydney Morning Herald*, 18 June 2003 and 'Visagate raffle ripples widen', editorial, *Australian*, 8 July 2003

government. It concludes by examining obstacles to the conduct of this inquiry created in the first instance by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and subsequently by the new minister, Senator Vanstone, and the wider implications of executive obstruction for parliamentary accountability.

Allegations of impropriety raised by the Opposition

1.6 Four separate cases involving alleged impropriety by the former immigration minister, Mr Ruddock, were raised by the Opposition and debated in the House of Representatives between 29 May and 26 June 2003.[4] The Opposition gradually pieced together details involving each case over a number of weeks, mainly in response to answers provided in the House by Mr Ruddock. The core allegations involved in each of the four cases are summarised below:

- Mr Bedweny Hbeiche applied for a protection visa in 1996 when he first arrived in Australia. His application was refused, and the matter was taken unsuccessfully to the Refugee Review Tribunal (RRT) and the Federal Court. Following two separate requests for the minister to exercise his discretion, which he declined, a third request by Bishop Darwish on 27 September 2001 was dealt with by the minister in January 2001. The minister stated that he dealt with this request because new information was supplied to him, namely, that Mr Hbeiche has three married sisters who are Australian citizens, and that it was this information that influenced his decision to intervene in the case.

  The Opposition alleged that Mr 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 Hbeiche's behalf. It was also alleged that Mr Hbeiche's original application mentioned that he had three sisters in Australia, whereas the minister claimed that the brief that came from DIMIA did not contain this information.

- Mr Karim Kisrwani is a Parramatta travel agent, a prominent member of the Lebanese community and long-time acquaintance of Mr Ruddock. Immigration department statistics show that between 1999-2003 Mr Kisrwani made 55 requests for the minister to exercise his discretion, of which 36 were finalised and 17 were successful.

  The Opposition raised a number of allegations about Mr Kisrwani, including that he was the central figure in the 'cash-for-visas' scandal, and that he received money for migration advice although he was not a registered migration agent. Specifically, the Opposition alleged that Mr Kisrwani:

4 The allegations were raised over the period 28-29 May, 2-5 June, 16-19 June, and 24-26 June

- made a donation of $3,000 to the minister's re-election campaign on Mr Hbeiche's behalf to influence the minister's decision;
- received $220,000 from Mr Dante Tan to use his influence with the minister to have his visa restored (see below);
- received $1,500 from Mr Roumanos Boutros Al Draibi to represent him in a migration matter; and
- received $2,000 a month from Mr Jim Foo's failed Pioneer Spirit Developments in Dubbo for an 'immigration consultancy'.

- The Opposition questioned the minister on a number of occasions about a donation of $100,000 that was made by the Maha Buddhist Monastery to the NSW Liberal Party and the number of visas for religious workers received by the monastery. The minister responded that he only became aware of the donation when it was reported in the media in February 2002, and that 23 nominations and 10 visas for religious workers were awarded to the monastery in the three years from 2000-01.

- Mr Dante Tan, a business migrant from the Philippines who was granted a visa on 11 September 1998, had his visa cancelled on 5 September 2001, when he could not be contacted following expiration of the three-year period that applies to all business migrants. In November of that year, one of Mr Tan's business associates, Mr Kisrwani, contacted the minister's office to inquire about the status of Mr Tan's visa. After Mr Tan lodged an appeal to the Administrative Appeals Tribunal (AAT), the immigration department withdrew from the case after consulting with the minister on the question of costs.[5] More importantly, the department vacated the decision to cancel Mr Tan's visa after he convinced the department (and the Australian Securities and Investment Commission) that he was engaged in business activities in Australia. Mr Tan subsequently became an Australian citizen in May 2002.

  The Opposition alleged that Mr Tan's visa was reinstated after he made a $10,000 donation to the minister's re-election campaign at a fund-raising dinner organised by Mr Kisrwani, probably on 14 October 2001. Of added interest to this case is that the Philippine authorities laid charges of fraud against Mr Tan in 2000. When Mr Tan was informed that the Philippine authorities were seeking his extradition, he left Australia in 2003.

1.7 The Committee points out that unlike the cases involving Mr Hbeiche and Mr Kisrwani, those involving the Maha Buddhist Monastery and Mr Dante Tan did *not* involve Mr Ruddock exercising his ministerial discretion. It became clear during

5 *House Hansard*, 3 June 2003, p.15756

parliamentary debate that ministerial intervention had not been exercised in the granting of visas to the monastery, and that ministerial intervention could not have been considered for Mr Tan under the Migration Act because there had not been a review tribunal decision in that case.

1.8 While the Maha Buddhist Monastery and Tan cases do not fall directly within this inquiry's terms of reference, the Committee notes that they nevertheless raise serious allegations of impropriety by Mr Ruddock similar to the allegations surrounding cases involving Mr Hbeiche and Mr Kisrwani.

Outcome of parliamentary debate

1.9 The parliamentary debate that followed airing of the 'cash-for-visa' allegations resulted in two censure motions being moved by the Shadow Minister for Immigration, Ms Julia Gillard, against Mr Ruddock on 5 June and 26 June, respectively. Not surprisingly, both motions were defeated on party lines. A third attempt by the Opposition to move a censure motion against Mr Ruddock on 18 June was prevented when the Deputy Speaker ruled the motion out of order (the motion was not consistent with a special ruling on government business that had been made for that sitting day).[6]

1.10 On both occasions the minister rejected the allegations made against him, and brushed aside the censure motions as nothing more than planned and premeditated political stunts. He claimed that the motive behind the first censure motion was 'quite malevolent', and that it was 'a deliberate attempt to diminish me'.[7] On other occasions, the minister stated categorically that: 'I have never exercised my personal discretion in return for a donation'.[8]

1.11 The parliamentary debate surrounding the allegations reiterated long-standing criticisms of the discretionary powers. These included that the powers are open to real or perceived distortion, political influence and corruption at the highest levels of public office because they are too broad in scope and far removed from the established avenues of accountability that apply across all levels of executive decision-making.[9]

1.12 In short, because the minister's discretionary powers are non-compellable, non-reviewable and non-delegable – an issue examined in detail in this report – they are effectively beyond the reach of parliamentary scrutiny and leave a significant accountability 'black hole' in the administration of immigration policy.

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6 *House Hansard*, 18 June 2003, p.16810

7 *House Hansard*, 5 June 2003, p.16281

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

9 *House Hansard*, 29 May 2003, p.15475

1.13 In the light of the unsatisfactory responses to the allegations by Mr Ruddock, the Opposition parties decided that the allegations and the government's response were serious enough for the issue of the minister's discretionary powers to be brought before a parliamentary committee of inquiry.[10]

1.14 The Select Committee on Ministerial Discretion in Migration Matters was subsequently appointed by the Senate on 19 June 2003. Although the allegations raised in parliament in 2003 provided a focus for the inquiry, the Committee was empowered under its terms of reference to examine broader issues, such as the appropriateness of the ministerial discretion powers under sections 351 and 417 of the Migration Act within the current migration system. The Committee was also empowered to consider the operation of the discretionary powers by immigration ministers, including the criteria that applied (and should apply) to the exercise of the powers.

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

1.16 The following section describes how during the course of its inquiry the Committee met a number of obstacles that prevented the inquiry moving forward. Specifically, in a period of nearly five months, from mid-September 2003 to March 2004, the Committee was impeded on a number of occasions in its efforts to gain access to certain documents it considered important to its inquiry.

Obstacles to the conduct of the inquiry

1.17 The Committee's efforts to test the allegations outlined above were hampered by the lack of cooperation received from both DIMIA and Senator Vanstone, as the new immigration minister. The Committee made numerous requests for information that might shed light on specific cases where allegations had been aired in parliament and the media. At various stages of the inquiry, Committee members requested, *inter alia*: case files and details of cases where Mr Karim Kisrwani had made representations on behalf of an applicant; details of cases where Mr Ruddock used the intervention powers in a case initially assessed by DIMIA officers as falling outside the ministerial guidelines; cases decided by Mr Ruddock during his last week in office; case files where the 'top ten' sponsors had made representations; and the case history of certain individuals who had received ministerial intervention and who became the subject of media interest, including Mr Bedweny Hbeiche. The Committee was also interested in

10 Meaghan Shaw and Russell Skelton, 'Ruddock may face inquiry on intervention', *Age*, 7 June 2003

how Senator Vanstone used the power after she became minister, and sought information about the well-publicised case of Mr Ibrahim Sammaki.

1.18 The Committee also requested the notebooks kept by a departmental liaison officer (DLO) serving in Mr Ruddock's office during the period in question. The departmental liaison officer told the Committee that he kept notebooks to keep track of the content and any outcome of phone calls,[11] some of which could be relevant to ministerial intervention cases of interest to the Committee.[12]

1.19 All of the Committee's requests for detailed case file information were met with resistance, initially from DIMIA and ultimately from Senator Vanstone. Their responses to these requests are summarised below:

- At a public hearing on 23 September 2003, the Committee asked DIMIA to provide case files where Mr Kisrwani and Ms Marion Le had made representations. On 31 October 2003, DIMIA wrote to the Committee advising that the request raised significant workload implications for the department, in that it would take an estimated 120 person days to prepare the files for the Committee's perusal. The letter also indicated that the department had broader concerns about the provision of files, as the files 'relate to individuals who are not themselves the subject of the inquiry' and the persons concerned were assured that their personal details would not be disclosed by the department except for certain purposes.

- In correspondence dated 29 October 2003, the Committee asked DIMIA to provide information about 17 cases in respect of which Mr Kisrwani had made representations. DIMIA evidently commenced work on compiling this information, as at a public hearing on 17 November 2003 Ms Philippa Godwin, a deputy secretary in DIMIA, informed the Committee that the department was on the point of providing it.[13] On 18 November Ms Godwin again stated that she had reviewed a significant portion of the work, and that answers should be provided by the next week.[14] These answers never eventuated, due to events outlined below.

- At the public hearing on 18 November 2003, the issue of DIMIA providing information about individual cases was discussed at some length.[15] DIMIA

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11 Mr Knobel, DIMIA, *Committee Hansard*, 5 September 2003, p.72

12 A summary of case file related information requested by the Committee and related correspondence is at Appendix 4

13 Ms Godwin, DIMIA, *Committee Hansard*, 17 November 2003, p.3

14 Ms Godwin, DIMIA, *Committee Hansard*, 18 November 2003, p.60

15 *Committee Hansard,* 18 November 2003, pp.59-70

witnesses indicated that the Committee's requests for information involved some 250 individual cases, and that to provide the information requested by the Committee would require around 250 person days. In light of the workload and timing considerations, the Committee agreed to prioritise its information requests, and suggested holding a private meeting with DIMIA officials to work though some of those issues.

- On 27 November 2003, the Committee Chair and Deputy Chair met with DIMIA officials to discuss the provision of case file related information. At that meeting, the Committee endeavoured to reduce the workload implications for the department by scaling back the information requests.

- In correspondence dated 12 December 2003, DIMIA indicated that, despite refinement of the information requested, there remained some 130 cases about which further information was requested, which would still require a substantial amount of work. DIMIA also noted that the nature of the information requested raised privacy concerns, and could 'have implications going well beyond this inquiry'. DIMIA advised that: 'We have therefore consulted with the Minister's office. In view of the considerable workload implications and unprecedented nature of the request, the Minister, Senator Vanstone has not authorised the Department to provide such a broad ranging and significant amount of personal material'. This letter did not mention the 17 Kisrwani cases on which, as outlined above, most of the work had already been done.

- On 14 January 2004 DIMIA notified the Committee that it had received advice from its Special Counsel (Australian Government Solicitor) that in order to provide detailed information on Mr Hbeiche and Mr Sammaki as requested by the Committee, it would need to seek their permission. This letter stated that DIMIA was in the process of contacting those two individuals and it would forward the information once permission was received. On 10 March 2004 DIMIA advised that it had written to Mr Hbeiche and Mr Sammaki on 16 January but had not received a response from either.

- The Committee's request to view the notebooks kept by DLOs serving in the minister's office was referred to the minister, and was eventually refused by Senator Vanstone in a letter dated 23 January 2004. Senator Vanstone's letter expressed concern at the 'broad' and 'unprecedented' nature of the request. Her stated grounds for withholding the notebooks were, broadly speaking: the notebooks contain records of phone calls from a range of people on topics across the whole portfolio, only some of which related to ministerial intervention; without contextual information, the notebooks could give misleading impressions to the Committee; it would be inappropriate to pass to the Committee information related to people whose affairs are outside the scope of the inquiry, and; even in matters that may touch on ministerial intervention, normal privacy principles would

require the approval of specific individuals before passing on information about them.

- On 11 February 2004, the Committee Chair wrote directly to Senator Vanstone, noting the Committee's power, delegated by the Senate, to order the production of any documents it deems relevant to its inquiry, and pointing out that the Senate and its committees are not bound by privacy legislation or privacy principles. This letter requested that Senator Vanstone meet the Committee's outstanding information requests by 19 March 2004.

- On 2 March 2004 Senator Vanstone replied to the Committee Chair refusing to provide the information requested. Her letter stated that: '…I am not intent on refusing to provide the Committee with information, but I do not believe that it is appropriate to provide it in the way that it has been sought'. Notwithstanding the Chair's explanation of the Senate's powers to require the production of documents and to request any information it considers relevant to its inquiries, Senator Vanstone reiterated her concern about the Committee seeking 'a broad ranging and significant amount of personal information in relation to individuals who are not themselves the subject of [this] inquiry'.

1.20 Without access to case files, documents and other contextual information on specific cases where Mr Ruddock used the intervention powers, the Committee has been unable to resolve the suspicion and doubt that has arisen following the airing of allegations last year. This has led to a situation where the Committee has been unable to fully address one of the inquiry's key terms of reference on the operation of the discretionary powers by ministers and the criteria that applied when ministers exercised their discretion (term of reference (c)). The Committee can only conclude that the present minister's unwillingness to provide the detailed information necessary to conduct a full and thorough investigation of relevant cases suggests a reluctance to expose the decision making process to close scrutiny.

1.21 Through the course of this inquiry, the Committee has discovered investigations by the Australian Federal Police and Australian Electoral Commission into matters which may be relevant to the subject of the inquiry. However, operational constraints have prevented the Committee from obtaining further details about the nature of those investigations and what, if any, relevant information is held by those organisations. The Committee accepts the reasons given by the AFP and AEC for not disclosing information pertinent to current investigations. The Committee has not been advised of the results of these investigations and is therefore unable to determine whether they would have had any bearing on the findings of this inquiry.

1.22 The Committee was unsuccessful in efforts to obtain direct comment from Senator Vanstone on her views on the ministerial discretion powers. On 27 October 2003, the Chair wrote to Senator Vanstone inviting her to express her views on the use and operation of the ministerial discretion powers for the record. Senator Vanstone did

not respond until shortly before this report was due to be printed, when she said a response was 'overlooked' last year and expressed the view that 'it was not appropriate' for her to comment on the issues before this inquiry.

1.23 Despite these constraints, this inquiry has put on the public record a substantial volume of information about an area of public administration not generally known for its transparency and accountability. The information provided by DIMIA, while limited in its usefulness for examining specific uses of the intervention powers subject to the allegations outlined above, has partially enabled the Committee to address its terms of reference in a general way.

1.24 The Committee's examination of the evidence available to it from the department and non-government witnesses suggests that a systematic investigation of the operation of the ministerial discretion powers under the Migration Act is indeed warranted. The *Migration Act 1958* vests the minister for immigration with an extraordinarily free discretion to intervene on behalf of unsuccessful visa applicants where the minister considers it 'in the public interest' to do so. However, the minister's exercise of this discretion is subject to no external review. The only accountability mechanism is the requirement to table statements in parliament every six months. Under the Howard Government, the statements have outlined in the broadest terms cases where the minister has intervened.

1.25 A key area of concern for the Committee through the course of this inquiry has been to assess whether the systems currently in place are adequate to ensure that the operation of this unusual power is transparent and open to scrutiny. One area of interest is the department's processes for supporting the operation of the ministerial intervention powers. The Committee noted with some concern that DIMIA officials did not view the department's role as including any 'decision making', despite clear evidence that ministerial intervention requests are vetted by departmental officials in the first instance to determine whether the minister would be briefed in any detail on that case. Furthermore, the Committee has found that departmental processes surrounding the ministerial intervention powers do not involve generating adequate records or statistical data to enable effective external scrutiny of the way the powers are operating. The Committee has also heard of aspects of the administration of the powers that appear to create hardship for individual visa applicants.

1.26 The Committee has heard significant concerns from non-government stakeholders that a lack of authoritative, publicly available information on the operation of the powers leads to a perception in the community that it is not 'what you know but who you know' that will determine whether a ministerial intervention request is successful. Through this inquiry, the Committee has sought to ascertain whether this perception is justified, by looking at the available information on the role of representatives, be they lawyers, community leaders or parliamentarians, in accessing the minister to support cases seeking ministerial intervention. The lack of conclusive evidence in this area has led the Committee to the view that the current structure of the system invites the perception of corruption, and opens the way for unscrupulous behaviour at all levels.

1.27 The most concerning aspect of the inquiry has been the lack of information the Committee has been able to access about the decision making process once a case reaches the minister's office. The Committee's difficulty obtaining evidence to investigate serious allegations relating to the use of these powers highlights how easy it would be for a minister to use them for party political ends. The intention of parliament when these powers were inserted in the Act was that parliament would be able to scrutinise a minister's use of the powers. If, however, as has been seen through this inquiry, a parliamentary committee charged with investigating the use of these powers can be frustrated by a lack of cooperation by the government, the ability of parliament to scrutinise the operation of the powers is impaired.

Powers of Senate committees: ministers, officials and departments

1.28 Parliamentary accountability is the cornerstone of modern democracy. The Committee notes the assessment made in the report of the 'children overboard' inquiry that, within the context of the public service:

> …there is a continuum of accountability relationships, both vertical and horizontal, between the public service, the government, the parliament and Australia's citizens. Nevertheless, there are some fundamental tenets and practices of accountability that are well established in public administration, even though these received notions of accountability are increasingly being stretched.[16]

1.29 Against this background, the Committee would like to stress that the difficulty it has had in gaining access to material central to its inquiry and in obtaining full and accurate information in a timely way, is an issue of overriding importance. As discussed in the previous section, the Committee was unable to obtain access to all the documents relevant to its inquiry for reasons provided by the department that the Committee does not accept. Much like the experience of the 'children overboard' inquiry, the Committee is of the view that actions taken by Senator Vanstone and her department during this inquiry do not promote transparency, accountability and good governance.[17]

1.30 The Committee is left in no doubt that it was obstructed in carrying out the full task requested of it by the Senate, as provided in the inquiry's terms of reference. The obstacles to the conduct of this inquiry created by Senator Vanstone and her department raise a number of broader issues relating to parliamentary accountability, the powers of Senate committees and the ability of Senate committees to fulfil their reporting obligations to parliament.

1.31 While the Committee does not wish to dwell on the complex issue of accountability in modern governance arrangements, it believes it is necessary to

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16 Select Committee on a Certain Maritime Incident, *Report*, October 2002, p.149

17 Select Committee on a Certain Maritime Incident, *Report*, October 2002, p.193

summarise at the outset four established tenets of parliamentary accountability that underpin the operation of Senate committees:

- Senate committees empowered by the Senate have a clear authority to require the attendance of witnesses, the answering of questions, and the production of any document relevant to their inquiries;

- The power to call for persons and documents is a necessary adjunct of the Senate's authority to conduct inquiries. The undoubted source of this authority is section 49 of the Constitution.[18] There are no known limitations in law to this power. The power is delegated to the Senate's committees in the operating rules of the Senate known as *Standing Orders and other Orders of the Senate*;

- While a minister may offer reasons for the non-attendance of persons at a public hearing or the non-production of documents – for example, commercial-in-confidence, public interest, or privacy – it is the committee in the first instance, and ultimately the Senate, that determines whether or not to accept the reasons; and

- The Senate and its committees are not bound by privacy legislation or privacy principles, but may choose to respect them in practice.[19]

1.32 The Committee notes that other Senate committees have had similar experiences of ministers, departments and agencies failing to provide documents, and invariably it has been commercial-in-confidence, public interest and, in the case of this inquiry, privacy issues that were provided by the minister as reasons for not complying with committee requests. It is no wonder that the consideration of accountability, especially the accountability of the executive as a whole, featured prominently in their published reports.[20]

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18 Section 49 states: 'The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth'.

19 For an authoritative discussion of the powers of Senate committees, see Harry Evans (ed.) *Odgers' Australian Senate Practice*, 10th edn, Department of the Senate, 2001, Chapter 16 'Committees', Chapter 17 'Witnesses', and Chapter 19 'Relations with the Executive Government'

20 Most notably, two interim reports of the Senate Finance and Public Administration Committee Inquiry into the Government's Information Technology Outsourcing Initiative, *Accountability in a Commercial Environment—Emerging Issues*, April 2001, *Accountability Issues: Two Case Studies*, June 2001; and the report of the Select Committee on a Certain Maritime Incident, October 2002, especially Chapter 7, 'Accountability'

1.33 The Committee takes the issue of executive obstruction of a Senate committee inquiry very seriously. In this context, the Committee's dealings with the immigration minister, Senator Vanstone, reinforce the main findings of the first interim report of the Senate Finance and Public Administration Reference Committee's inquiry into the government's information technology outsourcing initiative. That report highlighted:

- the apparent disregard or ignorance in the Australian Public Service about parliamentary accountability;
- the lack of timeliness and quality of answers in response to the Committee's request; and
- the continuing need to facilitate an improved awareness of the powers of Senate committees and the framework of accountability in which ministers are accountable to the parliament for the policies and actions of their departments and ultimately, through parliament, to the public.[21]

1.34 The Committee is aware that executive departments have been advised on numerous occasions by the Auditor-General, the Administrative Review Council and by Senate committees about the rules of parliamentary accountability and the powers of Senate committees to call for persons, papers and documents.[22] It is for this reason that the Committee regrets having to repeat the fundamental principles of parliamentary accountability and to remind the immigration minister and her department that they are bound by these clear accountability requirements.

1.35 The minister's disregard for the Committee's power to obtain the departmental case files and ministerial notebooks necessary to fully explore the minister's discretionary powers is a dominant theme that runs through this inquiry. As previously noted, the Committee acknowledges that internal departmental procedures may have been a legitimate factor behind some of the delays experienced by DIMIA in providing the Committee with information. The Committee nevertheless finds that the history of executive obstruction of Senate committees has been magnified during the course of this inquiry, given Minister Vanstone's unacceptable responses to the Committee's repeated requests for information.

1.36 In the light of this obstruction, the Committee decided that the best course of action was to report its findings and recommendations to the Senate and place on the public record information about the operation of the minister's discretionary power that is otherwise not available. The Committee formed the view that further requests

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21 Senate Finance and Public Administration Committee, *Accountability in a Commercial Environment—Emerging Issues*, April 2001, p.2

22 Australian National Audit Office, *The Use of Confidentiality Provisions in Commonwealth Contracts*, Audit Report No. 38 2000-01, May 2001; Administrative Review Council, *The Contracting Out of Government Services*, Report No. 42, 1998. See also the Senate committee reports listed in footnote 20

to the minister for case files and documents would most likely be refused, which would needlessly prolong the inquiry process. However, the evidence before the Committee was sufficient to enable it to formulate conclusions on the exercise and administration of the discretionary power. The Committee's conclusions are reflected in the recommendations to this report.

1.37 The Committee decided not to attempt to exercise its power to call for persons, documents and witnesses. It concluded that this course of action would have led to considerable and unacceptable delays in bringing the inquiry to a satisfactory conclusion and would probably have embroiled the Committee, and ultimately the Senate, in a protracted dispute with the government. In reaching this decision, the Committee was mindful of the view of the majority report of the 'children overboard' inquiry that a stand-off between a Senate committee and the executive over the powers of Senate committees could be challenged in the courts at considerable cost to taxpayers, causing further delays until the issue was settled.[23]

23 Select Committee on a Certain Maritime Incident, *Report*, October 2002, Chair's forward

Chapter 2

Ministerial discretion in migration matters: explanation and history

2.1 This chapter provides a general introduction to the origins and development of the ministerial discretion powers in the *Migration Act 1958*. First, it provides a brief history of the discretionary powers in the Act followed by a summary of the major legislative reforms to immigration introduced in 1989. It then offers a detailed examination of sections 351 and 417 of the Act, which are the main focus of this inquiry. The chapter concludes with a brief summary of past parliamentary committee inquiries which have examined different aspects of the ministerial discretion powers.

Pre-1989 discretionary powers

2.2 Wide-ranging discretionary powers relating to entry, stay and deportation from Australia were incorporated into the *Immigration Restriction Act 1901* and subsequently codified in the *Migration Act 1958*.[1] However, the Migration Act gave the minister considerable scope to exercise the discretion, delegable to departmental decision makers, to grant a visa or entry permit to a non-citizen.[2] According to DIMIA, the migration regulations in force up to 1989 placed no requirements on the exercise of ministerial discretion. In fact, the guidelines relevant to the exercise of the powers were only set out in policy instructions. This meant they did not have the force of law and delegates were not legally obliged to follow them.[3]

2.3 The current use of ministerial discretion in immigration policy under the Migration Act stems from changes to migration law and policy brought about by reforms introduced in 1989 by the then Minister for Immigration, Local Government and Ethnic Affairs, Senator Robert Ray. The reforms were influenced in part by recommendations made by the Committee to Advise on Australia's Immigration Policies (CAAIP), chaired by Stephen Fitzgerald. CAAIP published its report (the 'Fitzgerald Report') in 1988.[4] Assisted by a specialist legal panel, it formulated a draft

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1 *Ministerial Discretion in Migration Matters*, Brief prepared for Senate Select Committee on Ministerial Discretion in Migration Matters, Department of the Parliamentary Library, Canberra, September 2003, p.1

2 DIMIA, Submission no. 24, p.3

3 DIMIA, Submission no. 24, p.21

4 *Immigration: A Commitment to Australia*, Report of the Committee to Advise on Australia's Immigration Policies, Australian Government Publishing Service, Canberra, 1988

model bill to take into account changing attitudes and practices, and to reflect a positive and forward-looking approach to immigration policy and administration.[5]

2.4 The Fitzgerald Report noted that the migration legislation was criticised for 'its indiscriminate conferral of uncontrolled discretionary decision making powers'.[6] The report reinforced this criticism by stating that a major deficiency of the Migration Act was 'the broad and unstructured nature of discretionary powers' which 'created a great deal of uncertainty'.[7] To overcome this deficiency, the draft model bill formulated by CAAIP included a system where 'identifiable policies and criteria for decision making will be clearly set out in statutory rules'.[8]

Legislative reforms of 1989

2.5 In December 1989, the Migration Act was amended by the *Migration Amendment Act 1989*, the *Migration Legislation Amendment Act 1989*, and the *Migration Legislation Amendment Act (No. 2) 1989*. The original Migration Legislation Amendment Bill 1989 (No. 1), introduced in the Senate in April 1989, sought, amongst other things, to expunge nearly all avenues for the exercise of ministerial discretion in immigration matters. In his second reading speech, the then minister, Senator Robert Ray, argued:

> The wide discretionary powers conferred by the Migration Act have long been a source of public criticism. Decision-making guidelines are perceived to be obscure, arbitrarily changed and applied, and subject to day-to-day political intervention in individual cases.[9]

2.6 When asked by ABC radio to respond to comments about the legislation made by the then Shadow Minister for Immigration and Ethnic Affairs, Alan Cadman, the minister was adamant that the legislation was about 'cutting political patronage out of immigration, cutting any sleazy aspect out of it'.[10]

2.7 This bill, however, was blocked in the Senate and subsequently withdrawn because the Opposition and the Democrats argued the bill went too far in removing ministerial discretion. Following negotiations between the government and Opposition

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5 *Immigration: A Commitment to Australia—Legislation*, The Committee to Advise on Australia's Immigration Policies, Australian Government Publishing Service, Canberra, 1988

6 *Immigration: A Commitment to Australia*, Report of the Committee to Advise on Australia's Immigration Policies, Australian Government Publishing Service, Canberra, 1988, p.112

7 *Immigration: A Commitment to Australia*, Report of the Committee to Advise on Australia's Immigration Policies, Australian Government Publishing Service, Canberra, 1988, p.113

8 *Immigration: A Commitment to Australia*, Report of the Committee to Advise on Australia's Immigration Policies, Australian Government Publishing Service, Canberra, 1988, p.112

9 *Senate Hansard*, 5 April 1989, p.922

10 *Ministerial Discretion in Migration Matters*, Brief prepared for Senate Select Committee on Ministerial Discretion in Migration Matters, Department of the Parliamentary Library, Canberra, September 2003, p.7

parties, an amended version of the bill was agreed to by both houses in June of that year (*Act 59 of 1989*).

2.8 Senator Ray as minister had strong reservations about the ministerial discretion provisions being inserted in the Act in the first place. His concern over its future operation was expressed in his Second Reading Speech to the Migration Legislation Amendment Bill (No. 2) 1989:

> I have only one objection to ministerial discretion. It is a remaining objection and one I will probably always have. What I do not like about it is access. Who has access to a Minister? Can a Minister personally decide every immigration case? The answer is always no. Those who tend to get access to a Minister are members of parliament and other prominent people around the country. I worry for those who do not have access and whether they are being treated equally by not having access to a Minister.[11]

2.9 A subsequent bill introduced in the Senate in December 1989, amending *Act 59 of 1989*, established the limited context under which the minister is able to exercise discretion in immigration matters, especially in relation to humanitarian claims for visa applications which fall outside the visa categories codified in the Migration Act. The bill was supposed to provide balance for an otherwise inflexible set of regulations to allow the minister a public interest power to grant a visa in circumstances not anticipated by the legislation where there are compelling, compassionate and humanitarian circumstances for doing so. Ministerial discretion conceptualised in this way was to act as a safety net:

> The Bill was welcomed by the opposition parties for its recognition of the need to restore a residual power of ministerial discretion in immigration matters, particularly in relation to applicants who do not meet the strictness of the new codified visa categories, but whose individual circumstances warrant humanitarian consideration.[12]

2.10 According to DIMIA, the comprehensive reforms introduced in 1989 were designed to enable government to regain control of onshore immigration determinations and to provide a more transparent determination process. The reforms included:

- Statutory criteria which, if satisfied, provided the applicant with a statutory right to be granted a visa. Similarly, if the applicant did not satisfy the statutory criteria, the visa application would be refused;

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11 Senator Robert Ray, *Senate Hansard*, 30 May 1989, p.3012

12 *Ministerial Discretion in Migration Matters*, Brief prepared for Senate Select Committee on Ministerial Discretion in Migration Matters, Department of the Parliamentary Library, Canberra, September 2003, p.3

- Statutory-based internal and independent merits review rights for some visa classes and applicants with a lawful connection to Australia[13] – the former Migration Internal Review Office (MIRO) and the Immigration Review Tribunal, now the Migration Review Tribunal (MRT). At that time, review decisions in refugee matters were undertaken by the Refugee Status Review Committee, whose functions were subsequently overtaken by the Refugee Review Tribunal (RRT) on 1 July 1993; and
- A non-compellable discretion for the minister to intervene personally to substitute a decision of a merits review body, with a more favourable decision for the applicant.[14]

2.11 Since 1989 there have been several further changes to this statutory framework, including changes to the section 351 and section 417 discretionary powers. These include the expansion of merits review rights to all visa applicants present in Australia and limitations on the grounds for judicial review of visa related decisions.[15]

2.12 DIMIA emphasised that the ministerial discretion powers built into the 1989 legislation provide flexibility in an otherwise highly prescriptive visa process with set criteria:

> The flexibility provided by the [discretionary] scheme enables the government to provide responsive visa solutions in exceptional and unforseen circumstances in a way which retains its capacity to manage the onshore visa framework and also limits the scope for unmeritorious applicants to use processes to frustrate and delay removal from Australia.[16]

2.13 DIMIA also stated: 'The ministerial discretion powers provide a mechanism for dealing with people in extenuating or exceptional circumstances that cannot be easily legislated in visa rules'.[17] Although there are currently 80 classes of visa and 143 sub-categories in the Migration Regulations which provide a comprehensive framework covering the large majority of personal circumstances, DIMIA noted that it is not possible to anticipate and codify 'all human circumstances'.[18]

2.14 The Commonwealth Ombudsman, Professor John McMillan, offered a similar view on the role of sections 351 and 417 of the Migration Act. He noted that the discretionary powers are a key part of the Act because:

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13 According to DIMIA, a 'lawful connection' is established either by a physical presence in Australia, or by an Australian citizen, permanent resident or Australian business sponsor of a visa applicant

14 DIMIA, Submission no. 24, p.4

15 DIMIA, Submission no. 24, p.5

16 DIMIA, Submission no. 24, p.7

17 DIMIA, Submission no. 24, p.13

18 DIMIA, Submission no. 24, p.51

> They play an important role in permitting or facilitating action that tempers the harsh, unpredictable or unintended effect that can arise occasionally in the administration of a heavily codified system of rules of the kind found in the Migration Act and Regulations. In an area such as migration decision-making, where the decisions can markedly affect the living situation not only of those about whom a decision is made, but also their relatives and accomplices in Australia, it is vital that a safety net scheme…is preserved in some form or another.[19]

Ministerial discretion powers under sections 351 and 417 of the *Migration Act 1958*

2.15 Significantly, the far-reaching changes to the Migration Act ushered in a new statutory framework with regard to immigration matters. The minister no longer had a general discretion to grant or refuse visa applications, but had to approve applications which met criteria prescribed by the Migration Act and its regulations.[20] The minister's discretionary power under the Act was circumscribed to enable the minister either to determine that certain provisions of the Act should not apply, or to substitute a more favourable decision than that of the merits review tribunal.[21]

2.16 Under the Migration Act, the minister can exercise various discretionary powers, including substitution powers and powers to vary processes, order release from detention and cancel visas on character grounds. However, this inquiry is mainly concerned with the use made by the former immigration minister, Mr Philip Ruddock, of the discretionary powers under sections 351 and 417 of the Act. An important distinction needs to be made at the outset between these powers. Section 351 powers may be exercised following a decision of the MRT which considers all cases except protection visa cases, whereas section 417 powers may be exercised following a decision of the RRT which considers only protection visa cases.

2.17 Under sections 351 and 417, the minister may substitute a more favourable decision than the one handed down by a tribunal 'if the Minister thinks it is in the public interest to do so'. In other words, the public interest or 'safety net' discretion that the minister may exercise is much broader than the strictures of the regulatory criteria.[22] While the legislation does not specify that a more favourable decision must result in the grant of a visa to the applicant, the discretionary power is most commonly used in that way.[23]

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19 Office of the Commonwealth Ombudsman, Submission no. 28, p.5

20 See section 65 of the Act

21 The relevant sections of the Migration Act are 37A, 46A, 46B, 72, 91F, 91L, 91Q, 137N, 261K, 351, 391, 417, 454, 495B, 501A, 501J and 503A

22 DIMIA, Submission no. 24, p.17. A number of the minister's other various discretionary powers under the Migration Act are also primarily linked to the 'public interest' – see subsections 46A(2), 46B(2) and 72(2) and sections 48A, 48B, 91F, 91L and 91Q

23 DIMIA, Submission no. 24, p.14

2.18 At least four features of the discretionary powers under sections 351 and 417 are worth noting:

- The discretionary powers may only be exercised in circumstances where a visa application has been assessed both at primary and merits review stages as failing to meet the criteria for grant of a visa – for example, at the MRT under section 351 and at the RRT under section 417;
- The discretionary powers are non-compellable, non-reviewable and non-delegable within domestic law. In other words, the minister does *not* have a duty to exercise the discretionary power, and a court cannot order the minister to use the discretionary power to consider an applicant's case. Section 476(2) states that: '…the Federal Court and the Federal Magistrates Court do not have any jurisdiction in respect of a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under [sections 351 and 417]';[24]
- In making a decision under section 351 or 417, the minister is not bound by Subdivisions AA (about the making of a valid visa application) or AC (about matters that must be considered in making a decision about a visa) of the Migration Act. In practice, this means that when considering exercising the discretionary powers, the minister is not restricted by the type of substantive visa that can be granted, and does not have to be satisfied that criteria specified in the Migration Regulations have been met;[25]
- The minister must table a statement in both houses of parliament setting out the decision of the relevant tribunal, the decision substituted by the minister, and the reasons for substituting a more favourable decision. The statement must not name or, under the terms of section 417, identify the applicant or anyone associated with the request if the minister believes it to be in the public interest that the name not be included. The statement must be tabled within fifteen sitting days of the end of the six month period in which the decision is made; and
- The discretionary powers must be exercised personally by the minister and cannot be delegated. Subsections 351(7) and 417(7) both state: 'The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances'.[26]

2.19 Although the minister's discretionary power cannot be delegated, in practice the administration of these two sections, along with sections 345, 391, 454 and 501J is governed by a set of ministerial guidelines (known as Migration Series Instruction (MSI) 386) which 'delegate the vetting of a substantial volume of requests for Ministerial intervention to the Ministerial Intervention Unit and departmental case

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24 Ms Johanna Stratton, Submission no. 10, p.7. See also the reasons provided by Hely J in *Kolotau v MIMIA* [2002] FCA 1145, 5 September 2002

25 DIMIA, Submission no. 24, p.15

26 *Migration Act 1958*, Subsection 351(7)

officers'.[27] DIMIA told the Committee that the guidelines 'comprehensively outline circumstances where the Minister may consider it appropriate to use the discretionary powers'. The current version of the guidelines:

- explain how a request for the minister to consider the exercise of his public interest powers may be made;
- inform departmental staff when to refer a case to the minister so that he can consider exercising his public interest powers; and
- advise that other compelling cases may also be drawn to the minister's attention.[28]

2.20 DIMIA listed all the circumstances in which the minister can use his or her discretion. The list included circumstances where:

- The visa applicant has made a visa application to a delegate of the minister who is a departmental officer;
- The delegate has decided to refuse to grant a visa (the primary decision);
- The visa applicant or the Australian sponsor has applied to the relevant Tribunal for merits review of the primary decision; *and*
- The relevant Tribunal has accepted that merits review application; *and*
- The relevant Tribunal has made a decision under sections 349 or 414 about the visa applicant; *and*
- It is possible for the Minister to make a decision more favourable to the applicant than that of the Tribunal.[29]

2.21 The application of the ministerial guidelines is an area of interest to the Committee and is examined in detail in Chapter 4. The practice of departmental staff vetting requests made for special consideration by the minister raises an important question about the accountability of decision making within executive departments. Specifically the Committee examines decision making within DIMIA and the department's administration of the ministerial guidelines.

2.22 This practice of DIMIA vetting requests for ministerial intervention was challenged unsuccessfully in the Federal Court in *Ozmanian (1996)*.[30] On that occasion, Merkel J noted that the minister's discretion permits three different decisions: a decision to exercise the discretion; a decision not to exercise the discretion; and a decision not to consider whether to exercise the discretion. The

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27 *Ministerial Discretion in Migration Matters*, Brief prepared for Senate Select Committee on Ministerial Discretion in Migration Matters, Department of the Parliamentary Library, Canberra, September 2003, p.5. MSI 386 is entitled: Guidelines on ministerial powers under sections 345, 351, 391, 417, 454 and 501J of the *Migration Act 1958*

28 DIMIA, Submission no. 24, p.29

29 DIMIA, Submission no. 24, pp.15-16

30 141 ALR 322

important point, noted by Dr Mary Crock, is that the first two decisions must be exercised by the minister acting personally, whereas the third decision can be delegated to the department.[31]

2.23 The administration of sections 351 and 417 is not subject to judicial or tribunal review within domestic law, which means an important mechanism of external oversight that applies in other areas of executive decision making does not apply to the discretionary powers. Two mechanisms are available for controlling the administration of the discretionary powers. The first, as previously noted, is the administrative guidelines that guide the administration of sections 351 and 417 within the department. The second is the oversight of departmental administration that can be undertaken by the Commonwealth Ombudsman.[32] The Commonwealth Ombudsman, Professor John McMillan, told the Committee that under the *Ombudsman Act 1976* he is empowered to:

> …investigate departmental action either side of a ministerial decision. In this area, for example, we can investigate a complaint against the quality of a briefing given to the minister and whether a briefing should have been given to the minister. We can also investigate action to implement a ministerial decision. The Ombudsman's office has therefore been well placed to gauge the role that is played by the discretions conferred by sections 351 and 417 in the operation of the Migration Act scheme…Investigations by the Ombudsman, usually at the instance of complaints, is the main external oversight mechanism.[33]

2.24 The minister's discretionary powers can also be subject to scrutiny in international law through complaints mechanisms established by two United Nations Committees: the Human Rights Committee and the Torture Committee. However, the views of these committees are not legally binding or enforceable, and the efficacy of these committees relies on parties voluntarily agreeing to implement their views.[34]

Parliamentary consideration of ministerial discretion powers

2.25 Different aspects of ministerial discretion have been the subject of scrutiny by three parliamentary committee inquiries over the past decade. In 1992, the then Joint Standing Committee on Migration Regulations made a recommendation in relation to

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31 Mary Crock, 'A Sanctuary Under Review: Where to From Here for Australia's Refugee and Humanitarian Program?', *The University of New South Wales Law Journal*, vol.23, no.3, 2000, pp.281-82

32 Office of the Commonwealth Ombudsman, Submission no. 28, p.6. While the exercise of the minister's discretion cannot be the subject of investigation by the Commonwealth Ombudsman consistent with s5(2)(b) of the *Ombudsman Act 1976*, action taken by a department in relation to a ministerial decision can be the subject of investigation under s5(3A) of the Act

33 *Committee Hansard*, 18 November 2003, p.1

34 *Ministerial Discretion in Migration Matters*, Brief prepared for Senate Select Committee on Ministerial Discretion in Migration Matters, Department of the Parliamentary Library, Canberra, September 2003, p.4

the minister's discretionary powers, following an analysis of the refugee and humanitarian determination process. Recommendation 20 stated that:

> the Refugee Review Tribunal be empowered to recommend to the Minister for Immigration, Local Government and Ethnic Affairs that, in deserving cases which do not meet the requirements for grant of refugee status, the Minister grant stay on humanitarian grounds, in accordance with the Minister's discretionary powers under section 115 of the *Migration Act 1958*.[35]

2.26 The government's response to this recommendation reiterated the current procedure whereby the files of unsuccessful applicants for refugee status are referred to officers of DIMIA who may submit cases to the minister for possible exercise of the discretionary powers. It did not, however, address the core issue embedded in the recommendation – that the RRT be given the authority to make a direct recommendation to the Minister with regard to deserving cases, and not via existing administrative avenues within the department.

2.27 More recently, the Senate's Legal and Constitutional References Committee report of 2000, *A Sanctuary Under Review*, examined in detail, and as part of its terms of reference, 'the adequacy of a non-compellable, non-reviewable Ministerial discretion to ensure that no person is forcibly returned to a country where they face torture or death'.[36] Chapter 8 of that report dealt exclusively with the concept of ministerial discretion – its implementation and administrative procedures, and the nature of a non-compellable and non-reviewable decision and forced *refoulement* when an applicant is unable to gain refugee status under the Refugee Convention. The focus of the report's consideration of ministerial discretion is the lack of integration of several international human rights conventions within Australia's refugee immigration law. Following on from this, the report asks whether a new mechanism might be introduced that is more effective in offering protection for non-Convention asylum seekers than the ministerial discretion powers.

2.28 The report made seven recommendations dealing with various issues raised by the ministerial discretion powers. Recommendation 2.2 supported incorporation of international obligations under the Convention Against Torture (CAT), the Convention on the Rights of the Child (CROC) and the International Covenant on Civil and Political Rights (ICCPR) into Australia's domestic law.[37] The Committee examines this recommendation in Chapter 8, together with the government's response.

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35 Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control*, Australian Government Publishing Service, Canberra 1992, p.140

36 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000

37 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, Recommendation 2.2, p.60

2.29 The other six recommendations focused on procedural and administrative improvements to the way the discretionary powers are exercised. Issues covered by the recommendations included that:

- the minister should consult with stakeholders to ensure the ministerial guidelines are contemporary and address the specific purposes of Australia's obligations under the CAT, CROC and ICCPR (recommendation 8.1);
- the RRT should continue its current practice whereby members informally advise the minister of cases where there may be humanitarian grounds for protection under international conventions (recommendation 8.2);
- an information sheet be made available in appropriate languages to explain the provisions of s417 and the ministerial guidelines, as well as information about section 48B (recommendation 8.3);
- section 417 processes be completed quickly and the outcome advised to the relevant person (recommendation 8.4);
- the subject of the request should not be removed from Australia before the initial or first section 417 process is finalised (recommendation 8.5); and
- appropriately trained DIMA staff consider all section 417 requests and referrals against CAT, CROC, and ICCPR.

2.30 The government's response to the recommendations was noteworthy for its lack of engagement with many of the core concerns which they raise. The government maintained that certain of the recommendations are either current practice or not necessary because existing administrative procedures and arrangements are adequate. According to DIMIA's submission to the present inquiry, apart from the government enhancing the ministerial guidelines to cover CAT and the ICCPR: 'Other suggestions were not taken up due to the capacity to undermine or remove the Government's ability to effectively manage its migration program'.[38]

2.31 The government's response to recommendation 8.3 has been criticised for being misleading.[39] The government stated that DIMIA Fact Sheet 41 (which was renumbered Fact Sheet 61 in August 2003) explains the ministerial discretion powers and that further information is not necessary. However, the Fact Sheet provides only two sentences of information about ministerial discretion, but no advice on the process or how to make a request for consideration under the guidelines:

> The Minister has the power to intervene after an RRT or AAT decision relating to a Protection Visa, but is not compelled to do so. The Minister

38 DIMIA, Submission no. 24, p.33

39 *Ministerial Discretion in Migration Matters*, Brief prepared for Senate Select Committee on Ministerial Discretion in Migration Matters, Department of the Parliamentary Library, Canberra, September 2003, p.11

> may intervene to substitute a more favourable decision to the applicant if the Minister believes it is in the public interest to do so.[40]

2.32 The Committee believes that this information would not be of any assistance for a visa applicant seeking the minister's intervention. While the Fact Sheet is a public document, DIMIA advised the Committee that the department has no obligation to make information on the ministerial intervention process publicly available because the minister's powers are non-compellable.[41] When asked by the Committee if the two sentences contained in Fact Sheet 61 provide all the information that is currently available in the fact sheet series on ministerial discretion, the answer provided by the department stated: 'Yes'.[42]

2.33 The 2001 report of the Joint Standing Committee on Foreign Affairs, Defence and Trade on visits to immigration detention centres also made a recommendation about the minister's powers under section 417, similar to that made by the Joint Standing Committee on Migration Regulations in 1992. On this occasion, Recommendation 7 stated that the current informal arrangement whereby the RRT can draw attention to humanitarian issues in the case of an asylum seeker should be formalised. This would require an amendment to section 417 of the Migration Act to permit these issues to be formally included in the minister's consideration of such cases.[43]

2.34 Consistent with the official response to recommendations made by the report *A Sanctuary Under Review*, the government did not accept the recommendation. It claimed the recommendation is not necessary because current arrangements are satisfactory:

> The Government considers the current arrangements to be sufficient to address cases where there are humanitarian concerns and, therefore, formalisation of this arrangement through legislative change is considered to be unnecessary.[44]

2.35 The Committee notes that the issues arising from these recommendations have been too easily brushed aside by government and remain unresolved. It believes that the issues raised by the findings and recommendations of these committee reports are central to this inquiry's terms of reference – for example, DIMIA's administration of the ministerial guidelines, the use made by immigration ministers of the discretionary powers, and the extent to which information about the discretionary process is publicly available.

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40 DIMIA, *Fact Sheet 61: Seeking Asylum Within Australia*, p.2

41 DIMIA, Submission no. 24D, Answer to question on notice N1

42 DIMIA, Submission no. 24D, Answer to question on notice N3

43 Joint Committee on Foreign Affairs and Trade, *Visits to Immigration Detention Centres*, Report No. 100, 2002

44 DIMIA, Submission no. 24, p.34

Chapter 3

Patterns of use of ministerial discretion

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

- The use made by the Minister for Immigration of the discretionary powers available under sections 351 and 417 of the Migration Act 1958 since the provisions were inserted in the legislation.

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

Data limitations

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

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

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

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

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

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

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

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

Use of discretion by ministers

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

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

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

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

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

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

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

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

Source: DIMIA Submission 24, Attachments 16-18.

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

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

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

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

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

Table 3.2: Ministerial Interventions on RRT and MRT Decisions

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

*Decisions affirmed by IRT

**Decisions affirmed by IRT and MRT

Source: DIMIA

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

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

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

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

Table 3.3: Exercise of Powers of Discretion by Various Ministers

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

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

Source: DIMIA, Submission 24, Appendix 15.

3.15 As may be observed from Table 3.3, Mr Ruddock exercised his power to intervene on 1916 occasions from 1996 to 30 June 2003 (with another 597 interventions between 1 July and 6 October 2003), compared with Senator Bolkus's 311 in three years and Mr Hand's 81 in two years. Although Mr Ruddock has obviously used the power much more than the other ministers, there were also many more cases in which he could intervene.

3.16 DIMIA has suggested that there were three main reasons for the increase in the use of ministerial discretion since 1996-97. First, the Government has chosen to deal

with onshore applications for visas on a case-by-case basis rather than by establishing special visa categories. Second, there have been more requests as the workload and decisions made by the tribunals have increased significantly. Third, there is greater public awareness of the existence and processes of the exercise of discretion. DIMIA also suggested that judicial review has influenced the number and timing of requests.

Special concession visa categories

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

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

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

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

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

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7 DIMIA, Submission no. 24, p.45

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

9 DIMIA, Submission no. 24, p.44

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

Greater numbers of decisions by tribunals

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

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

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

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

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

11 DIMIA, Submission no. 24, p.46

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

Source: DIMIA, Submission No. 24, Attachment 13

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

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

Increased public awareness of the discretionary powers

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

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

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12 DIMIA, Submission no. 24, p.46

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

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

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

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

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

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

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

Other factors that encourage greater use of ministerial discretion

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

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

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

16 DIMIA, Submission no. 24. p.52

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

18 DIMIA, Submission no. 24, p.49

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

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

Cases before the courts

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

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

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

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

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

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19 DIMIA, Submission no. 24, p.47

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

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

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

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

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

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

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

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

Use by nationality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Categories of visas granted

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Humanitarian and compassionate grounds

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

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

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

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

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

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

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

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

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

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

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

Use of discretion to meet international obligations

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

Conclusion

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

Recommendation 1

3.54 The Committee recommends that the minister require DIMIA to establish procedures for collecting and publishing statistical data on the use and operation of the ministerial discretion powers, including (but not limited to):

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

- **the number of cases referred to the minister for consideration in schedule and submission format respectively;**
- **reasons for the exercise of the discretion, as required by the legislation;**
- **numbers of cases on humanitarian grounds (for example, those meeting Australia's international obligations) and on non-humanitarian grounds (for example, close ties);**
- **the nationality of those granted intervention;**
- **numbers of requests received; and**
- **the number of cases referred by the merits review tribunals and the outcome of these referrals.**

Chapter 4

Development of ministerial guidelines and the exercise of the minister's discretionary powers

4.1 As discussed in Chapter 2, the discretionary powers under sections 351 and 417 of the *Migration Act 1958* are the minister's alone to exercise – they are non-compellable, non-reviewable and non-delegable within domestic law. This situation has made the Committee's task of understanding the decision making process in individual cases difficult. Nevertheless, the operation of these powers relies heavily on administrative support from the immigration department, which processes requests for ministerial intervention and refers to the minister cases where the minister may wish to exercise his or her discretion to grant a visa.

4.2 Since the discretionary powers were inserted in the Migration Act, the department has established detailed procedures for dealing with intervention related correspondence, assessing cases where ministerial intervention may be a possibility and referring them to the minister. The department's task of assessing and referring cases has been assisted by guidelines set in place by successive ministers.

4.3 This chapter examines the use made by immigration ministers of the discretionary powers under sections 351 and 417 of the Migration Act and the processes in place to manage requests for ministerial intervention at the departmental level, under terms of reference (a) and (c) respectively. It looks first at the development of guidelines and administrative processes under successive ministers since the powers were inserted in the Migration Act in December 1989. It then sets out the current administrative arrangements described in DIMIA's evidence to the inquiry, focusing on the latest version of the ministerial guidelines (MSI 386) and the accompanying administrative guidelines (MSI 387), both of which were issued on 15 August 2003.[1] The chapter's final two sections critically examine the consistency and quality of decision making in the immigration department, and address briefly the role of the RRT and MRT in the refugee and migration determination process, respectively.

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1 DIMIA, Submission no. 24B, Answer to question on notice, 5 September 2003, p.24. Interestingly, in separate answers to questions taken on notice from the public hearing on 5 September, DIMIA states that both ministerial and administrative guidelines 'became operational' or 'were issued' the previous day, 14 August, when they were placed on the department's LEGEND database. From that day, the guidelines were available to all departmental staff and external subscribers but were not made available on the department's website. DIMIA advised that: '…members of the public can access individual MSIs through the Ombudsman, Privacy and Freedom of Information Section of the Department…Members of the public also have access to the updated commercial version of LEGEND, as the department distributes CD-ROM updates to each State and Territory library and the National Library'. Answers to questions on notice, 5 September 2003, p.14, p.15 and p.31.

Development of guidelines and administrative procedures

4.4 The processes set in place at the departmental level to manage requests for ministerial intervention have developed under successive ministers since the powers were inserted in the Act. Information available to the Committee on these developments is somewhat sketchy. DIMIA's submission provides some background on the development of ministerial guidelines for departmental staff on the use of the powers and procedures for managing the system. However, the information appears incomplete, in some instances inconsistent, and the Committee has experienced confusion trying to ascertain the status of some of the documents provided in attachments to the submission.[2]

4.5 Senator Ray (September 1988 – April 1990) was the immigration minister at the time the relevant provisions were inserted in the Migration Act. He does not appear to have actually used the powers,[3] as he moved to another portfolio shortly after they came into effect. However, he did make the following observation on what 'the public interest' could mean in the operation of these powers, noting that:

> The term 'public interest' is not limited solely to public issues. Consideration of the public interest could involve consideration of the circumstances of the particular case having regard to unusual, unforeseen or other features that are deserving of a more favourable response against the background of Australia being a compassionate and humane society.[4]

4.6 This broader notion of the public interest continues to be of relevance in the current operation of the powers, as evidenced by the standard wording of recent statements tabled in parliament.

4.7 Minister Gerry Hand (April 1990 – March 1993) made a statement in parliament on 9 May 1990 on developments in migration legislation. Referring to the ministerial intervention powers, he stated that:

> …I have no intention of intervening under my review powers unless there is a serious reason. That is, I shall not be setting aside decisions reached in accord with the criteria established by the regulations unless I am convinced that there is a gap in policy, that the refusal is an unintended consequence of the regulations or that an individual case requires special consideration. In these circumstances I shall move to amend the regulations as necessary.[5]

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2 DIMIA, Submission no. 24, pp.27-30. See also DIMIA, Submission no. 24B, Answer to question on notice D, p.31

3 DIMIA, Submission no. 24, Attachment 15

4 Senator Robert Ray, *Senate Hansard,* 14 December 1989, p.4503

5 *House Hansard*, 9 May 1990, p.136

4.8 According to DIMIA, this statement provided guidance for departmental officers preparing submissions on cases submitted for ministerial consideration.[6]

4.9 The department issued a policy control instruction in August 1990 (PC1721) outlining the minister's powers and providing some instructions to officers on the kind of information that should be provided to the minister in submissions and tabling statements.[7] However, this document provides little further guidance on the kinds of cases where the minister would consider intervening.

4.10 On 15 October 1990, in a press statement on moves to regularise the status of certain illegal entrants, Mr Hand set out a framework for the exercise of the minister's discretionary powers, suggesting that the following types of cases could be referred to him:

- those in which the circumstances of the case are such that the legislator could not have anticipated them;

- those in which the consequences of not having recognised the circumstances in the legislation were not intended by the legislator;

- those which present compassionate circumstances of such order that failure to recognise them would result in severe hardship to an Australian citizen or lawful permanent resident of Australia.[8]

4.11 These principles were reiterated with slight rewording in correspondence with the Principal Member of the Immigration Review Tribunal (IRT) dated 21 December 1990.[9] They were adopted by the department as guidelines for submissions for the minister's consideration.[10]

4.12 In his letter to the IRT, Mr Hand invited the Principal or relevant Senior Member to refer to him cases that present 'the most extraordinary circumstances' as outlined above. Interestingly, he noted that he anticipated that very few cases would be referred to him under these arrangements. He made the following comments on the most appropriate way for the IRT to refer cases to him:

> I am concerned to avoid as much as possible raising any expectation on the part of the applicant that exercise of my s137 powers will follow the referral of a case to me under these arrangements. It seems to me that raised expectations could most readily be avoided if appropriate cases were referred in as informal a manner as possible. I have in mind a letter from you or the relevant Senior Member to me.

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6 DIMIA, Submission no. 24, p.27

7 DIMIA, Submission no. 24, p.27 and Attachment 3

8 DIMIA, Submission no. 24, Attachment 4

9 DIMIA, Submission no. 24, Attachment 5

10 DIMIA, Submission no. 24, p.28

> I envisage that the letter will set out the reasons why you or the relevant Senior Member consider that the case meets the above guidelines and will attach a copy of the relevant Tribunal decision. As it is likely that I will seek advice also from my department on these cases, I would appreciate a copy of the referral letter being sent to the Secretary…[11]

4.13 During Senator Bolkus' time as immigration minister (March 1993 – March 1996), it appears that three sets of guidelines were circulated to departmental officers.[12]

4.14 The first of these, entitled 'Guidelines for Processing Requests for Ministerial Intervention in Migration Act Decisions', was circulated within the department on 28 July 1994. It provides much more detail than previous documents on the department's role in handling non-humanitarian cases where a request had been made for ministerial intervention, including instructions on identifying cases, briefing the minister, and record keeping.[13] Also attached to these guidelines is a set of pro-forma documents designed to be used for replying to intervention related correspondence, briefing the minister and preparing tabling statements.

4.15 In addressing the question of what sort of cases would be appropriate for ministerial intervention, these guidelines note the following:

> …Successive Ministers have not defined the public interest explicitly, but their statements of reasons tabled in Parliament indicate that they have not restricted the exercise of their powers to cases which raise issues of public importance such as national security or economic issues. The compassionate circumstances attached to a case, particularly as they affect an Australian resident or citizen, have been a common reason for intervention.

4.16 They indicate that the minister would consider cases where:

- the circumstances of the case are such that the regulations could not have anticipated them; and

- the consequences of not having recognised the circumstances were clearly unintended; and

- the applicant presents strong compassionate circumstances of such order that failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or lawful permanent resident aggrieved by the decision; or

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11 DIMIA, Submission no. 24, Attachment 5

12 DIMIA, Submission no. 24, p.28

13 The actual powers dealt with in this document are the old sections 115 and 137, which gave the minister the power to set aside and substitute a new decision for a decision of a departmental review officer and the Immigration Review Tribunal, respectively. They are broadly equivalent to the power now given under section 351 to substitute a decision of the Migration Review Tribunal.

- the applicant would bring substantial economic or cultural benefit to Australia.

4.17 Of these, the first three points were the same as the guidelines issued by Mr Hand, but the fourth was new.

4.18 The second set of guidelines issued under Senator Bolkus was the Guidelines for Stay in Australia on Humanitarian Grounds,[14] which provided a framework for assessing cases of persons who: 'do not meet the requirements for refugee status but who face hardship if returned to their country of origin which would evoke strong concern in the Australian public'. The guidelines note that:

> In accordance with Australia's commitment to protection of human rights and the dignity of the individual, it is in the public interest to offer protection to those persons whose particular circumstances and characteristics provide them with a sound basis for expecting to face, individually, a significant threat to personal security, human rights or human dignity on return to their country of origin.[15]

4.19 The guidelines state that it is in the public interest to provide protection on humanitarian grounds to: persons with Convention related claims in the past and continuing subjective fear; persons likely to face treatment closely approximating persecution; and persons facing serious mistreatment which while not Convention related constitutes persecution.

4.20 The guidelines also state that grant of residence on humanitarian grounds must be limited to exceptional cases where the applicant's fears are well founded and based on serious grounds presenting threat to personal security, intense personal hardship or abuse of human rights. They set out a number of circumstances where the power should not be used, including where the person is seeking residence in Australia principally on non refugee related grounds such as family, medical or economic reasons.

4.21 The third set of guidelines produced while Senator Bolkus was immigration minister are the Guidelines for the Minister's Public Interest Powers Under Sections 345, 351 and 391 of the Migration Act 1958 Non-Humanitarian Cases.[16] This document provides much less detail than the earlier guidelines on non-humanitarian intervention and their primary aim seems to be to reflect the renumbering of the Act which took place in 1994.

4.22 These guidelines stress that: 'They are only "guidelines" and do not define the Minister's power of intervention nor circumscribe it in any way. They also point out

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14 DIMIA, Submission no. 24, Attachment 7. The version of this document in DIMIA's submission is not dated, and it is not entirely clear from the text when it was actually signed.

15 DIMIA, Submission no. 24, Attachment 7

16 DIMIA, Submission no. 24, Attachment 7

that the powers: 'are not intended as an automatic additional tier of merits review, nor do they operate as such'.[17] The wording on cases where the minister may intervene is substantially the same as in the previous guidelines.

4.23 When Mr Philip Ruddock MP became minister for immigration in 1996, he initially accepted Senator Bolkus' guidelines on the operation of the ministerial intervention powers.[18] In 1998 the increasing number of requests for ministerial intervention led to a number of regulation and procedural changes designed to limit repeat requests for intervention.[19] On 31 March of that year Mr Ruddock signed revised public interest guidelines, which became Migration Series Instruction (MSI) 225. These guidelines remained current until August 2003.[20]

4.24 MSI 225 dealt with both humanitarian and non-humanitarian cases and provided a more comprehensive outline of the type of cases the minister may consider for intervention than previous guidelines. It also set out countervailing issues that should be taken into account by case officers, and provided some guidance on how cases should be brought to the minister's attention.

4.25 Factors set out in the guidelines as relevant to assessing whether a case involves unique or exceptional circumstances include:

- Existence of a significant threat to a person's personal security, human rights or human dignity on return to their country of origin;
- Cases that bring Australia's obligations as a signatory to the Convention Against Torture, Convention on the Rights of the Child or International Covenant on Civil and Political Rights into consideration;
- Circumstances that the legislation that could not have anticipated, unintended consequences of the legislation, and particularly unfair or unreasonable consequences of the legislation;
- Strong compassionate circumstances that failure to recognise would harm an Australian family unit or Australian citizen;
- Exceptional economic, scientific, cultural or other benefit to Australia;
- The length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community; and
- The age, health or psychological state of the person.[21]

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17 DIMIA, Submission no. 24, Attachment 7

18 DIMIA, Submission no. 24, p.29

19 DIMIA, Submission no. 24, p.29

20 DIMIA, Submission no. 24, Attachment 8

21 DIMIA MSI 225: Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where it May Be in the Public Interest to Substitute a More Favourable Decision Under s345, 351, 391, 417, 454 of the *Migration Act 1958(1)*, Submission no. 24, Attachment 8, pp.4-5

4.26 A new version of these guidelines was signed by Mr Ruddock on 5 August 2003, becoming MSI 386 on 15 August 2003.[22] According to DIMIA, the amended guidelines were issued in the light of '…the passage of time and changes to policy and legislation'.[23] The main change to the guidelines is the inclusion of the Minister's public interest powers at s501J of the Act. The other changes are 'textual' and include that the new guidelines: cover all current and defunct review tribunals; set out in more detail the circumstances where the powers would not be available; explain in more detail the circumstances where a case may not be appropriate to consider; and state more clearly what action may be taken by officers when notified by a review tribunal that a primary decision has been affirmed.[24]

4.27 The Committee is concerned that the department did not provide any detailed reasons for the changes to the ministerial guidelines that were formalised with MSI 386. The Committee is also concerned that the minister can change the guidelines without explanation, highlighting another deficiency with the administration of the discretionary powers.

4.28 Accompanying the ministerial guidelines (MSI 225 and 386) is a set of administrative guidelines setting out departmental procedures for processing cases.[25] According to DIMIA, these guidelines were provided to departmental staff in draft form in 1999, but were not formalised into an MSI until August 2003, when an updated version became MSI 387.[26] These guidelines provide the most detailed information available both on the identification of cases where ministerial intervention may be considered and on processes for handling them.

4.29 The full text of MSI 386 and MSI 387 are found at Appendix 5.

4.30 DIMIA explained the relationship between the two sets of guidelines in the following terms:

> The Minister's Guidelines…provide guidance to DIMIA officers in relation to the types of exceptional and compelling circumstances identified by the Minister as circumstances he may wish to consider exercising his public interest powers. The Administrative Guidelines…underpin the Ministerial Guidelines and assist department staff in the application of those Guidelines.[27]

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22 DIMIA, Submission no. 24B, Answers to questions on notice D6 and D7, p.33. The new guidelines are included in DIMIA's submission at Attachment 9

23 DIMIA, Submission no. 24B, Answer to question on notice, 5 September 2003, p.33

24 DIMIA, Submission No 24B, Answer to question on notice, 5 September 2003, p.25

25 DIMIA, Submission no 24, Attachment 2

26 DIMIA, Submission no. 24B, Answer to question on notice, 5 September 2003, p.25

27 DIMIA, Submission no. 24B, Answer to question on notice, 5 September 2003, p.32

4.31 Although documentary evidence is somewhat limited, the development of successive sets of guidelines suggests a gradually evolving system with increasing guidance given to departmental officers on identification and processing of cases where the Minister may wish to intervene.

'The public interest'

4.32 An important point to note is that, while the minister's guidelines are intended to provide guidance to staff involved in processing cases, they are not criteria for intervention and are not binding on the minister. DIMIA has made this point clearly in answers to questions on notice, stating, for example that:

> The Minister's Guidelines are not criteria for intervening. Rather they are guidelines for the types of cases that the Minister has asked DIMIA to refer to him for possible consideration for intervention. …
>
> The sole criterion for the Minister's intervention is that it be in the public interest. It is intentionally flexible to pick up cases that are inherently not able to be codified as part of normal visa classes.[28]

4.33 Elsewhere, DIMIA pointed out that:

> The Ministerial intervention process differs fundamentally from the visa determination process, in that the Ministerial intervention consideration focuses on the extent to which the characteristics of the case raise the public interest, whereas a visa determination focuses on whether the individual is able to meet the codified criteria for the grant of a visa.[29]

4.34 As can be seen by the successive guidelines outlined above, the 'public interest' has been interpreted broadly to include humanitarian and compassionate circumstances. Yet whatever guidelines may exist, ultimately it is up to the minister of the day to determine what the 'public interest' is. Because the power is non-compellable, non-reviewable and non-delegable, there is no scope for challenging a minister's personal views on what is and is not in the public interest.

Recent operation of the ministerial discretion powers

4.35 The unreviewable nature of the ministerial discretionary power has largely shielded the department's processes in this area from significant public scrutiny. As discussed in Chapter 2, the operation of the power under section 417 was subjected to some parliamentary scrutiny during the Senate Legal and Constitutional Affairs Committee's inquiry into Australia's refugee and humanitarian determination processes in 1999-2000.

4.36 While the Committee endorses the *Sanctuary Under Review* report's findings and recommendations to improve the administration of the section 417 process and to

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28 DIMIA, Submission no. 24D, Answer to question on notice E3

29 DIMIA, Submission no. 24D, Answer to question on notice N5

facilitate the dissemination and application of the ministerial guidelines,[30] it believes that a great deal of information about the operation of the minister's discretionary power has not yet found its way on to the public record. Accordingly, the Committee believes strongly that one of the benefits of this inquiry is that it has placed on the public record further evidence from the immigration department and other stakeholders about how claims for ministerial intervention, both humanitarian and non-humanitarian, are processed and assessed.

4.37 The Committee is keen to address an area of concern raised during this inquiry – that publicly available information relating to the minister's discretionary power is not widely disseminated and therefore not well understood by those most likely to avail themselves of that power.

4.38 The remainder of this chapter builds on the information contained in *A Sanctuary Under Review* and paints a more complete picture of administrative processes under the section 417 power. It outlines some of the current administrative processes that are in place to manage requests for ministerial intervention at the departmental level, using evidence provided by DIMIA. This partial overview provides a useful backdrop for criticisms of the operation and administration of the discretionary power by a number of witnesses who also gave evidence to this inquiry. This is the subject of the next chapter.

Evidence provided by DIMIA

4.39 DIMIA emphasised that requests for ministerial intervention are not visa applications, and the processes for dealing with the intervention powers should not be benchmarked against the formal determination process for visa applications.[31] This view suggests an assumption that normal processing procedures and standards do not apply, as can be seen from the following answer to a question on notice from DIMIA:

> The concept of overall processing times for Ministerial intervention also has little relevance because there is no formal application process and because there is no obligation for the Minister to consider the use of his powers in a particular case…[32]

4.40 Nevertheless, a more or less established process has developed to deal with the large ministerial intervention workload. The ministerial guidelines (MSI 386) provide two categories of circumstances in which a case can come to the department's attention as a candidate for ministerial intervention. The first category is described as 'Action to be taken after a decision by a review tribunal':

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30 See the discussion of Recommendations 8.1 to 8.5 of the report in Chapter 2

31 DIMIA, Submission no. 24, p.38 and Ms Godwin, *Committee Hansard*, 23 September 2003, p.48. See also DIMIA, Submission no. 24D, Answer to question on notice N5

32 DIMIA, Submission no. 24B, Answer to question on notice C5, p.30

6.2.1 When a case officer receives notification of a review tribunal's decision to affirm a primary decision, they may assess the visa applicant's circumstances against these Guidelines, and:

- if the case falls within the ambit of these Guidelines, bring the case to my [the minister's] attention in a submission, so that I may consider exercising my public interest powers, or
- if the case falls outside the ambit of these Guidelines, write a file note to that effect.

6.2.2 When a review tribunal member holds the view that a case falls within the ambit of these Guidelines, they may refer the case to my Department and their views will be brought to my attention using the process outlined in 6.3.3:

- Comments by members of review tribunals in their decision records do not constitute an initial 'request' for the purposes of 6.3 below[33]

4.41 DIMIA told the Committee that under 6.2.1, assessment of a visa applicant's circumstances against the guidelines is automatic in cases where the RRT or the AAT has affirmed an adverse protection visa decision. Assessment by a case officer following a decision of the MRT is not necessarily automatic.[34]

4.42 The second category is described as: 'Requests for the exercise of my public interest powers':

6.3.1 A person can request the exercise of my public interest powers in writing or by electronic transmission.

6.3.2 Their agent or supporters can also make the request relating to the person's case.

6.3.3 When a first request for me to exercise my public interest powers is received, an officer is to assess that visa applicant's circumstances against these Guidelines, and:

- for cases falling within the ambit of these Guidelines, bring the case to my attention in a submission so that I may consider exercising my power, or
- for cases falling outside the ambit of these Guidelines, bring the case to my attention through a short summary of the issues in schedule format, so that I might indicate whether I wish to consider the exercise of my power.[35]

4.43 Figures 4.1 and 4.2 reproduce flowcharts provided by DIMIA which show the administrative process for dealing with ministerial intervention requests both at the completion of the RRT process and from the receipt of a request. However, the Committee holds the view that these flowcharts are only indicative of a process where applicants can follow multiple pathways before ministerial intervention. The two

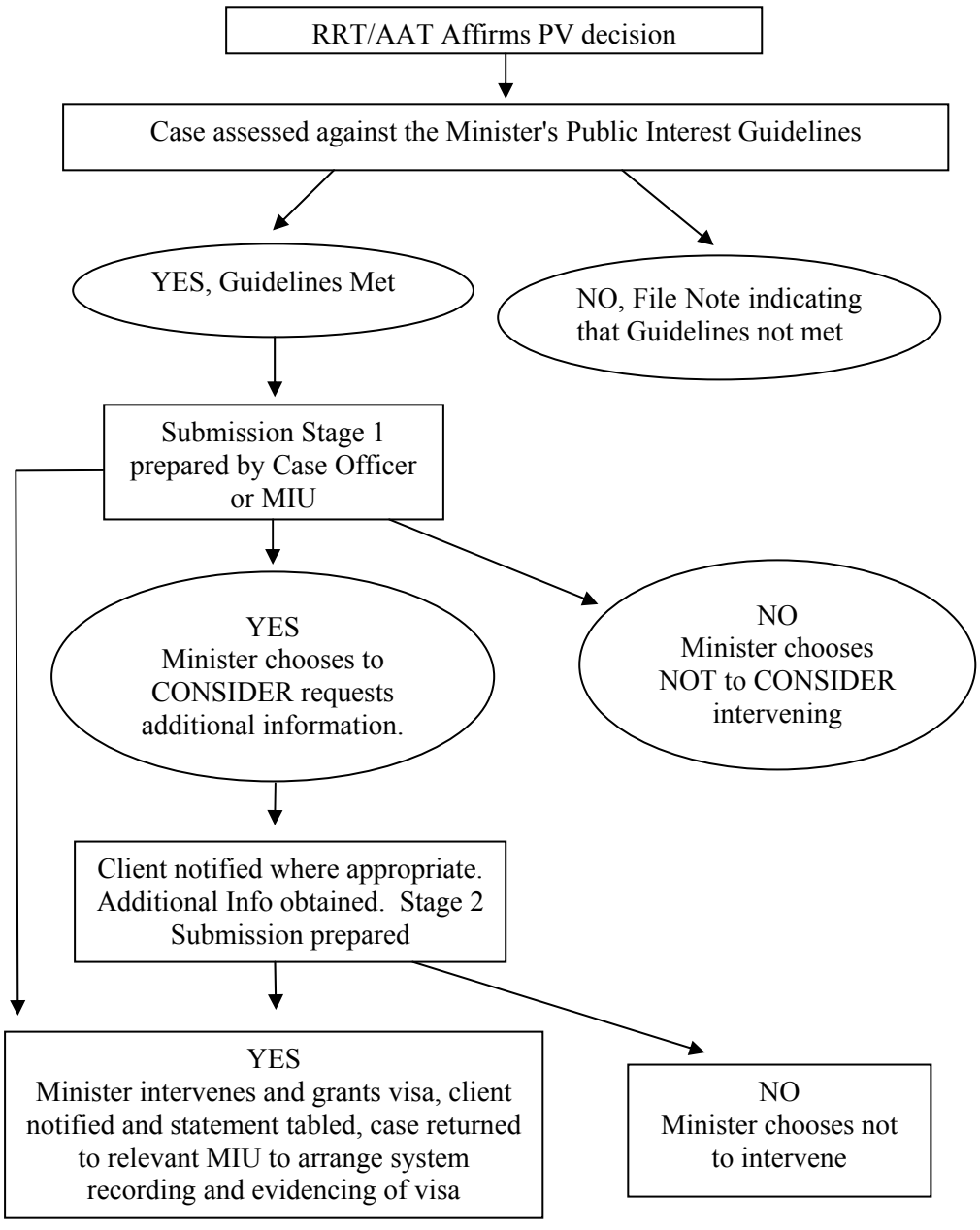
33 DIMIA, Submission no. 24, Attachment 9, p.7

34 DIMIA, Submission no. 24, p.40

35 DIMIA, Submission no. 24, Attachment 9, p.8

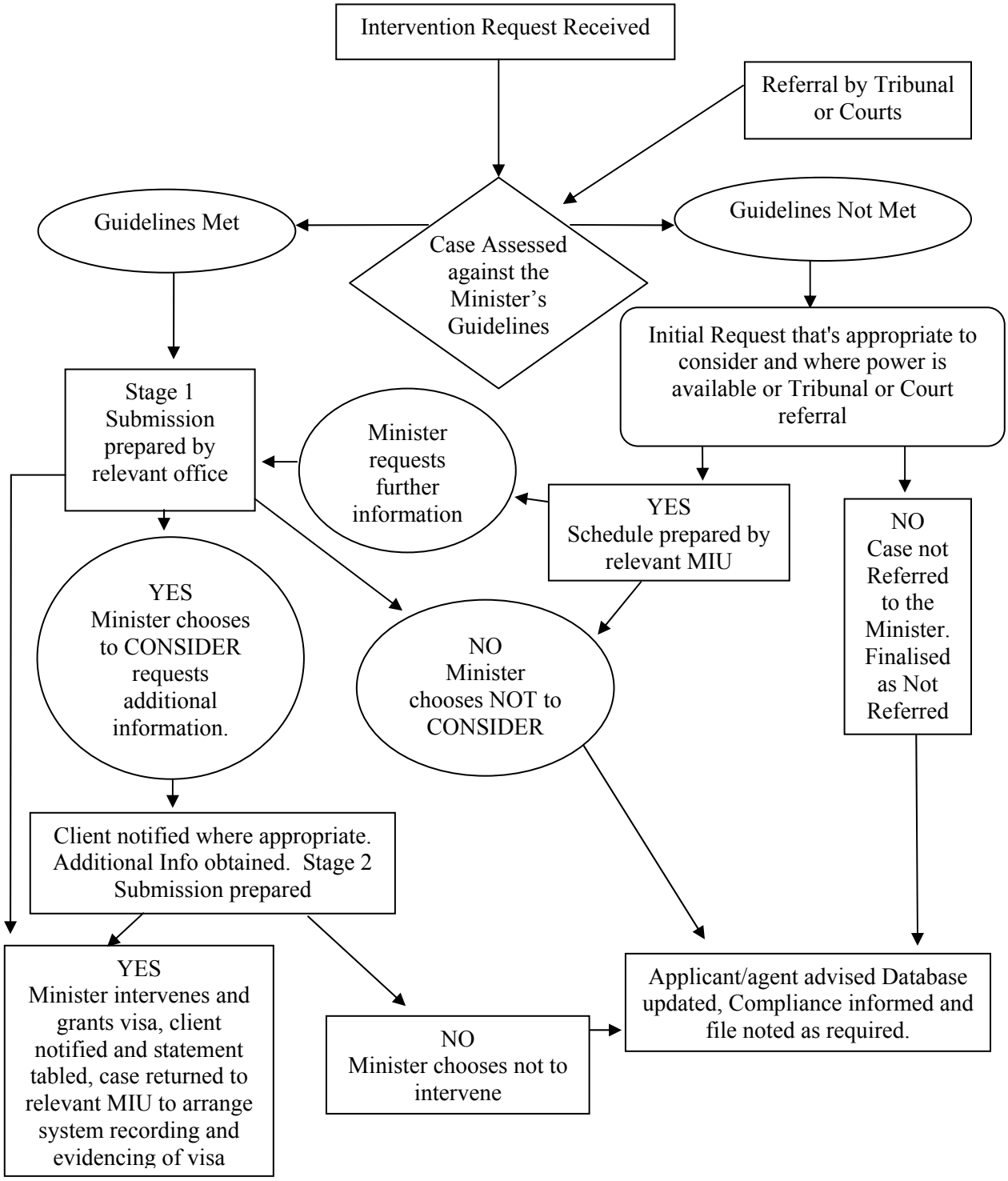
flowcharts provided by the department should not, therefore, be interpreted as fixed administrative processes.

Figure 4.1: Flowchart for the Post RRT Process



Source: DIMA Submission no. 24, Attachment 11

Figure 4.2: Flowchart for Process from Receipt of a Request



Source: DIMA Submission no. 24, Attachment 12

4.44 Although the guidelines appear relatively straightforward in terms of identifying categories of circumstances for the use of the minister's discretionary powers, the Committee nevertheless sought clarification from senior immigration department officers with regard to how the department and departmental liaison officers (DLOs) process requests for ministerial intervention from the time a request for intervention is received, usually by DLOs working in the minister's office at Parliament House.

4.45 A number of issues arising from the administration of the ministerial guidelines relate to the established procedures that enable the minister's office and the department to coordinate the handling and processing of large numbers of intervention requests. These procedures, many of which have not previously been disclosed for the public record, shed some light on the complex and lengthy administrative processes in place for dealing with intervention requests. Some of these issues were examined by the Committee at various public hearings and are discussed below.

Intervention related correspondence

4.46 DIMIA told the Committee that there is no formal application for ministerial intervention and no 'prescribed form' for making a request.[36] A person seeking intervention or their supporters can make a request either in writing or electronic format.[37] Where a request is made orally the person is usually advised to submit the request in writing, however a phone call to the minister's office would be actioned if it raised a matter that required the attention of a departmental officer:

> In the first instance a decision about whether an oral communication amounts to a request would be made by the person receiving the communication. In line with the Minister's clear preferences, an officer identifying an oral request would generally ask that this be made in writing to the Minister. However, the Minister's Guidelines require that DIMIA officers bring all cases to the Minister's attention where they fall within the ambit of the Guidelines.[38]

4.47 There is no limit on the number of requests that can be made for the minister's intervention.[39] Requests are treated as ministerial correspondence, and are tracked using DIMIA's correspondence database, the Parliamentary Correspondence Management System (PCMS).[40] While requests can vary from a one-page hand written note to an extensive submission, DIMIA stressed that the process for handling requests for ministerial intervention is fundamentally different from the normal visa application process. All requests for ministerial intervention are assessed by DIMIA as

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36 DIMIA, *Committee Hansard*, 5 September 2003, p.29

37 DIMIA, Submission no. 24, p.38

38 DIMIA, Submission no. 24E, Answer to question on notice A4

39 DIMIA, Submission no.24, p.38

40 DIMIA, Submission no. 24, Attachment 25. See also *Committee Hansard*, 23 September 2003, pp.39-40

to whether the information in a submission falls within the ambit of the guidelines – there are no separate criteria for the decision maker to apply:

> …a one-page letter may be as effective as a lengthy submission. In a one-page letter the two or three pertinent points that the person wants to draw to attention are there. A very detailed submission may well include those same pertinent points but in amongst a lot of other information, some of which may have already been known to the department.[41]

4.48 Requests for intervention are also treated by the department strictly on a case-by-case basis – a minister's decision to intervene in one case does not set a precedent for any other cases that exhibit similar circumstances.[42]

4.49 The Committee notes the absence of any guidelines on timing for processing a request for ministerial intervention. As previously noted, DIMIA told the Committee that the concept of an overall processing time for intervention 'has little relevance' because there is no formal application process. However, DIMIA did confirm that, while it is extremely difficult to assess workloads, an officer would spend an average of seven or eight hours working on each case.[43]

Departmental Liaison Officers

4.50 DIMIA advised the Committee that apart from the Ministerial Intervention Units (MIUs), at least five areas within the department play a role in processing requests for ministerial intervention. However, the Committee was particularly interested in the role of DLOs in processing intervention requests because such requests are usually received in the minister's office and handled, in the first instance, by a DLO. Because the DLOs are normally the first point of contact for people seeking ministerial intervention, their actions in effect set in motion a complex administrative process. The department's administrative guidelines state:

> 4.3.1 The Departmental Liaison Officers (DLOs) provide a coordinating, guiding and liaising role for all requests for the Minister's public interest powers. Their role is to ensure that all requests for the Minister's public interest flow in and out of the Minister's office smoothly.
>
> 4.3.2 Documentation for requests that the Minister exercise his public interest power…is reviewed by a DLO before being forwarded on to the Minister.
>
> 4.3.3 Where necessary, the DLO coordinates with the relevant MIU or policy area on urgent issues.[44]

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41 Ms Godwin, DIMIA, *Committee Hansard*, 23 September 2003, p.59

42 DIMIA, *Committee Hansard*, 23 September 2003, p.61

43 DIMIA, Submission no. 24B, Answer to question on notice, p.19

44 DIMIA, Submission no. 24, Attachment 2, p.88

4.51 DIMIA's submission states that the DLOs engage in a 'preliminary examination' of requests for ministerial intervention before they are referred to the department for assessment.[45] At the public hearing on 5 September 2003, departmental officers and DLOs were asked clarify what is involved in a 'preliminary examination' because it implies, mistakenly, that DLOs make an assessment as to whether unique or exceptional circumstances apply in individual cases. DIMIA confirmed that 'preliminary examination' describes only 'a simple cataloguing technique or mechanism' where requests are 'processed in a mostly pro forma manner'. Mr Knobel, a DLO, told the Committee:

> A large amount of correspondence does come into us every day. We do a very initial assessment to determine if it is an intervention request…We try to identify which power of the act these clients are seeking intervention under and then simply mark it off to the relevant ministerial intervention unit…We provide an initial screening of these request to get them moved on to the department.[46]

4.52 The DLOs rarely elicit more information from the person sending the request, but they do correspond with representatives acting on that person's behalf. Mr Knobel told the Committee that a high proportion of phone calls to the minister's office each day relate to questions on intervention: 'has the request been received? How is my case going? We get calls from representatives or members of parliament seeking an update on how the intervention request is going'.[47]

Ministerial Intervention Units

4.53 Following 'preliminary examination' by the DLO, as described by DIMIA, requests for ministerial intervention are allocated to one of four Ministerial Intervention Units (MIU) located in Sydney, Melbourne, Perth and Canberra for processing. All section 351 requests are processed in the Canberra MIU, while the other three MIUs are primarily concerned with section 417 requests.[48]

4.54 The MIU is responsible for assessing intervention requests against the ministerial guidelines. For cases which are deemed to fall within the guidelines, the MIU prepares a submission for the minister outlining the reasons why it comes within the guidelines.[49] The submission generally follows a particular format providing the necessary background and a statement of the case and any relevant issues. The

45 DIMIA, Submission no. 24, p.38

46 DIMIA, *Committee Hansard*, 5 September 2003, p.41

47 DIMIA, *Committee Hansard*, 5 September 2003, p.52

48 DIMIA, *Committee Hansard*, 5 September 2003, p.21

49 DIMIA, Submission no. 24, p.38

submission also sets out a range of visa options available should the minister decide to use his discretionary power.[50]

4.55 Cases deemed outside the guidelines are included on a schedule, which gives a summary of the request and representations made regarding the case as well as information about the primary decision making and review process. It would also include some background information and a statement based on that information to the effect that the matter falls outside the guidelines.[51]

4.56 All submissions and schedules are then handled by the DLOs, a process described by former DLO, Mr Christopher, as 'basically a clerical function…to make sure that submissions, letters and things are properly signed off. If [the minister] forgets to sign, we take it back to him and say: "You need to sign this"'.[52]

4.57 As previously mentioned, there is no limit on the number of times a person may request intervention by the minister. The minister's attention would be drawn to a repeat request by way of some notation in the information that is included in the case file.[53] The administrative guidelines set out in detail the procedures to be followed if there is a repeat request.[54] The key issue is whether new information that is provided by the applicant, or information that had not previously been put before the minister, potentially brings the case within the ambit of the guidelines.[55] The administrative guidelines state that DIMIA is to prepare a submission for cases that do meet this criterion:

> 6.59 The submission should always make it clear that the case has previously been brought to the Minister's attention and should identify the changes in the information that suggests that the case may now fall within the ambit of the [Ministerial] Guidelines.[56]

Decision making within DIMIA

4.58 During the inquiry, an inconsistency in DIMIA's written evidence about its role in the decision making process for ministerial discretion came to light. The department points out in its written submission of August 2003 that under revised procedures instituted in 1996, officials no longer reply to applicants whose cases fall outside the ministerial guidelines. Instead, the minister periodically executes a minute

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50 Mr Nicholls, DIMIA, *Committee Hansard*, 23 September 2003, pp.60-61

51 Mr Nicholls, DIMIA, *Committee Hansard*, 23 September 2003, p.61

52 DIMIA, *Committee Hansard*, 5 September 2003, p.56

53 Mr Knobel, DIMIA, *Committee Hansard*, 5 September 2003, p.60

54 DIMIA, Submission no. 24, Attachment 2, pp.97-98 (6.5: 'Repeat requests')

55 DIMIA, Submission no. 24, Attachment 2, p.98 at 6.5.6 of the guidelines

56 DIMIA, Submission no. 24, Attachment 2, p.98 at 6.5.9 of the guidelines

stating that he does not propose to consider the exercise of his discretionary power for persons named on an attached schedule which is provided by the department.[57]

4.59 The key point relating to the revised procedures is that all decision making up to the point where the minister decides not to exercise his discretion actually takes place within the department. This follows from the statement in the submission that the schedule provided to the minister is the department's recommendation that he not consider the exercise of his power.[58] The Committee observes that while in theory it is up to the minister to decide not to use the discretionary powers, in practice the minister's decision is the culmination of a chain of administrative decision making that begins and ends within the department.

4.60 DIMIA's submission contradicts an answer it provided in October 2003 to a question on notice about measures taken within the department to improve consistency of decision making. The answer provided states categorically that departmental officers exercising their judgement whether to prepare a full submission or a schedule *does not* involve decision making at the departmental level:

> The intervention process does not involve decision making at the departmental level. Rather it is a process in which intervention requests are assessed against the Minister's Guidelines as to whether the request falls within the ambit of the Guidelines. In the end, all of the information in a case is weighed by the Minister to form a view of what he decides is in the public interest. This includes contemplation of information other than the individual's circumstances. Different outcomes for apparently similar individuals do not denote inconsistency, but a different judgement by the Minister concerning the public interest.[59]

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

4.62 The Committee finds that decision making within DIMIA is not restricted to cases where it advises the minister not to consider whether to exercise his discretion. The minister's capacity to formulate an independent view on a particular case that might lead him to exercise his discretion is dependent almost entirely on the information provided by the department. While the Committee accepts that the final decision to grant a visa rests with the minister, the decision making process within the

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57 DIMIA, Submission no. 24, p.36

58 DIMIA, Submission no. 24, p.38

59 DIMIA, Submission no. 24C, Answer to question on notice E4, p.3

department, especially whether to prepare for the minister a submission or a schedule, is critical to the success or otherwise of individual cases.

4.63 This conclusion is supported by evidence provided by the Commonwealth Ombudsman, Professor John McMillan. In expressing concerns about the use of the ministerial guidelines, he told the Committee that:

> The minister, realistically, is heavily reliant upon the work of the department in filtering, feeding, preparing and briefing cases. If there are deficiencies in the work of the department, then necessarily those deficiencies flow through into the integrity of the exercise of the powers by the minister.[60]

4.64 Leaving aside the extent of decision making within DIMIA for the intervention process, an important issue that was brought to the Committee's attention concerns the consistency and quality of decision making within the department, and the effect of departmental decision making on the minister's use of the discretionary powers.

4.65 Serious concerns about the adequacy of departmental procedures were raised by several witnesses. The Commonwealth Ombudsman informed the Committee of known cases where information was not put before the minister by the department; where the officer responsible for considering a case did not have access to all departmental files relevant to a case; and where a person assessing a claim did not consult a file held by the department which contained important information that should have formed part of a submission to the minister.[61] The latter case involved a person who '…had had an operation months earlier, yet the submission to the minister said that he would be required to have that operation in the future and it would cost so many dollars. It would suggest that the file was not examined'.[62] The Committee notes that concerns with the administrative actions of the department were first raised in the Commonwealth Ombudsman *Annual Reports* for 1995-96 and 1996-97.[63]

4.66 The Committee believes that these documented cases reveal serious and fundamental administrative weaknesses in DIMIA's decision making processes. The concerns expressed by the Ombudsman are compounded because DIMIA does not have in place an internal system for auditing its own decision making in relation either to decisions made by the minister or the department's internal submission process. The Committee strongly supports the Ombudsman's view that: '…it would be desirable if DIMIA introduced routine auditing' of its decision-making processes.[64]

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60 Professor McMillan, *Committee Hansard*, 18 November 2003, p.2

61 Professor McMillan, *Committee Hansard*, 18 November 2003, pp.6-7

62 Mrs Hawke, Office of the Commonwealth Ombudsman, *Committee Hansard*, 18 November 2003, p.7

63 Office of the Commonwealth Ombudsman, Submission no. 28, p.10

64 Professor McMillan, *Committee Hansard*, 18 November 2003, p.8

Recommendation 2

4.67 The Committee recommends that DIMIA establish a procedure of routine auditing of its internal submission process. The audits should address areas previously identified by the Commonwealth Ombudsman, namely identifying ways to improve departmental processes for handling cases, and ensuring that claims are processed in a timely way and case officers consider all of the available material relevant to each case.

4.68 The most scathing criticisms of departmental processes were provided by Ms Marion Le, a human rights advocate and registered migration agent who has worked closely with the department and represented people to ministers over a twenty-five year period.

> One of the biggest problems is that the department [does] not always send on submissions that are put to them, and we as the practitioners or the people bringing the submissions do not know when the department [has] passed on our submissions and when they have not, so we never know whether the minister is receiving them.[65]

4.69 Ms Le further commented that:

> The whole situation is really messy. I would not like to say that it is working well; it is not working well. It is messy, time consuming and stressful. Those of us who are doing it do not know what the outcome is – as I said, the submission heads off into the abyss.[66]

Recommendation 3

4.70 The Committee recommends that the Commonwealth Ombudsman carry out an annual audit of the consistency of DIMIA's application of the ministerial and administrative guidelines on the operation of the minister's discretionary powers. The audit should include a sample of cases to determine whether the criteria set out in the guidelines are being applied, and to identify any inconsistency in the approach of different case officers.

4.71 Witness concerns about DIMIA's decision-making were not limited to the ministerial intervention process. The Legal Aid Commission of New South Wales also drew the Committee's attention to problems in the current migration regime, particularly 'very poor quality decision making' at the primary level, which it believes account for the large number of appeals to the minister:

> Most refugee applicants are not interviewed at the primary level. Many of the decisions often bear no direct relation to the points that the person puts in their application. People do not understand the decision making and then are very confused. It is only when they go to the RRT that many people

65 Ms Le, *Committee Hansard*, 18 November 2003, p.47

66 Ms Le, *Committee Hansard*, 18 November 2003, p.51

> finally get to verbalise their claims before a decision maker. Many of them consider this to be the primary decision, because the first decision at primary level was made without discussion and without any feedback from the department.[67]

4.72 Reflecting on the determination system as a whole, Ms Le expressed the view that the ministerial discretion powers were important to counteract poor decision making in the department. She told the Committee:

> Normally I would not go to see a minister on specific cases. But because I feel the system has been so bad in the last two years, so appalling at both the primary decision making level and at the RRT, I have gone to the minister.[68]

4.73 The Committee notes the evidence by Dr Mary Crock which gives a broader perspective on the changing climate of decision making within DIMIA in the late 1990s, when acceptance rates for protection visa applicants reached as high as 98 to 100 per cent for Afghans and Iraqis. Dr Crock argued that statistics on acceptance rates after 1999, which show a drop from 100 per cent to approximately 75 per cent, reflect the 'considerable pressure' that was being exerted on the department by the government when it realised that the high acceptance rates 'started to become such a hot political issue'.[69] Dr Crock claimed this assessment is corroborated by anecdotal evidence from sources within the department which apparently shows that:

> …absolutely direct pressure was placed on departmental members to be tougher with their assessments, that people were brought in from other areas, such as security and enforcement, and placed in the area, that some experts were removed from the area, in a very direct attempt to drive the acceptance rate down.[70]

Referral by a tribunal – the role of the RRT and the MRT

4.74 Cases may be brought to DIMIA's attention by a referral from the RRT and the MRT. Members of the review tribunals may indicate in their decisions that a particular case raises humanitarian issues. However, the RRT and the MRT have slightly different processes for referring cases for the minister's consideration. The RRT notifies DIMIA of potential humanitarian considerations either by reference in a tribunal decision that the case may be suitable for consideration under section 417, or by a letter to the DIMIA State Director that the case may raise humanitarian considerations.[71] The letter would normally state: 'This application may raise humanitarian claims. Please note that the tribunal has no power to consider such

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67 Ms Biok, Legal Aid Commission of New South Wales, *Committee Hansard*, 22 September 2003, pp.22-23

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

69 Dr Crock, *Committee Hansard*, 21 October 2003, p.35

70 Dr Crock, *Committee Hansard*, 21 October 2003, p.36

71 Migration Review Tribunal and Refugee Review Tribunal, Submission no. 11, pp.2-3

claims'.[72] The tribunal's decision is also provided to the appellants or their advisers.[73] The applicant, however, is not told that DIMIA has been informed of the comment.[74]

4.75 The MRT referral process provides an alternative and somewhat more flexible means of referring cases for the minister's consideration. The tribunal notifies DIMIA of cases involving unique, compassionate and exceptional circumstances through correspondence from the Principal Registry to the Ministerial Intervention Unit in DIMIA:

> The correspondence is produced if, at the end of the review process, the matter is identified by the presiding Member as one potentially raising unique, compassionate and exceptional circumstances. The reasons for the referral or details of the case are included in the correspondence if the Tribunal decision does not contain information relevant to consideration of the exercise of the discretion by the Minister.[75]

4.76 Successive ministers have made sure that referral of cases from the RRT and MRT is a relatively informal process which in no way binds the minister to exercise discretion in a given case. Mr Hand initially requested that the former IRT write to him regarding cases where ministerial consideration may be warranted. The guidelines put in place under Mr Ruddock show that the review tribunals were expected to notify the department, rather than the minister directly, of cases that could raise public interest considerations.[76]

4.77 Evidence from the tribunals indicates that their role in the ministerial discretion process is 'very limited and indirect'.[77] Members of both tribunals are expected to deal with the criteria of the visa at hand and concentrate on related issues rather than consider in detail any compassionate or humanitarian claims that may be raised.[78] As noted above, where such claims are made, the Member may decide to notify the department of the case.

4.78 The tribunals advised the Committee that the MRT does not keep any statistical data or a central record of the number of cases identified as potentially raising humanitarian considerations, and that the same applies to the RRT for the period before July 1999. Furthermore, the tribunals do not record the reasons for the referral of matters to DIMIA for consideration of the exercise of ministerial discretion.[79]

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72 Mr Blount, *Committee Hansard*, 22 October 2003, p.15

73 Mr Karas, *Committee Hansard*, 22 September 2003, p.11

74 Mr Blount, *Committee Hansard*, 22 September 2003, p.10

75 Migration Review Tribunal and Refugee Review Tribunal, Submission no. 11, pp.2-3

76 DIMIA, Submission no. 24, Attachment 8, p.6

77 Migration Review Tribunal and Refugee Review Tribunal, Submission no. 11, p.1

78 Mr Karas, *Committee Hansard*, 22 September 2003, p.4

79 Migration Review Tribunal and Refugee Review Tribunal, Submission no. 11, p.3

4.79 The Committee accepts that the MRT and RRT's limited role in the operation of the ministerial discretion powers reflects the role prescribed for them in legislation. However, it notes the suggestion of some witnesses that the tribunals are well placed to play a greater role in assessing cases that may warrant special consideration on compassionate or humanitarian grounds.

4.80 The Migration Institute of Australia, for example, argued that because the tribunals are in an ideal position to assess the credibility of an applicant's circumstances, their processes '…could be developed to allow [them] to make a formal finding on [an applicant's] suitability for ministerial intervention'.[80] This could involve more thorough reasoning in a tribunal member's decision which would allow a more persuasive case to be put before the minister.

4.81 More forthright views on this subject were conveyed to the Committee by Mr Michael Clothier, Chairman of the Law Institute of Victoria's Immigration Law Centre, but acting in his private capacity. He believes strongly that reforms to the migration law are necessary to enable decision makers at the primary and review levels to exercise discretion in difficult cases. The argument is based on the view that:

> We pay our immigration officers and Tribunal Members significant salaries and we should be expecting more of them than being mere ciphers. The Minister should not, in my view, have to be placed in a position where he is *micro-managing* Australia's Immigration "discretions"…[81]

4.82 The Committee notes that these arguments go considerably further than the recommendation contained in the report of the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian determination processes, *A Sanctuary Under Review*. The report acknowledged that during the review process, the RRT may collect valuable additional information about the circumstances of an applicant seeking refugee status that was not presented, or not presented clearly, by the applicant. However, it concluded in favour of the status quo: 'As the RRT member is not making a determination…it is appropriate that the referral mechanism to the Minister, through the DIMIA case office, continue to be informal'.[82]

4.83 In view of the evidence presented during the inquiry, the Committee believes it is time to reconsider the role of the RRT and MRT in the ministerial discretion process. The Committee accepts that the tribunals' core task is the review of decisions of the immigration department to refuse or cancel protection and other visas. However, the Committee also believes that the tribunals are well placed to assess the entirety of an applicant's circumstances, especially when new information is presented that was not previously available to the department.

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80 Migration Institute of Australia, Submission no. 32, p.9

81 Mr Clothier, Submission no. 20, p.2 (emphasis in original)

82 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.251

Recommendation 4

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

Recommendation 5

4.85 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.

Conclusion

4.86 The criticisms of the department's decision making processes canvassed in this chapter are a major area of concern for the Committee. The criticisms raise a host of other issues about the effect of administrative deficiencies on individual applicants who are relying on the minister's discretion as their last opportunity to obtain a visa. They also raise questions about the avenues that are open to individuals to gain access to the minister, and the role played by professional advocates some of whom are bypassing the department and approaching the minister because their experience with the department has been less than satisfactory. The Committee examines both of these sets of issues in Chapter 5 and Chapter 6 respectively.

Chapter 5

Operation of the powers – problems encountered by applicants

5.1 In this chapter the Committee discusses the operation of ministerial discretion from the perspective of those who request that the minister exercise the discretionary power in their favour. The chapter thus addresses in part the third of the inquiry's terms of reference, on the operation of the discretionary powers.

5.2 As discussed elsewhere in this report, it is widely recognised that ministerial discretion can provide a safety net for those non-citizens who cannot meet the strict requirements of the migration laws for permission to remain in Australia. DIMIA gave evidence that the ministerial discretion process allows cases that do not fit neatly within the framework to 'be resolved at minimum cost and inconvenience for the applicant'.[1]

5.3 Nevertheless, the migration system in general and ministerial discretion in particular is administered in ways that may result in applicants being exploited and suffering hardship. Many of these difficulties stem from a lack of readily available information about ministerial discretion and its processes.

Availability of information

5.4 As discussed in Chapter 2, information relating to ministerial discretion is publicly available, but it is not widely disseminated. The lack of readily-available information and many applicants' poor English language skills can lead to their exploitation by unscrupulous operators. Exploitation of non-citizens is discussed later in this chapter.

5.5 The Legal and Constitutional Affairs References Committee in its 2000 report identified a lack of readily available information as an issue in the operation of ministerial discretion. In its report that Committee recommended that an information sheet should be produced to explain the provisions of section 417 and the accompanying Ministerial Guidelines.[2] The Government's response to the recommendation was that:

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1 DIMIA Submission no. 24, p.8

2 Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.257

> Ministerial Guidelines on s417 … are publicly available. DIMIA Fact Sheet 41 explains the Minister's discretionary powers and further publication of such information is not considered necessary. The powers are non-compellable and, in any event, every case where the RRT finds that a person does not require refugee protection is considered by DIMIA against the intervention guidelines as a matter of course. Cases meeting the guidelines are referred to the Minister without any action being required by the applicant.[3]

5.6 As noted in Chapter 2, the DIMIA fact sheet that contains information about ministerial discretion (now Fact Sheet 61) includes only two sentences on the subject and gives no advice on how to make a request or on how requests are processed.[4] DIMIA clearly sees no need to make information more widely available. DIMIA submitted that:

> The Minister's powers are non-compellable and therefore, there is no obligation on the Department to make this information publicly available. However, given the level of requests made to the Minister seeking the exercise of his public interest intervention powers, the information is clearly well known.[5]

5.7 Some witnesses have a different view from the government about whether information should be more widely disseminated. A migration agency, George Lombard Consultancy, for instance, submitted that:

> … it is extraordinary that there is no widely disseminated source of information about access to the Minister's discretionary powers and how the Minister might be assisted to consider a matter. In that a large number of Ministerial intervention requests are made each year, it would seem that a failure to advise of the existence of the discretion does not inhibit the use made of it, and instead makes potential applicants reliant on agents. It would clearly be better to formalise both the information available about the discretion and the public aspects of the processing. There is probably the need for an information form and an application form.[6]

5.8 As noted in the quote above, applicants will tend to rely on agents or others because they do not have sufficient information to make a request themselves. People in the community who wish to make or support a request should have reasonable access to the ministerial guidelines. DIMIA and the minister would also benefit if all

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3 Government Response to the Senate Legal and Constitutional References Committee Report, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.13

4 DIMIA, *Fact Sheet 61. Seeking Asylum within Australia*, p.4

5 DIMIA Submission no. 24D, Answer to question on notice N1

6 George Lombard Consultancy Pty Ltd, Submission no. 16, p.3

requests were to address the guidelines. The Committee considers that in the interests of equity and efficiency information should be more easily accessible than at present.

Recommendation 6

5.9 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.

Legal aid

5.10 As stated by George Lombard Consultancy, applicants are encouraged to rely on agents because information is not widely disseminated. Applicants are also disadvantaged by the unavailability of legal aid. Ms Balgi informed the Committee that Legal Aid Commission of NSW (LAC) was unable to take on many immigration cases either under the Immigration Application Advice and Assistance (IAAAS) contract or otherwise and were generally not able to help people with requests for ministerial intervention. She stated that:

> This lack of legal aid availability for these kinds of applications can create problems, especially for people who are financially disadvantaged. They may try to put their case themselves, and they may not have the knowledge of the Australian migration system or the personal language skills to really put their case properly to the minister. As a result, they may have a very significant outcome such as the cancellation of a visa; they may fall through the safety net of the minister's substitution powers under the act. Given the importance of these outcomes, we are of the opinion that legal aid should be more generally available for people who are seeking to have the minister exercise his discretion in their favour.[7]

5.11 Applicants' dependence on others may, as mentioned earlier, lead to exploitation. The LAC commented that the unavailability of legal aid may exacerbate this possibility. The LAC stated that:

> It must also be remembered that there is no assistance for ministerial requests provided through the IAAAS Scheme or through community workers at migrant resource centres. As no general advice is available from credible legal information services, vulnerable applicants are often driven to approach migration agents who give them unrealistic expectations as well as charging large fees for applications to the Minister.[8]

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7 Ms Balgi, *Committee Hansard*, 22 September 2003, p.24

8 Legal Aid Commission of NSW, Submission no. 17, p.22

Recommendation 7

5.12 The Committee recommends that coverage of the Immigration Application Advice and Assistance (IAAAS) scheme 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.

Reasons not given to unsuccessful applicants

5.13 Many witnesses were concerned that the minister does not give reasons for a refusal to exercise the discretionary powers.[9] Summaries of cases prepared by the MIUs in which the minister chose not to intervene may be accessed by applicants under the Freedom of Information laws, but, as was noted by the Immigration Advice and Rights Centre (IARC), most applicants are not able to do this because they have been required to leave Australia. The IARC submitted that this information should be provided to applicants at the time when the minister does not exercise the public interest power in their favour.[10] Uniting Justice Australia submitted that the section 417 power should:

> Require that the applicant be informed, in writing, of the decision made and the reason for intervening, or not intervening, with reference to the relevant sections of the guidelines.[11]

5.14 The LAC also suggested that in some cases it may be appropriate for the minister to provide someone for whom the minister has refused to exercise the discretionary powers with a copy of the statement of the reasons as to why that is the case.[12]

5.15 Migration agents and solicitors naturally want to know the reasons why cases they have prepared have not attracted the minister's discretionary powers so that in the future they may advise their clients appropriately and prepare cases that are more likely to succeed. Some witnesses stated that they were concerned that unsuccessful applicants may be distressed because they are not given reasons why they have failed, or may feel that they have not had a fair hearing. Because they do not know the reasons why the minister has not intervened on their behalf, some applicants are

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9 See, for example, Mr Prince, *Committee Hansard*, 22 September 2003, pp.69-70, Dr Thom, Amnesty International Australia, and Ms Burn, *Committee Hansard*, 23 September 2003, pp.15, 24

10 Immigration Advice and Rights Centre, Submission no. 22, pp.4, 5

11 Uniting Justice Australia, Submission no. 19, p.10

12 Legal Aid Commission of NSW, *Committee Hansard*, 22 September 2003, p.24

prepared to risk staying in Australia illegally in order to appeal again to the minister.[13] A corollary to this argument was stated as follows:

> It is important that asylum seekers have all the information as to why they have been refused. Allowing asylum seekers to feel that their entire case has been heard and that a definitive decision looking at all our [Australia's] obligations has been made will assist and facilitate a more humane process of return.[14]

5.16 The Commonwealth Ombudsman suggested a procedure that would provide applicants with a much better indication of why their cases may have been unsuccessful and would make the entire process much more transparent. He submitted that:

> As a matter of principle it would be desirable that each applicant be shown a draft of any submission to be placed before the Minister, to enable the applicant to comment on the comprehensiveness of the submission and to obviate later disputation. There is admittedly a risk that this could prolong the process of consideration in some cases unless a tight time frame was established, but equally there is a greater risk of delay arising subsequent to an ill-prepared submission.[15]

5.17 The Committee considers that the minister should give applicants the reasons for not exercising the discretionary power at the time they are informed that the minister will not intervene on their first request. This would be fair to the applicants and may satisfy them that their cases have been properly considered. If any significant claim had been overlooked, the giving of reasons would allow the applicant to draw attention to that in any subsequent request. Giving reasons for not intervening would also enable the parliament and the community to ascertain how the powers were being used.

Recommendation 8

5.18 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**

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13 Uniting Justice Australia, Submission no. 19, p.6 and Legal Aid Commission of NSW, Submission no. 17, p.22

14 Uniting Justice Australia, Submission no. 19, p.6

15 Commonwealth Ombudsman, Submission no. 28, p.11

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.**

Exploitation of applicants

5.19 As mentioned earlier in this Chapter the secretiveness surrounding the exercise of ministerial discretion may result in the exploitation of applicants. Asylum seekers are particularly vulnerable to the predations of unscrupulous operators. Mr Mitchell of the Hotham Mission, a church agency that provides services to asylum seekers, said their research revealed that:

> Asylum seekers who approach the minister or indeed the RRT are in a very vulnerable situation. They are very vulnerable to unscrupulous migration agents who promise all kinds of things, including having connections with the minister, give the impression that they can get them work rights or a visa, charge them a lot and are of course unable to wield any influence. It is a common scenario. [16]

5.20 Ms Biok, a legal officer with the Legal Aid Commission of NSW, informed the Committee that some non-citizens in Australia have paid exorbitant amounts of money to agents for visa applications such as the 'woman at risk' visa that cannot succeed because they are offshore applications.[17] Ms Biok stated that she had heard of an agent asking for $45,000 in cash, and that asking $5,000 to $10,000 is not unheard of.[18] Another migration lawyer, Mr Prince, said that 'figures of $20,000 are regularly bandied around by my clients'.[19] Although some of these amounts represent the total bill for work spanning initial visa applications through review appeals and requests for intervention, all witnesses agreed that fees of this magnitude appear excessive and unreasonable. It is, however, likely that the danger of exploitation is greater at the earlier stages of the migration process than at the level of ministerial discretion. Mr Bitel, a migration lawyer, stated that:

> I think that probably the level of abuse at the ministerial discretion stage is a lot lower than in the other stages because, of course, no work permits are given. Frequently amongst applicants whose sole aim is to extend their stay

16 Mr Mitchell, *Committee Hansard*, 21 October 2003, p.15 See also Ms Burgess, Immigration and Rights Advice Centre, *Committee Hansard* 22 September 2003, p.44

17 Ms Biok, *Committee Hansard* , 22 September 2003, p.32

18 Ms Biok, *Committee Hansard*, 22 September 2003, p.35

19 Mr Prince, Ms Biok, *Committee Hansard*, 22 September 2003, p.75

> and obtain permission to work and obtain some money, the ministerial discretion stage is not that significant. [20]

5.21 According to Mr Bitel most of these operators are not registered migration agents. They are people who operate outside the system and prey on the vulnerability, ignorance and desperation of non-citizens.[21]

5.22 Applicants with limited English skills and little knowledge of their rights are generally disadvantaged in the complex field of migration and vulnerable to exploitation. However, people from communities or countries where dealing with bureaucracies and politicians involves middlemen and money changing hands are particularly susceptible to operators boasting of close ties to, or influence with, departmental officials or the minister. Ms Balgi of the Legal Aid Commission of NSW observed that

> …some people, because they come from cultures where personal links speak for all, are particularly vulnerable to advocates who put out that they have personal links to the minister.[22]

5.23 The risk of exploitation that non-citizens face is not only symptomatic of their general vulnerability but also reveals some of the problems peculiar to the area of ministerial discretion. The opaque nature of the ministerial discretionary system itself compounds this disadvantage and leaves people open to operators peddling misleading information, whether this is about the chances of success or their supposed personal connections with the minister. Mr Lombard stated that it is 'largely the absence of any explanatory material and any openness in the system that means that clients are very much prey to people who are not honest agents'.[23]

5.24 The Committee returns to this problem in the next chapter which discusses the role of advocates and in particular the behaviour of non-registered agents towards groups that are vulnerable.

Visas and work rights

5.25 Persons who have had their application for a visa refused by DIMIA cannot legitimately request that the minister exercise the discretionary powers unless the DIMIA decision has been upheld by an appeals tribunal. On making a first request of the Minister the applicant becomes eligible for a bridging visa while the request is being considered. Persons making second or third requests (there is no limit to the

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20 Mr Bitel, *Committee Hansard*, 21 October 2003, p.59

21 Mr Bitel, *Committee Hansard*, 21 October 2003, p.61

22 Ms Balgi, *Committee Hansard* 22 September 2003, p.29 See also Mr Prince, *Committee Hansard* 22 September 2003, p.75

23 Mr Lombard, *Committee Hansard*, 22 September 2003, p.58

number of requests a person may make) are only eligible for a bridging visa where the request is referred by DIMIA to the minister. [24]

5.26 Witnesses informed the Committee that on occasion persons lose their eligibility for a bridging visa because a letter is written to the minister, sometimes without their knowledge, which is treated as a request, or because an inadequate case is presented by an advocate. Christopher Levingston and Associates (CLA) submitted that:

> In our experience it is often the case that well-intentioned members of the public often write to the minister seeking assistance in relation to a non-citizen. It is our experience that these 'requests' commonly consist of a short letter containing only general information about the applicant and rarely represent a fulsome [sic] presentation of the compassionate features of the non-citizen's case.[25]

5.27 According to CLA, the result for the applicants is that they become eligible for a bridging visa when the 'request' is received, but these at best sketchy requests are almost bound to fail to attract the minister's intervention. If an unsolicited letter is written or an inadequate case is made, when a more thorough case is later presented to the minister by a competent advocate, it is treated as a second request. The applicant is therefore not eligible for a visa during the time that this request is being processed, unless and until it is considered by the minister personally. During the processing period the applicant will be illegally at large in the community or will be detained.

5.28 CLA submitted that this undesirable situation could be addressed as follows:

> Non-citizens should not be considered to have made a request to the Minister until the Minister has received a signed conformation from the non-citizen indicating that:
>
> They wish to make the appeal to the Minister;
>
> They understand that subsequent appeals to the Minister will not necessarily result in the grant of bridging visas; and
>
> Only registered migration agents are permitted by law to receive any money or benefit from them for the preparation or assistance of appeals to the Minister.[26]

5.29 The Committee considers that the above suggestions have merit. If implemented, they would not only address an unfortunate and no doubt unintended consequence of

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24 DIMIA, Submission no. 24, p.41

25 Christopher Levingston and Associates, Submission no. 6, p.7

26 Christopher Levingston and Associates, Submission no. 6, pp.7-8.

the current regulations, but would also assist in ensuring that people are not exploited for financial gain.

Delays in obtaining bridging visas

5.30 Another associated issue was raised by CLA to the effect that a bridging visa may only be granted once a request is forwarded to a Ministerial Intervention Unit (MIU) and is being assessed by one of its officers against the guidelines. CLA informed the Committee that:

> There are two significant problems with this process. First, it is our experience that this process can take several weeks, during which time the non-citizen remains in a form of unlawful limbo and is unable to legalise their status in Australia, even though they have an appeal with the Minister. Second, the non-citizen has no way of knowing when their case is actually being considered by the MIU and consequentially does not know exactly when they should apply for a bridging visa.
>
> This situation is especially difficult for non-citizens in detention where any application for a bridging visa must be refused unless at the time their application is lodged the MIU is assessing the request against the Minister's Guidelines. Consequently, the non-citizen potentially has to remain in detention for a further 30 days before being able to make a fresh application for a bridging visa and release from detention. [27]

5.31 Although the Committee received information from DIMIA about the time taken to process requests, that information did not specifically cover the time taken from receipt of a request by the Minister's office till initial assessment by a MIU. In view of the list of priorities set down in DIMIA's departmental administrative guidelines (MSI 387), it seems likely that in many cases a period of weeks may indeed elapse. The Guidelines assign a high priority to the processing of certain categories of requests, by minors and people in detention, for example, but the 'remainder of cases' are dealt with 'in order of receipt'.[28] DIMIA informed the Committee that cases with lower priority have longer processing times.[29] It is reasonable to conclude that non-citizens in the community may have to wait for some time for their request to receive attention in a MIU.

5.32 CLA suggested that the problem could be overcome if a bridging visa were granted automatically upon the minister receiving written confirmation from the non-

27 Christopher Levingston and Associates, Submission no. 6, p.9

28 DIMIA, Submission no. 24, Attachment no. 2, p.22

29 DIMIA, Submission no. 24, p.49

citizen that he or she wished to seek the minister's personal intervention, as discussed in the preceding section.[30]

5.33 The Committee has reservations about this suggestion. First, a 'request' may be made where the minister cannot exercise the discretionary power, for example, where a visa application is being assessed by DIMIA or is before a tribunal. Second, a request may be received that the minister may consider is 'inappropriate to consider', because, for example, migration-related litigation has not been finalised. Requests need to be first assessed to determine that they are both within the legislative power and that they are appropriate before being further assessed against the Guidelines. There would therefore be potential for abuse of the system if the making of a 'request' brought with it automatic eligibility for a bridging visa.

5.34 The Committee notes, however, that the instructions to departmental staff for applying the guidelines accords a high level of priority to requests where the minister has no power to exercise discretion and to requests which are 'inappropriate to consider'.[31] The Committee considers therefore that there would be limited potential for abuse of a system of automatically granting a bridging visa.

Recommendation 9

5.35 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.**

Financial hardship

5.36 There may be work rights attached to the Bridging E Visas where there is financial hardship, but only where the case has been referred to the minister for consideration.[32] In effect, however, persons on bridging visas usually do not have work rights, or any income at all. A study of 111 cases involving 203 asylum seekers that was undertaken by the Asylum Seekers Project (ASP) of the Hotham Mission from February 2001 to February 2003 found that:

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30 Christopher Levingston and Associates, Submission no. 6, p.9

31 DIMIA, Submission no. 24, Attachment 2, p.21

32 DIMIA, Submission no. 24, p.42

> Almost 95% of all interviewed asylum seekers currently have no right to work. This includes all asylum seekers who failed to lodge their Protection Visa (PV) Application within 45 days (60% of all plane arrivals) and those who have appealed after receiving a negative decision from the RRT or Courts. No asylum seeker interviewed has access to ASAS benefits.[33]

5.37 Without work rights and concomitant tax file numbers, asylum seekers do not have access to Medicare.

5.38 The ASP study found that ineligible asylum seekers live in abject poverty, with virtually no mainstream supports available to them, and concluded that:

> The impact of these issues, coupled with the long waiting period and the prolonged passivity of this group, included high levels of homelessness, anxiety, depression, mental health issues and a general reduction in overall health and nutrition. High levels of family breakdown, including separation and divorce, were also noted. The impact of the Bridging Visa category was felt particularly by single mothers and young asylum seekers.[34]

5.39 Of the 111 cases studied, 37 had had a final outcome. Of the remainder still in the determination stage, 14 had made a request for ministerial intervention and an additional 4 had not been successful in attracting the discretionary power. Other cases were before the RRT or the courts.

5.40 Australia's charitable institutions are apparently having difficulty meeting the needs of these ineligible asylum seekers. The ASP alone was spending $30,000 a month on emergency relief and housing in early 2003. One witness stated that the 'welfare sector' would be hit by large numbers of people who were on temporary protection visas, who had been refused permanent visas, and who were appealing to the minister.[35]

5.41 That bridging visas do not come with work rights is not an oversight or an unintended consequence of the Migration Regulations. When explaining why changes had been made to the Regulations, DIMIA stated that the government had been concerned about the 'attractiveness of using repeat requests to obtain, for example,

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33 *Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E, April 2003*, Asylum Seekers Project – Hotham Mission, Uniting Justice Australia, Submission no. 19A, p.17

34 *Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E, April 2003*, Asylum Seekers Project – Hotham Mission, Uniting Justice Australia, Submission no. 19A, p.30

35 Mr Glenn, A Just Australia, *Committee Hansard*, 21 October 2003, p.25

work rights and prolonged stay … There are very narrow provisions of work rights and extension of lawful stay'.[36]

5.42 The Committee is concerned about the plight of people, particularly families and minors, who are suffering because of the lack of any income. It notes the recommendations made by the ASP that:

- Asylum seeker children should have access to the Asylum Seeker Assistance Scheme (ASAS) throughout the Protection Visa and 417 stages; from lodging to final outcome and including asylum seekers released from detention on bridging visas.

- Asylum seekers should have Medicare coverage throughout Protection Visa and 417 stages; from lodging to final outcome and including asylum seekers released from detention on bridging visas.

- At least one family member should have access to work rights and including asylum seekers released from detention on bridging visas, with the 45 day rule being abandoned.[37]

5.43 The Committee sees merit in these suggestions. It considers that visas with work rights should be available for applicants during the appeal periods, up to the time of an outcome of a first request for ministerial intervention. Applicants making subsequent requests should not be eligible for the grant of a bridging visa that attracts work rights. Children who are seeking asylum should have access to ASAS or some other social security support throughout the period of any requests for ministerial intervention, and all asylum seekers should have access to health care up to the time of an outcome of a first request.

Recommendation 10

5.44 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.

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36 Mr Illingworth, DIMIA, *Committee Hansard*, 5 September 2003, p.85

37 Asylum Seeker Project – Hotham Mission, Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E: Research and Evaluation, April 2003, Submission no. 19A, p.30

Tribunal determination as prerequisite for intervention

5.45 As described earlier, the minister may exercise the discretionary powers only after a review tribunal has affirmed the department's decision to refuse a visa. Some witnesses commented on problems that relate to the need to appeal to a tribunal, particularly in cases where there is no chance of success before the tribunal, but where there is a reasonable chance that the minister might intervene.

5.46 These cases usually involve persons who narrowly fail to be recognised as refugees, those who can invoke discrimination under the CAT or ICCPR, or those with close family ties. Mr Fergus, a solicitor and migration agent, provided information about two cases in which the Minister had intervened which suggest that the ministerial discretions are too rigidly tied to the pre-condition of a review decision by the relevant tribunal.[38] In both cases, the MRT and the RRT had no choice other than to uphold DIMIA's decision to refuse visas, although such was the nature of the cases that there was a strong likelihood that the Minister would intervene. Mr Fergus concluded that the Minister should have been able to act at an earlier stage of the process and suggested that:

> In other instances, the Minister has discretions to allow certain actions in 'compassionate and compelling circumstances'. I submit that these two cases and others like them show that a similar discretion ought to be available to the Minister under sections 351 and 417 of the Act. I do not envisage that a 'compassionate and compelling circumstances' discretion would be exercised often but it would be available to save the unnecessary costs and waste of resources caused by cases such as these.[39]

5.47 Another migration lawyer submitted that the requirement for a prior ruling by a review authority could lead to otherwise deserving cases being denied the opportunity to request ministerial intervention. He described the case of a visa applicant who had not received the letter of refusal of his application for a visa from DIMIA and was therefore not able to lodge an appeal with the RRT within the statutory time. Not being able to appeal to the RRT, the non-citizen could not request the Minister to exercise the discretionary power.[40] The Legal Aid Commission of NSW described the case of a Korean woman who was forced to leave Australia with her Australian citizen child because of the inflexible time limits for appeals and the requirement that the Minister can only grant a visa where a case has been decided by a tribunal.[41]

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38 Mr Fergus, Submission no. 4, p.2

39 Mr Fergus, Submission no. 4, p.2

40 Mr Bitel, *Committee Hansard*, 21 October, 2003, p.61 and Parish Patience Immigration Lawyers, Submission no. 26, p.3

41 Legal Aid Commission of New South Wales, Submission no. 17, p.10

5.48 The Commonwealth Ombudsman informed the Committee that from the perspective of his office the main difficulty with sections 351 and 417 lies in the fact that the power cannot be exercised unless there was an earlier and less-favourable decision of a tribunal. According to the Ombudsman's office the main problem arising from this provision is that a person who through mistake, mishap, experience or impecuniosity has not lodged an effective appeal to a tribunal within the appeal period also loses the opportunity to benefit from ministerial intervention. Another problem that arises from the government's interpretation of sections 351 and 417 is that persons who have successfully appealed to the courts must pursue proceedings to finality in a tribunal before they can make a request of the minister.[42]

5.49 The Ombudsman stated that consideration should be given to defining some additional or alternative mechanism for activating the minister's powers. He suggested that:

> An alternative mechanism, which would preserve the intent of ss 351 and 417, would be to confer a discretion upon the Department to refer a case to the Minister if, notwithstanding that the person did not lodge an appeal with a tribunal, there were "exceptional circumstances" that warranted the referral. Another alternative would be to provide that a matter could be referred to the Minister upon the recommendation of the Ombudsman.[43]

5.50 The Ombudsman noted that the suggestion that he could recommend matters to the minister would have significant resource implications for his office.[44]

5.51 DIMIA considers that there could be undesirable consequences if the discretionary power could be exercised in the absence of a review tribunal decision. The department submitted that:

> The creation of an intervention power from the primary decision point may create potentially duplicating and delaying processes and could create potential for misuse of the process by those wishing to prolong their stay in Australia and frustrate their removal from Australia.[45]

5.52 The Committee considers that non-citizens should be given every chance to make their case at the primary decision-maker and review stages. It appreciates that the system is designed to ensure that only the most difficult cases should be available for the exercise of ministerial discretion. The cases described in the evidence show, however, that the system can fail to deliver a reasonable outcome in every case. The Committee will recommend therefore that the exercise of ministerial discretion be

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42 Office of the Commonwealth Ombudsman, Submission no. 28, p.8

43 Office of the Commonwealth Ombudsman, Submission no. 28, p.8

44 Office of the Commonwealth Ombudsman, Submission no. 28, p.8

45 DIMIA, Answer to question on notice G2, Submission no. 24D, p.1

extended to cover those cases in which applicants through no fault of their own are not able to appeal to a tribunal

Recommendation 11

5.53 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.

Conclusion

5.54 The Committee is concerned that the current processes involved in the exercise of the ministerial intervention powers may result in hardship for the very people they are supposed to assist. The lack of readily available information about the intervention powers and opaque process allow unscrupulous people to exploit applicants who desperately desire to stay in Australia. While appreciating that the system needs to have safeguards to prevent abuse of process to prolong unlawful stay in Australia, the Committee notes the hardship caused by lack of work rights for people with strong humanitarian or compassionate claims that could not be considered in the primary visa application or review processes.

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 Kisrwani, 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.[1]

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

1 DIMIA, Submission no. 24A, Attachment D

rates' in their requests to the minister, some enjoying levels of over 50 percent.[2] 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.[3] 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.[4]

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.[5] 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'.[6]

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'.[7]

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

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'.[8]

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'.[9] 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.'[10]

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.[11]

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.[12]

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.[13]

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.'[14]

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?[15]

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.[16]

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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[17] 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.[18] 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 [1]**	**Number of s417, s351 Requests**	**Cases**	**Intervened (Cases)**	**% Cases Intervened (D/C) [2]**
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%
Total:	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 39th Parliament, as well as sitting members of the 40th Parliament.

Table 6.2: Total Caseload Information - Top 10 Parliamentarians [3]

	A	B	C	D	E
	Intervention Correspondence [1]	**Number of s417, s351 Requests**	**Cases**	**Intervened (Cases)**	**% Cases Intervened [2]**
Top 10 Parliamentarians	582	533	411	104	25%

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

[1] The figures include intervention requests other than s351 and s417, such as those relating to s48b.

[2] Percentage of Intervened Cases = D/C expressed as a percentage.

[3] 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'[19] 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

19 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

'it has not – I repeat, not – been my experience that using politicians has been of any value at all'.[20]

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.[21]

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.[22] 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[23] 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.[24]

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.[25]

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'.[26] 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

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

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

> you can achieve support, the more likely it is that somebody will be accepted.[27]

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.[28] 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.[29]

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.[30]

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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.[31]

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.[32]

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.[33]

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,[34] 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
Total	411	**Total**	243

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 Kisrwani 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 Kisrwani has one of the highest success rates of any individual or community group.[35]

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.

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.[36] 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.[37]

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.[38]

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'.[39]

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 Kisrwani, 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 Kisrwani 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.[40]

6.48 Over the years Mr Kisrwani 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 Kisrwani 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 Kisrwani would call the minister's office 'a couple of times a week about a range of cases'.[41]

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.[42] 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.[43] Data for the ten individuals or community groups that made the most requests for intervention, including Mr Kisrwani, 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 Kisrwani 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 Kisrwani 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.[44]

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.[45] 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.[46] 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.[47]

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.[48] 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.[49]

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.[50] The review found that the 'low standards of an unscrupulous few' continued to be of 'serious concern'.[51] 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.[52] 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.[53] 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,[54] 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.[55]

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.[56]

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.

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.[57]

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

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

Chapter 7

The role of the minister

7.1 The preceding chapters of this report have dealt with important aspects of the operation of the ministerial discretion powers under the Migration Act. However, ultimately the discretion to grant a visa using these powers is up to the minister alone to exercise. While the minister may receive advice from the department or representatives of visa applicants, it is the minister's judgment of the 'public interest' that will determine which cases succeed and which do not. Being non-delegable, non-compellable and non-reviewable, the powers vest an extraordinary amount of power over individual cases in the hands of the minister. The only accountability mechanism is the requirement that the minister table statements in parliament every six months giving reasons why he or she has considered it in the public interest to intervene in particular cases.

7.2 This chapter examines the central role of the minister for immigration in the operation of the ministerial discretion powers under term of reference (c). It looks firstly at the extent of the personal discretion vested in the minister by the way the powers are framed. The second part of this chapter examines aspects of the powers' operation and use under the former minister, Mr Philip Ruddock as required by term of reference (a). Mr Ruddock's personal use of the powers was a key area of interest for the Committee, due to the allegations aired in parliament that led to the establishment of this inquiry. Most of the evidence presented to the Committee relates to the seven years during which he was the immigration minister.

7.3 Two key issues raised by the Committee's examination of former ministers' use of the powers are firstly whether there is sufficient transparency and accountability in the operation of the powers, and secondly whether the sheer volume of cases reaching the minister for personal consideration is an appropriate part of the migration system.

The Minister's personal discretion

7.4 It is worth reiterating here a number of key features of the ministerial discretion powers noted in Chapter 2. A previous Senate Committee Report summarises the section 417 power as follows:

1. The minister may substitute a more favourable decision for a decision of a tribunal if the minister thinks it is in the public interest to do so;

2. The power may only be exercised by the minister personally;

3. If the minister substitutes a more favourable decision he/she must present a statement to inform Parliament of the new decision reached;

4. Certain information is not to be disclosed to parliament in the statement made. In particular, the person's identity and the identity of associated persons must not be disclosed;

5. Statements must be made to parliament at the times specified in the legislation; and

6. The minister is under no duty to consider whether to exercise this power.[1]

7.5 Section 351 is substantially the same, except that there is no provision in the latter to exclude from the statement presented to parliament information that may identify the applicant or associated persons other than their names.

Broad personal discretion in 'the public interest'

7.6 The result of the way these powers have been framed is that the minister for immigration is vested with a broad discretion to overturn a tribunal decision and grant a visa on the grounds of 'the public interest'. The Commonwealth Ombudsman noted that:

> It has customarily been noted by courts that the phrase "public interest" confers an unconfined discretion on a decision-maker, comprehending all relevant matters of advantage and disadvantage.[2]

7.7 In evidence to the Committee, he added that:

> The minister's discretion is an outstanding example of what we call an unconfined discretion. It is a discretion which does not have to be exercised, and it is a discretion which is exercised on the ground of public interest. In theoretical terms, there can be no broader discretion than that.[3]

7.8 As noted in Chapter 4, 'the public interest' has generally been broadly interpreted by successive ministers to include recognition of a wide range of humanitarian and compassionate circumstances.

7.9 The minister may, as all ministers have done since 1990, produce guidelines setting out what kind of cases he or she may consider as possibly raising public interest considerations. The Commonwealth Ombudsman underlined the value of an executive policy such as the ministerial guidelines providing structure and guidance

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1 Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.238

2 Office of the Commonwealth Ombudsman, Submission no. 28, p.7

3 Professor McMillan, Office of the Commonwealth Ombudsman, *Committee Hansard,* 18 November 2003, p.14

for the exercise of a broadly-expressed power. He also pointed out the risk of such an executive policy being followed too narrowly without adequate regard for the breadth of the power it is supposed to inform. He suggested that the former MSI 225 overcame that risk by stating that: "*My ability to exercise my public interest powers is not curtailed in a case brought to my attention in a manner other than that described above*" and that the guidelines are not exhaustive and each case: "*will depend on various factors and must be assessed by reference to the circumstances of the particular case*".[4]

7.10 As can be seen, then, the ministerial guidelines are a guide for departmental staff, and are not binding on the minister's decision making. Ultimately, what factors are relevant to determining 'the public interest' in any given case are up to the minister.

7.11 As noted in Chapter 2, the minister is also not bound by certain sections of the Migration Act when using the discretionary powers. Under the provisions of sections 351 and 417 the minister, when exercising the discretionary power, is not bound by subdivisions AA and AC of the Act and the regulations that complement those subdivisions. DIMIA informed the Committee that the practical effect of these provisions is that the minister does not have to be satisfied that criteria specified in the Migration Act are met and is not restricted as to the type of visa that can be granted.[5]

7.12 According to DIMIA, the Minister not being bound by the entirety of the Migration Act and Regulations in the exercise of these powers:

> …allows individual cases to be considered against public interest factors that are broader than the strictures of the regulatory criteria.[6]

7.13 The Committee notes here the broad discretion vested in the hands of the immigration minister. The Committee has heard of no equivalent ministerial discretion in other Commonwealth legislation.

Power is non-delegable

7.14 Sections 351(3) and 417(3) provide that the powers may only be exercised by the minister personally. In practice, the decision not to consider whether to exercise discretion can be delegated to departmental staff, as discussed in Chapter 4.[7] As noted there, the immigration department performs an important screening function by

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4 Commonwealth Ombudsman, Submission no. 28, p.9

5 DIMIA, Submission no. 24, p.15

6 DIMIA, Submission no. 24, p.17

7 This has been confirmed by Merkel J in *Minister for Immigration and Multicultural Affairs v Ozmanian* [1996] 141 ALR 322. See also Senate Legal and Constitutional References Committee, *A Sanctuary Under Review* (2000), p.263

providing detailed submissions to the minister only on those cases departmental officers have assessed as raising public interest considerations.

7.15 However, the decision to exercise discretion to grant a visa can only be made by the minister. In effect, the minister is the sole arbiter of 'the public interest' with the power to determine who will be granted a visa through this process.

Power is non-compellable and non-reviewable

7.16 In addition to conferring a personal discretion on the minister to make decisions based on 'the public interest', the legislation provides that the minister does not have a duty to consider whether to exercise the power.[8]

7.17 In effect, because the minister cannot be compelled to exercise the discretionary power, the minister's decisions under sections 351 and 417 are not subject to judicial review. DIMIA stated that:

> As the minister cannot be compelled in the exercise of the ministerial discretion powers, there is no scope for a court to issue orders of mandamus, prohibition or certiorari to the minister in respect of the ministerial discretion powers. It is also not clear that a court would be able to make a declaration in such circumstances.[9]

7.18 The codification in 1989 of the then existing discretions under the Migration Act and the non-compellable ministerial discretion provisions introduced in 1989 were intended to quarantine decision making in migration matters from judicial review. DIMIA stated that:

> The breadth of the pre-1989 provisions of the Migration Act also enabled courts to set aside decisions where visas had been refused to onshore persons on the basis of the court's own view of how the discretion should be applied. This was particularly true of cases where there were claims to 'strong compassionate grounds' for remaining permanently in Australia. This led to rapidly escalating numbers coming within these grounds in the late 1980s, and the government no longer being able to set and manage its migration program.[10]

7.19 Elsewhere, DIMIA noted that:

> The non-compellable nature of the power was carefully framed to ensure that an unsuccessful applicant cannot use requests for intervention merely to prolong their stay or disrupt their removal from Australia; nor can a court

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8 Sections 351(7) and 417(7), *Migration Act 1958*

9 DIMIA, Submission no. 24, p.16

10 DIMIA, Submission no. 24, p.4

> order that the minister embark on a consideration of the applicant's case under these discretionary powers.[11]

7.20 What is important to note here is that the minister's personal powers to grant or not grant visas under section 351 or section 417 are not subject to judicial scrutiny. The express intention of framing them in this way was to ensure that the minister's decision was final and not subject to appeal in the courts. Thus an important check on the workings of executive government is absent from the ministerial discretion process.

7.21 The minister's actions in this area are also not subject to the scrutiny of the Commonwealth Ombudsman, as section 5(2)(b) of the *Ombudsman Act 1976* (Cth) provides that: 'the Ombudsman is not authorized to investigate…action taken by a Minister'.[12]

Requirement to table statements in parliament

7.22 The only check on the minister's use of the discretionary powers is the requirement to table statements in parliament every six months. Sections 351(4) and 417(4) set out this requirement as follows:

> (4) If the minister substitutes a decision under subsection (1), he or she must cause to be laid before each House of the Parliament a statement that:
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> (a) sets out the decision of the Tribunal; and
>
> (b) sets out the decision substituted by the minister; and
>
> (c) sets out the reasons for the minister's decision, *referring in particular to the minister's reasons for thinking that his or her actions are in the public interest.* [Emphasis added]

7.23 The legislative intention of providing for tabling statements is to ensure a measure of parliamentary scrutiny of the minister's use of his or her discretionary powers. In his closing speech to the second reading debate on the Migration Amendment Bill (No. 2) 1989, the then Minister for Immigration, Local Government and Ethnic Affairs, Senator Ray, stated:

> I can intervene in the public interest, but I must report to this chamber as to why I have intervened. That is our critical achievement in progress through the migration law. Let us make sure that those reports are scrutinised by every honourable senator. If that happens we can guarantee that fairness and equity can flow in immigration like it never has before.[13]

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11 DIMIA, Submission no. 24, p.7

12 Commonwealth Ombudsman, Submission no. 28, p.4

13 *Senate Hansard*, 14 December 1989, p.4609

7.24 The then Member for Dundas, Mr Ruddock MP, told the House of Representatives on 21 December 1989 that:

> Obviously it is important that the parliament be aware of the way in which a power of this sort is exercised … There is a specific provision for public reporting in relation to the new power that is being introduced: the minister will report six-monthly on the way he has exercised this power in particular circumstances.[14]

7.25 In theory, these statements should provide sufficient information for parliament to understand how the powers are operating, and effectively scrutinise the incumbent minister's use of them. Whether they are an adequate accountability mechanism is considered below.

Operation of the powers under Minister Ruddock

7.26 During his seven years as Minister for Immigration, Mr Ruddock made more use of the ministerial discretion powers than any previous minister. As noted in Chapter 3, he used the powers to intervene in 1916 cases from 1996 to mid-2003, with an additional 597 interventions made between July and October 2003.[15] General reasons for the growth in the use of the powers were discussed in Chapter 3. However, some aspects of Mr Ruddock's personal use of the powers are worth noting.

7.27 Many witnesses, from both inside and outside the department, gave evidence that Mr Ruddock was attentive to the ministerial discretion workload. Ms Marion Le said she had a great deal of respect for Mr Ruddock's knowledge of the immigration law, and suggested that the system had only worked because of his depth of knowledge of the way the system worked and the law.[16] Mr Lombard similarly said that the system only worked: 'because the minister is incredibly assiduous in the amount of work he does'.[17] Dr Mary Crock suggested Mr Ruddock had an extraordinary capacity for work and for attention to detail.[18]

7.28 Witnesses from the department gave evidence that Mr Ruddock had extensive knowledge of the Migration Act and regulations gained through his experience and long term commitment to this policy area. They suggested that Mr Ruddock often had

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14 *House of Representatives Debates*, 21 December 1989, p.3458

15 Figures provided by DIMIA, Senate Legal and Constitutional Legislation Committee *Hansard* (Budget Estimates Supplementary Hearings), 4 November 2003, pp.41 and 43.

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

17 Mr Lombard, George Lombard Consultancy Pty Ltd, *Committee Hansard,* 22 September 2003, p.57

18 Dr Crock, *Committee Hansard,* 21 October 2003, p.44

greater knowledge of the Act than departmental officers, and could think of options that departmental officers simply had not thought about.[19]

7.29 Mr Ruddock as minister would on occasion use the intervention powers in ways not suggested by departmental staff. The department gave evidence that from mid 2000 to mid 2003 Mr Ruddock requested full submissions on 105 cases that the department had placed on a schedule, presumably as they were assessed as not falling within the ministerial guidelines. Likewise, Mr Ruddock would on occasion choose to grant a visa class outside the range presented by the departmental submission.[20]

7.30 Departmental witnesses saw nothing unusual in Mr Ruddock acting outside the scope of departmental advice in his use of the powers. Ms Godwin, a deputy secretary of DIMIA, told the committee that:

> …because it is a non-compellable discretion, because our role in it is to provide the minister with information and because in the end it is his decision to make and his alone that, notwithstanding the information put before him, if he also raises other issues for consideration or takes a view beyond that which is in the material put by the department then that is consistent with the nature of the power.[21]

7.31 When the minister does choose to act outside the scope of departmental advice, even where he appears to act contrary to his own published guidelines, he is not required to provide any explanation for so doing. Even departmental officials could be left in the dark as to reasons for the minister's decisions.[22] Referring to the minister's choice of visa class, the department noted that:

> The type of visa granted is a matter for the minister to decide. The minister is not required to provide an explanation for his decision other than in the information tabled in parliament, nor is the department required to report on his decision.[23]

7.32 Despite repeated requests to DIMIA to provide relevant case files, the Committee has not been able to examine individual cases where Mr Ruddock may have acted contrary to his own guidelines by intervening in a cased assessed by DIMIA as falling outside them. It therefore remains unclear to the Committee exactly

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19 Mr Storer, DIMIA, *Committee Hansard,* 5 September 2003, p.67

20 Mr Knobel, DIMIA, *Committee Hansard,* 5 September 2003, p.57

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

22 Ms Johanna Stratton's submission includes the following quote from interview with a DIMIA officer: '…unless you are able at the time [the minister] makes the decision, to be in his mind, it's impossible for us to even give you the slightest hint as to why the minister may decide that a particular type of visa should be granted.' Submission no. 10, p.22

23 DIMIA, Submission no. 24D, Answer to question I6.

what may have prompted the minister to seek further information about a case placed on a schedule: whether there was something in the brief case summary that caught his attention, or whether his desire for further information was triggered by other considerations. It does seem unlikely to the Committee that, of the thousands of cases presented in the schedule format, the minister would select a few for special consideration solely on the basis of a brief case summary.

7.33 As mentioned in Chapter 6, the Committee heard in evidence that Mr Ruddock was open to discussing individual cases with advocates able to access him or his office, such as parliamentarians and community leaders. A departmental liaison officer, Mr Peter Knobel told the Committee that:

> The minister [ie. Mr Ruddock] has made it clear that he is open to speak to parliamentarians and community leaders about individual cases.[24]

7.34 While he would not usually discuss cases with individuals who called his office,[25] Mr Ruddock was open to interested people at community events making representations to him about cases. After such events, he would sometimes seek information on cases that had been raised with him. Mr Knobel said that:

> The minister [Mr Ruddock] is often out and about at functions and meets many people. Occasionally he will come back with a case that has been raised with him and he will just ask for some background information on where it is at.[26]

7.35 This could happen at any stage of the process. In some instances, Mr Ruddock would alert his DLOs, and through them the MIU, of a case raised with him where a formal intervention request had not yet been made. As noted in Chapter 6, Mr Ruddock would on occasion alert DLOs to a case that had been raised with him at a community function before an application had been received, and the DLOs would in turn notify the relevant MIU that the case was coming through.[27] Referring to such occasions, Mr Knobel said:

> I recall that on those occasions the minister alerted me to the fact that an intervention request would be coming through and that there might be circumstances surrounding it that could warrant consideration.[28]

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24 Mr Knobel, DIMIA, *Committee Hansard,* 5 September 2003, p.53

25 Mr Knobel, DIMIA, *Committee Hansard,* 5 September 2003, p.53

26 Mr Knobel, DIMIA, *Committee Hansard,* 5 September 2003, p.53

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

28 Mr Knobel, DIMIA, *Committee Hansard,* 5 September 2003, p.78

7.36 It does seem therefore that direct contact with Mr Ruddock at a community event could help expedite a case through the department's initial processing phase as Mr Ruddock was prepared to alert the department to cases of interest to him before they reached him through the normal channels.

7.37 The mixed views of external stakeholders about the appropriateness of raising individual cases directly with the minister were canvassed in Chapter 6. The Committee observes that Mr Ruddock's open door policy appears to have added to the perception that direct access to him could assist a case gain ministerial intervention. Mr Ruddock does not seem to have taken steps to contain this perception by, for example, insisting that all cases should be processed on equal terms by the department before being brought to his attention. Mr Ruddock's willingness to discuss individual cases at community events and other functions may also have encouraged a climate in which community leaders could assert that their links with the minister could help individuals known to them get visas through the ministerial intervention process.[29]

7.38 Again, without access to individual case files, the Committee has been unable to examine the extent to which the media allegations of undue influence of certain community leaders on Mr Ruddock's decision making are justified. As repeatedly stressed by departmental witnesses, the intervention powers are the minister's alone, and he or she is the sole arbiter of the 'public interest'. Any need to document decision making appears to stop once a case reaches the minister's office. Exactly what factors led to intervention in some cases and not others may be known only to the minister, or recorded in case files or documents the Committee was unable to obtain.

Family ties

7.39 The Committee heard strong anecdotal evidence that Mr Ruddock had a clear preference for intervening in cases where the applicant had family connections in Australia rather than cases raising purely humanitarian considerations. As seen in Chapter 3, this anecdotal evidence is backed up by data on the type of visas granted under the intervention powers, which show a preponderance of spouse and close ties visas granted under both sections 351 and 417.

7.40 One issue raised in connection with Mr Ruddock's use of the powers to recognise family ties is that his judgment of what constitutes 'family ties' could be entirely subjective, and bear no reference to relevant legislation. A number of witnesses suggested to the Committee that Mr Ruddock was more likely to intervene on behalf of an applicant with biological Australian citizen children than Australian citizen step children. If this were the case, it appears to be contrary to the definition of 'child' in both the Migration Regulations and the Family Law Act.[30] Another witness suggested

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29 In-camera evidence

30 For example, Mr David Bitel, Submission no. 26, p.2, Mr Clothier, *Committee Hansard,* 18 November 2003, p.41. Ms Le disagreed, citing a case where the minister had intervened on behalf of an applicant with step children. *Committee Hansard,* 18 November 2003, p.47

that Mr Ruddock was more likely to intervene on behalf of an applicant with Australian citizen children if that applicant had not previously been married or in a relationship giving rise to children.[31]

7.41 Whether the minister's personal judgment of what constitutes 'family ties' when considering an intervention request is inconsistent with other legislation is a moot point. The Committee has not been able to test these assertions, owing to the lack of detailed information on what factors influenced the minister's decision in any given case, especially where the minister decided not to intervene. More importantly, since there is no avenue to appeal the minister's decision to the courts, there is no way to test whether the grounds for a given decision are consistent with other Commonwealth legislation.

Accountability to parliament

7.42 As noted above, the sole accountability mechanism in cases where the power is used to grant a visa is the requirement to table statements in parliament on a six-monthly basis. According to the legislation, these statements should set out the minister's *reasons for* thinking intervention is in the public interest.

7.43 While the statements made under section 351 go some way to providing case specific reasons for ministerial intervention, those made under section 417 since 1998 provide no case specific reasoning. The majority of witnesses to this inquiry argued that the ministerial statements under s417 contain insufficient information to judge how the power is being used. The complaint was succinctly put by Dr Crock, who said that: 'they do not tell you anything'.[32] In *A Sanctuary Under Review* the Senate Legal and Constitutional References Committee reported that 'the only information that can be gleaned from [s 417 tabling statements] is the number of times the discretion has been used, and the type of visa class granted'.[33]

7.44 There has been some evidence of a decline in the amount of information provided in the section 417 statements during Mr Ruddock's tenure as immigration minister. Research undertaken by Ms Johanna Stratton noted Mr Ruddock's failure since 1998 to provide case-specific reasons for section 417 interventions.[34] Supporting

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31 Mr George Lombard, Submission no. 16, p.6. In evidence to the Committee, Mr Lombard stated that it was a departmental officer who told him this was the case, *Committee Hansard,* 22 September 2003, p.54. This assertion appears to supported by evidence from the NSW Legal Aid Commission, Submission no. 17A, p.2.

32 *Committee Hansard,* 23 September 2003, p.28

33 Senate Legal and Constitutional Affairs Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.265

34 Ms Johanna Stratton, Submission no. 10, pp.27-28

Ms Stratton's research, the Catholic Commission for Justice Development and Peace submitted that:

> The result of the current practice of only referring to the public interest reason without specifically stating what it is, means that there is a lack of clarity about the reasons behind the minister's exercise of s 417 and makes it an opaque and unaccountable process.[35]

7.45 The Refugee Council of Australia commented that:

> … it was the practice that the minister would set out in parliament the case-specific reasons why he/she had chosen to exercise these [discretionary] powers. This is no longer done. The minister now uses a standard reporting format, making reference to the public interest. This means that it is no longer possible for parliament to scrutinise the reasons why decisions have been made, making the process far less accountable and opening the way for criticism that the system is being abused.[36]

7.46 DIMIA claimed that the nature of the tabling statements has been consistent over the years. Ms Godwin stated:

> There are minor variations in wording, but essentially they reflect, I think, successive views about the balance between the need for information and the need to meet, in some instances, statutory requirements … if you look at the tabling statements over a period of years the pattern has remained pretty much the same.[37]

7.47 However, the Committee's examination of the tabling statements supports the view that section 417 tabling statements no longer provide reasons for the minister's decisions. Until late 1997, reasons were generally given, even if these were often not particularly revealing. For example, ministers often merely stated that the applicant would face hardship or severe hardship if returned to his of her country of nationality. Some were more detailed, for example, 'The applicant is from India, has suffered torture in the past and because of his subjective fear, it would be inhumane to return him to India'. Since late 1997, however, a standard form of words has been used, namely, 'Having regard to the applicant's particular circumstances and personal characteristics, I consider it would be in the public interest to allow the applicant to remain (temporarily) in Australia'. Examples of statements tabled in parliament before and after 1997 are at Appendix 6.

7.48 It is the Committee's view that this now-standard form of words is not sufficient for parliamentary scrutiny. The statements are failing to provide, as required by

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35 Catholic Commission for Justice Development and Peace, Submission no. 15, p.13

36 Refugee Council of Australia, Submission no. 12, p.3

37 DIMIA, *Committee Hansard*, 5 September 2003, p.32

legislation, the ministers *reasons for* considering his or her actions to be in the public interest. The Committee appreciates that it may be difficult in some cases for the minister to balance the legislative requirement under paragraph 417(4) that reasons be tabled for the decisions with other requirements under paragraph 417(5) that are intended to protect the applicant or the applicant's associates. Nevertheless, the Committee considers the statements that were presented by the former minister inadequate for the purposes of parliamentary scrutiny. Sufficient information should be provided for the Houses to determine how the discretionary powers are being exercised.

7.49 As noted above, Mr Ruddock's statements relating to the use of his discretion under section 351 set out case-specific reasons. Nevertheless one witness suggested that these statements could be made more useful if they included the names of the persons concerned. Mr Clothier argued that, given that MRT hearings are public and its decisions are published, there is no justification for secrecy. He suggested that:

> Parliament could, in my view, could go a long way to fixing this problem, by amending section 351 and making all non-refugee interventions transparent to the public. The minister would have to truly justify himself if he intervened for one person's grandmother but not for another and people would be able to compare and judge those interventions because they would be out in the public arena, which is what I think parliament really intended in 1989.[38]

7.50 The Committee notes advice from the Privacy Commissioner that other means of making the operation of the powers more transparent should be carefully considered before seeking to amend the legislation to name individuals.[39] However, given the pressing need for parliament to have sufficient information to scrutinise the use of the powers, and that MRT decisions are public, there seems little justification for withholding the names of all people granted a visa through the ministerial intervention process where the safety of the individual or their family is not an issue.

7.51 The Commonwealth Ombudsman also highlighted the need for the tabled statements to provide more information so that parliament can understand how the system is operating. He suggested that:

> The transparency of the system would be enhanced if the minister's notification statement to the parliament under ss 351 or 417 indicated briefly the path by which a case came to the attention of the minister – by an approach from the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department, or in some other way. Over time,

38 Mr Michael Clothier, Submission no. 20, p.2

39 Office of the Federal Privacy Commissioner, Submission no. 43, p.3

> this would enable a better picture to be drawn of the manner in which this important aspect of the migration scheme is operating.[40]

7.52 The Committee's inquiry has found that meaningful transparency and accountability in the ministerial intervention processes essentially stops at the door to the minister's office. The Migration Act vests a very broad personal and non-reviewable discretion in the minister, and the now-standard format of statements tabled in parliament when the powers are used provides inadequate information about the operation of the powers. With a process designed to deal with a few exceptional cases now being used on average several hundred times each year, this Committee considers it more important than ever to improve the transparency and accountability of the minister's decision making process.

Recommendation 15

7.53 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.

Recommendation 16

7.54 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.

Volume of cases decided by the Minister

7.55 Another feature of the operation of the ministerial discretion powers during Mr Ruddock's tenure is the comparatively large number of cases in which intervention was both sought and granted. As observed in Chapter 3, use of the minister's discretionary powers has gradually become more frequent since they were inserted in the legislation, going from 17 cases in 1992-92 to 483 cases in 2002-03, to 597 cases in three months from July to October 2003. DIMIA suggests that the number of interventions may simply reflect the expanding pool of cases that qualify for consideration of ministerial intervention. Yet the sheer volume of cases reaching the minister's desk for consideration raises two related issues: can a minister possibly give equal consideration to so many cases, and is it appropriate that a minister's time

40 Commonwealth Ombudsman, Submission no. 28, p.11

should be spent considering the details of thousands of individual cases rather than on overall policy development?

7.56 The Refugee Council of Australia suggested that during 2003, the minister would have before him or her, in addition to the 9 – 12 thousand persons whose cases will be affirmed by the tribunals, 1700 East Timorese who applied for refugee status in the early 1990s and about 140 Kosovars who were granted 3-year Temporary Humanitarian Concern visas that expired in August 2003. During 2004, the minister could also have to deal with more than 2000 requests from persons whose Temporary Protection visas expire. The Council concluded that the workload would be unreasonable for any full-time worker, let alone a minister of the crown with exhausting portfolio responsibilities.[41] Witnesses from the department confirmed that assessing ministerial intervention cases is 'an enormous workload on the minister of the day'.[42]

7.57 In his last week in that office, the former minister personally decided some 203 individual cases,[43] including at least 129 East Timorese.[44] The Committee calculates that, even if the minister had worked a 40 hour week doing nothing but assessing intervention requests, that allows at most 17 minutes for considering each intervention. This calculation does not allow for cases the minister considered but chose not to intervene, or for any other work during that week.

7.58 While many witnesses to the inquiry suggested that the former minister dedicated great time and attention to these matters, even he appears to have felt under some strain due to the quantity of work that was being generated by requests for ministerial intervention. Mr Purcell told the Committee of a meeting with Mr Ruddock where:

> He [Mr Ruddock] was expressing his frustration at the sheer volume of requests that were coming through under section 417 and saying that it was beyond any one individual to be able to work through that volume of applications.[45]

7.59 Given the number of cases reaching his desk, it is unsurprising that Mr Ruddock would have felt some frustration. It would be surprising in fact if he were able to give equal consideration to the merits of every one of the cases put before him and still

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41 Refugee Council of Australia, Submission no. 12, p.3

42 Mr Storer, DIMIA, *Committee Hansard,* 5 September 2003, p.56

43 Senate Legal and Constitutional Legislation *Committee Hansard* (Budget Estimates Supplementary Hearings), 4 November 2003, p.43

44 *Committee Hansard,* 18 November 2003, p.69

45 Mr Purcell, Catholic Commission for Justice, Development and Peace, *Committee Hansard,* 17 November 2003, p.33

have time to fulfil his other portfolio responsibilities. Unfortunately, procedural constraints have prevented the Committee from directly seeking Mr Ruddock's views.

7.60 This was not the intention when the powers were inserted in the Act. On the contrary, the changes were in part designed to limit the minister's involvement in individual cases. In parliamentary debate on the 1989 legislation, Senator Ray noted that the old system giving the minister power to reverse any decision made by a departmental officer:

> …can result in a minister becoming involved in the minutiae of the portfolio, at the cost of developing overall policy in the depth which, in my view, is essential.[46]

7.61 In relation to the 1989 changes, he said that:

> My concern is to ensure equity and consistency in decision-making. I believe this is best done where a minister concentrates on determining overall policy directions, and limits decision-making to those classes impacting most on national well-being.[47]

7.62 The Committee heard several witnesses suggest that the large number of cases reaching the minister is one of the problems in the current regime. Ms Biok of the Legal Aid Commission of NSW, noted the thousands of applications that are received regularly. She suggested that:

> Because of this, it is difficult for many of the applicants to understand what will constitute a successful appeal to the minister. This does create a perception in many people's minds that there is a randomness to who gets a visa through the ministerial powers.[48]

7.63 The Committee also heard suggestions that the blow-out in the number of cases being decided personally by the Minister reflects systemic problems. Ms Marion Le told the Committee that if an immigration minister was taking so much upon himself in making these decisions then there was something wrong with the system. She suggested that:

> That is because no minister should have that many cases going through to him if everyone down the line is acting with integrity and only bringing cases that are…ones that people consider to be absolutely essential.[49]

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46 *Senate Hansard*, 5 April 1989, p.922

47 *Senate Hansard*, 5 April 1989, p.922

48 Ms Elizabeth Biok, Legal Aid Commission of NSW, *Committee Hansard,* 22 September 2003, p.22

49 *Committee Hansard,* 18 November 2003, p.49

7.64 Ms Le felt that poor quality decision making in the first instance and at the RRT was contributing to the rise in the number of cases reaching the minister.[50] She suggested that the department was 'not doing its job' in some cases, which led to the minister having to exercise his intervention powers unnecessarily.[51] She also suggested that more flexibility in the system would avoid the need for the minister to personally decide so many cases.[52] This concern relates to the arguments discussed in Chapter 9 about the desirability of placing the only meaningful discretion in an otherwise heavily codified system in the hands of the minister.

7.65 Yet the volume of cases decided by Mr Ruddock is at least to some extent a matter of personal choice. The Committee notes that 1994 guidelines issued under Senator Bolkus included the following paragraph:

> Review Monitoring Section will monitor and report regularly on any interventions, and will initiate discussions with policy areas and the minister's office when it appears that a series of particular decisions to intervene may indicate that a preferred approach may be to amend current procedures or regulations.

7.66 Mr Ruddock, however, does not seem to have taken the view that continued use of ministerial intervention for similar cases was in itself problematic and should lead to reconsideration of the regulations. For example, the Committee heard that many of the cases receiving ministerial intervention relate to parents of Australian citizen children. One witness suggested that these cases could be more appropriately dealt with by creating a visa category,[53] which would mean that such cases could be dealt with through normal administrative processes and would not need to be considered by the minister in person. Mr Ruddock does not appear, however, to have considered this desirable or necessary, preferring to decide such cases himself. Similarly, since 1997 Mr Ruddock has chosen not to create special visa categories for groups such as the East Timorese, preferring to decide each case in person using the ministerial intervention power.

7.67 Mr Clothier suggested to the Committee that one reason ministers have preferred to use this power is to woo ethnic communities.[54] While the Committee has not heard unequivocal evidence to suggest that this was Mr Ruddock's intention, it notes that excessive use of the minister's personal power rather than usual administrative processes increases the scope for politicisation of immigration decision making.

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50 *Committee Hansard,* 18 November 2003, p.50

51 *Committee Hansard,* 18 November 2003, p.49, p.55

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

53 Mr George Lombard, George Lombard Consultancy Pty Ltd, *Committee Hansard,* 22 September 2003, p.49

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

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

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

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

Recommendation 17

7.71 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 exceptional or unforseen cases.

Chapter 8

International humanitarian obligations

8.1 Whether the minister's discretionary powers provide an adequate mechanism for implementing Australia's international humanitarian obligations has been a contentious issue in immigration policy for a number of years. It was subject to close scrutiny by the Senate Legal and Constitutional References Committee in its 2000 report *A Sanctuary Under Review*.[1] On that occasion, and notwithstanding the submission by the then Department of Immigration and Multicultural Affairs (DIMA), that Committee received evidence from a number of organisations claiming that reliance on the discretionary powers to fulfil Australia's international humanitarian obligations was fraught with a number of legal problems and administrative shortcomings.[2]

8.2 This chapter examines the ministerial discretion powers under term of reference (d). It evaluates the claim repeated by DIMIA during this inquiry that the minister's discretionary powers in their current form are appropriate to ensure that Australia meets its obligations under various international conventions. Australia's primary obligation to asylum seekers and other persons in Australia who are deemed in need of protection is to ensure that they are not refouled (returned) to their countries where they may face persecution, torture or death.

8.3 It describes Australia's obligations under various international conventions and identifies major shortcomings with the arguments presented by DIMIA in relation to those obligations. The chapter then outlines a range of criticisms of the current system by human rights and refugee-advocacy groups. These collectively voice concern that reliance on ministerial discretion places Australia at risk of breaching its international legal obligations not to refoule asylum seekers. There is also concern that the current system places unnecessary hardship on those who are required to exhaust a decision making process which has no direct application to them before they can have their humanitarian claims considered by the minister. It briefly revisits the conclusions of *A Sanctuary Under Review*, in particular the recommendation that Australia incorporate its relevant international obligations into domestic law.

8.4 The final section considers some options that could enable Australia to meet its non-refoulement obligations without relying solely on the minister's discretionary powers. It provides a brief overview of complementary protection, and considers the

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1 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000

2 See in particular submissions received by the Senate Legal and Constitutional References Committee from the Human Rights and Equal Opportunity Commission (HREOC), Law Council of Australia, South Brisbane Immigration & Community Legal Service Inc., Legal Aid Western Australia and The Refugee Council of Western Australia

Australian Government's position on this emerging issue, especially the question of whether a new humanitarian visa class would be a suitable additional safety-net to ensure compliance with various international treaties.

Ministerial discretion and Australia's international humanitarian obligations

8.5 Australia, as part of its Onshore Protection Program, has assumed responsibility to extend protection to asylum seekers already in Australia under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (the Refugee Convention).[3] As a signatory to the 1951 Convention, Australia is obliged to consider refugee cases and then provide protection if they pass the test.[4] The basis for the obligation is Article 33 which prohibits member States from returning a refugee to a country where, amongst other things, the life and freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.[5] People seeking refugee status under the Onshore Protection Program do so by applying for a Protection Visa.[6] Non-refoulement obligations apply to persons who may not have a fear of persecution under the terms of the Refugee Convention but who face a real risk of a violation of their fundamental human rights.[7]

8.6 Australia does not have a separate or distinct onshore process for dealing with asylum seekers on humanitarian grounds. Australia's obligation of non-refoulement is principally derived from four conventions:

- Convention Relating to the Status of Refugees (1951) and the Protocol relating to the Status of Refugees (1967) (COR);
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratified by Australia on 8 August 1989;
- Convention on the Rights of the Child (CROC), ratified by Australia on 16 January 1991; and
- The International Covenant on Civil and Political Rights (ICCPR), ratified by Australia on 13 August 1980.

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3 UNHCR, Submission no. 36, p.1

4 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.12

5 HREOC, Submission no. 13, p.3

6 The application and determination process for refugee status under the Onshore Protection Program is examined in the Senate Legal and Constitutional References Committee report, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, chapters 3-6

7 HREOC, Submission no. 13, p.3

8.7 A crucial issue with regard to these various conventions is that, with the exception of the Refugee Convention, they have not been incorporated into Australia's domestic law. As stated in *A Sanctuary Under Review*: '…treaties have no direct legal effect within Australia unless they are incorporated into domestic law by an Act of the Australian Parliament'.[8] Accordingly, the Migration Act implements only those obligations contained in the Refugee Convention. This is significant because, as the Human Rights and Equal Opportunity Commission (HREOC) points out, the definition of refugee under the Convention may exclude people who must be protected from refoulement under the CAT, CROC and ICCPR. According to Amnesty International:

> The consequences of non-incorporation into domestic law is that, under the current refugee determination system, there is no legal obligation under Australia's domestic law through which any individual can ensure that he or she is not forcibly removed from this country to another…[9]

Australia's obligations under the CAT, CROC and ICCPR

8.8 The ministerial guidelines specifically identify obligations under the CAT, ICCPR and the CROC.[10] However, as previously indicated, reference to these international treaties does not constitute their incorporation into Australian law and, therefore, does not create enforceable rights and obligations. The non-incorporation of these treaties into domestic law means that any breaches of Australia's non-refoulement obligations are not illegal within Australia.[11]

8.9 It is important to briefly describe Australia's international obligations under each of these Conventions. The obligation of non-refoulement under the CAT is contained in Article 3 which provides that:

> (1) No State Party shall expel, return ('refoule') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> (2) For the purpose of determining where there are such grounds, the competent authorities shall take into account all relevant considerations

8 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.40

9 Amnesty International Australia, Submission no. 23, p.4

10 Guidelines on ministerial powers under sections 345, 351, 391, 417, 454 and 501J of the *Migration Act 1958*, at guideline 4

11 Ms Jane McAdam, Submission no. 35, p.5

> including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[12]

8.10 The CAT is significant because it is the only universal treaty other than the Refugee Convention to explicitly refer to non-refoulement.[13]

8.11 Under the ICCPR, Australia has an obligation not to deliver a person by compulsion into the hands of another state or third party which might inflict harm, or which may expel that person to a third state which might inflict such harm. Australia is also obliged to consider the risk that a person's rights under article 6 (protection of the right of life), and article 9 (protection of the right to security of persons) will be violated.

8.12 Finally, HREOC states that like the ICCPR, Australia has an obligation under CROC not to place a child in a situation where the child's rights under articles 4, 6 and 37(a), (b) and (c) are violated.[14]

8.13 Significantly, both the CAT (article 3) and ICCPR (article 7), but not CROC, have mechanisms in place to hear complaints from individuals alleging that their human rights under these treaties have been breached. As part of this procedure, the Australian Government may respond to the findings of UN committees with regard to non-refoulement, and the response to each allegation is considered by the relevant Committee and included in the final written communications. According to HREOC, the Committee usually asks the State party to outline what measures have been taken to implement their recommendations.[15]

8.14 To illustrate the process, HREOC provided the Committee with copies of six communications sent to CAT and three to ICCPR from individuals in Australia which allege their right to non-refoulement would be breached if they were removed from Australia. HREOC noted that while the communications do not specifically relate to the operation of ministerial discretion: 'they relate to the possibility that ministerial discretion has failed to protect these individuals from refoulement'.[16] The communications cover the period December 1997 to September 2003.[17] HREOC also

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12 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, pp.52-53

13 Ms Jane McAdam, *The European Union Proposal on Subsidiary Protection: An Analysis and Assessment*, New Issues in Refugee Research Working Paper No. 74, UNHCR, Evaluation and Policy Analysis Unit, Geneva, December 2002, p.4

14 HREOC, Submission no. 13A, pp.3-4

15 HREOC, Submission no. 13A, p.1

16 ibid.

17 For an example of a communication under CAT, see *Communication No 120/1988: Australia. 25/05/99. CAT/C/22/D/120/1998. (Jurisprudence)*. For an example under the ICCPR, see *Communication No 706/1996: Australia. 04/12/97. CCPR/C/61/D/706/1996. (Jurisprudence)*. Copies of the communications were provided by HREOC as part of Submission no. 13A

told the Committee that it does not monitor individual communications in a systematic way, but does 'look at…communications occasionally [when] they come to our attention through various news and information...'.[18]

8.15 DIMIA advised the Committee that since June 1993 a total of 39 communications to UN Committees have been made by individuals claiming that Australia has not met its international humanitarian obligations. These have given rise to four findings against Australia from the UNHCR (April 1997, July 2001, October 2002 and August 2003) and one ruling against Australia from the United Nations Committee Against Torture (UNCAT) (May 1999).[19]

8.16 The Committee takes special note of the UNHCR document entitled *Concluding observations of the Committee against torture: Australia*, which provides a brief assessment of Australia's combined Second and Third Periodic Report under the Convention. The document expressed concern about, amongst other things, the lack of appropriate review mechanisms in Australia for ministerial decisions in respect of cases coming under article 3 of CAT. Accordingly, it recommended that Australia consider the desirability of providing a mechanism for independent review of ministerial decisions in respect of cases coming under article 3 of the Convention.[20]

Is Australia meeting its international obligations?

8.17 DIMIA stated that one of the justifications for the minister's discretionary powers is that they are the primary mechanism for implementing Australia's non-refoulement obligations under several international treaties, including the CAT, CROC and ICCPR. In particular, the ministerial discretion powers are used:

> …to ensure that relevant international obligations that Australia has are satisfied where the applicant would not otherwise be eligible for the grant of a visa.
>
> While migration legislation includes provisions that embrace Australia's obligations under the Refugees' Convention…there are no migration provisions regarding Australia's international obligations under instruments such as the United Nations Convention Against Torture (CAT) or the International Covenant on Civil and Political Rights.
>
> The ministerial discretion powers under sections 351 and 417 are used to enable Australia to meet those obligations in respect of individual applicants.[21]

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18 Ms Newell, HREOC, *Committee Hansard*, 22 October 2003, p.56

19 DIMIA, Submission No. 24D, Answer to question on notice, J1

20 Office of the High Commissioner for Human Rights, *Concluding observations of the Committee against Torture: Australia. 21/11/2000*. A/56/44, paras.47-53. (Concluding Observations/Comments)

21 DIMIA, Submission no. 24, p.17

8.18 The Committee, however, does not believe that this contentious issue is as straightforward as DIMIA's submission suggests. To begin with, the Committee heard from HREOC that Australia is in 'continuing breach' of article 2 of the ICCPR because it does not have in place a system that, for example, would guarantee the right to be protected from torture: 'If…discretion is exercised there will be no breach to the right to life in the specific circumstances. But the fact that there is no system in place to make sure that that breach does not occur is a continuing breach of…article 2 of the ICCPR'.[22]

8.19 Furthermore, notwithstanding DIMIA's contention that ministerial discretion *is* used as a device to enable Australia to meet its international humanitarian obligations, it could not provide the Committee with figures on the number of occasions the discretionary powers were used specifically for humanitarian reasons under various international treaties.

8.20 DIMIA advised the Committee that it does not collect in a reportable format detailed information on which requests for ministerial intervention cite Australia's non-refoulement obligations under the CAT, CROC and ICCPR. This is because the nature of ministerial discretion – the powers are personal to the minister and the minister does not usually provide detailed reasons for his or her decision – precludes the collection and analysis of data on individual cases considered by the minister:

> The department does not record the grounds on which the minister uses his s417 intervention powers beyond the information contained in statements tabled by the minister in parliament in relations to such cases. The minister determines whether to intervene on a case by case basis, depending on the facts of the individual case.
>
> It is not possible to extrapolate the reasons for the minister's intervention from the class of visa granted. As non-refoulement under CAT and ICCPR require merely that the person not be returned to the country where they face harm, any visa would deliver the outcome by allowing the person to stay lawfully in Australia.[23]

8.21 Ms Philippa Godwin, a Deputy Secretary in DIMIA, told the Committee that successive ministers have held the view that the number of cases that invoke Australia's international obligations is 'very small' and involves quite exceptional circumstances which are hard to quantify in a formal visa decision making process.[24] Another officer from DIMIA, Mr Illingworth, conveyed the view that most of these cases would meet criteria for a protection visa and hence receive 'the most beneficial form of protection'.[25]

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22 Ms Lesnie, HREOC, *Committee Hansard*, 22 October 2003, p.61

23 DIMIA, Submission no. 24B, Answer to question on notice, 5 September 2003, p.22. See also Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, pp.69-70

24 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, p.34

25 Mr Illingworth, DIMIA, *Committee Hansard*, 5 September 2003, pp.38-39

8.22 The Committee is of the view that the absence of data stems mainly from the lack of accountability and transparency characteristic of a discretionary process that is non-compellable and non-reviewable. Furthermore, the Committee is not aware of any other research or data that compares the different grounds for protection under the Minister's discretionary powers.[26]

8.23 The evidence presented to the Committee, such as it is, suggests that the exercise of ministerial discretion for humanitarian reasons applies only to small number of cases. The Uniting Church, for example, describes the experience of the Hotham Mission in its dealings with asylum seekers who possess a Bridging Visa E. It claims the Mission:

> …has found it difficult to gain an intervention from the minister when they have raised cases they believed held merit for humanitarian reasons or invoked non-refugee convention protection obligations…The minister appears to use the intervention power more for cases that involve a connection to Australia than in cases where there are primarily…only humanitarian concerns or protection needs.[27]

8.24 Amnesty International told the Committee that following discussions with various NGOs and DIMIA, it had concluded that 'Ministerial Discretion is being primarily exercised on the grounds of public interest and/or family reunion, rather than on Australia's international human rights obligations'.[28] Amnesty International is convinced Australia's human rights obligations are being compromised by inadequate use of section 417 powers for cases that warrant ministerial intervention.

8.25 This view is more or less supported by former Refugee Council of Australia President, David Bitel, who is currently a Partner with legal firm Parish Patience Immigration Lawyers. He told the Committee that, although his firm had acted for a large number of applicants seeking ministerial intervention under section 417, he could not 'recall one case where ministerial approval has been granted on "humanitarian" grounds'.[29] Because the current system 'involves no meaningful transparency or accountability', there is no way of identifying the number of cases where section 417 powers have been invoked on purely humanitarian grounds.

8.26 Another issue of concern to the Committee that sheds light on the question of Australia fulfilling its international human rights obligations relates to forms of persecution not specified by the Convention, such as gender-based persecution, and how Australia deals with such cases. Dr Mary Crock advised the Committee of the unique problems that confront women in refugee law because their subversive activities 'tend to be very private':

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26 Mr Gee, Amnesty International, *Committee Hansard*, 23 September 2003, p.6

27 Uniting Church of Australia, Submission no. 19, p.8

28 Amnesty International Australia, Submission no. 23, p.5

29 Mr Bitel, Parish Patience Immigration Lawyers, Submission no. 26, p.2

> In many traditional societies [women] will be the back-up people who make the coffee or do the secretarial work while the men are out front actively dissenting and putting their lives on the line. The problem is that, when the women come to claim refugee status, they are told "You weren't a member of a political party; you just made the tea', or 'You weren't raped because you were the sister of this dissident; you were raped because you're a woman and that is what happens to women in situations of disorder'.[30]

8.27 Amnesty International told the Committee that Australia is reluctant to expand the current definition of the Refugee Convention to take on board certain forms of gender persecution – such as female genital mutilation, honour killings, trafficking in certain countries, and domestic violence – and that the former immigration minister, Mr Ruddock, 'quite specifically said that he [did] not see a need to expand the current definition of the convention and he [was] not going to take those cases into consideration'.[31]

8.28 This is despite the argument put to the Committee by one witness that 'gender' should be included as a sixth category in Australia's domestic law definition of refugee. Australia, as well as Canada and the US, have not succeeded in past attempts to remedy the gender bias inherent in their refugee law. As a consequence, these countries still exclude the gender-specific claims of women in their legal definition of 'refugee'.[32]

Recommendation 18

8.29 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.

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30 Dr Crock, *Committee Hansard*, 23 September 2003, p.30

31 Dr Thom, Amnesty International, *Committee Hansard*, 23 September 2003, p.7. An officer from HREOC, Ms Vanessa Lesnie, advised the Committee that some cases currently coming before Australian courts are exploring the issue of gender persecution. In particular, the courts are exploring whether or not cases involving persecution on the basis of gender fall under 'membership of a social group' and, therefore, may some time in the future attract protection under the Refugee Convention. *Committee Hansard*, 22 October 2003, p.58

32 Ms Blaxland, Submission no. 42, *A Proposal to Add 'Gender' As a Sixth Category in the Domestic Law Definition of Refugee*, Honours thesis, University of Technology Sydney, 2003

Criticisms of reliance on ministerial discretion to fulfil Australia's non-refoulement obligations

8.30 A number of submissions expressed the view that protection from refoulement should not be left solely to ministerial discretion powers which are non-compellable, non-reviewable and non-delegable. To do so places Australia at risk of breaching its international legal obligations not to refoule individuals in fear of torture or other forms of cruel and inhuman treatment.[33] Reliance on ministerial discretion, therefore, always leaves open the possibility of breaches of Australia's convention responsibilities.[34]

8.31 The Committee heard from various stakeholders that because of the complexity, urgency and gravity of issues involved in cases where Australia's non-refoulement obligations under the CAT, CROC and ICCPR are invoked, the Commonwealth should at the very least undertake an assessment of this issue to improve the way Australia fulfils these obligations.

8.32 Mr David Prince captures the general thrust of the criticism by stating that the minister's discretion is 'an inappropriate means for Australia to seek to meet its non-refoulement obligations' and that the discretion powers 'should be reserved to act as "a measure of last resort" for dealing with compassionate and compelling cases that constitute "exceptions to the rule"'.[35] Given that individuals who are covered by the CAT, CROC and ICCPR are not necessarily refugees covered by the Refugee Convention, it is, according to Mr Prince, inappropriate that Australia's only mechanism for dealing with individuals who are at risk of the severest form of inhuman treatment is 'through a non-investigative, non-compellable and non-reviewable discretion' exercised by the minister.[36]

> Unless an applicant falls neatly within the definition of "refugee", the only way that their concerns can be brought before our government is by applying for a visa that they know they cannot achieve – by setting up an artificial pathway to reach the minister's desk. Only then can their extraordinarily serious claims be ventilated, in a context where there is an obligation for the minister to turn his mind to it.[37]

8.33 HREOC takes the issue further by emphasising that asylum seekers who wish to invoke Australia's protection obligations under the CAT, CROC and ICCPR:

> …do not have the benefits of merits review and access to the courts to review unfavourable decisions by [DIMIA]. The decision making process

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33 Dr Mary Crock, Submission no. 34, p.2

34 UNHCR, *Committee Hansard*, 18 November 2003, p.20

35 Christopher Levingston & Associates, Submission no. 6, p.5

36 ibid.

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

> regarding their claims, which…may be literally a matter of life and death, effectively defaults into a non-reviewable, non-compellable exercise of ministerial discretion.[38]

8.34 HREOC provided the Committee with a list of six specific concerns with the current system. The criticisms are comprehensive and inclusive of many of the criticisms raised by various organisations and individuals during the inquiry.

8.35 First, Australia's non-refoulement obligations under the CAT, CROC and ICCPR are not discretionary and subject to few, if any, exceptions. The obligation under article 3 of CAT has been described as 'absolute'. HREOC describes the discretionary process for protection from refoulement as 'fragile' and concludes that it 'appears incompatible with the nature of the obligations Australia has assumed'.[39]

8.36 Second, while HREOC acknowledges that the ministerial guidelines refer specifically to Australia's obligations not to refoule under the CAT, CROC and ICCPR, it maintains that unlike the multiple avenues of appeal available for applicants under the Refugee Convention, the current scheme for non-refoulement 'does not make adequate provision for the possibility of flaws in the decision making process'. The risk of an 'incorrect decision' which attends all administrative decision making underpins the entire system of judicial and merits review. Yet CAT, CROC and ICCPR asylum seekers have no such right of review and little protection in the way administrative decisions are scrutinised.

8.37 Third, as mentioned previously, the exclusive reliance upon the section 417 discretion for CAT, CROC and ICCPR asylum seekers places Australia in breach of its obligation to ensure that there are appropriate systems in place to provide what article 2(3) of the ICCPR calls 'effective remedies' for breaches of human rights instruments. The discretion under section 417 is considered a very limited form of administrative remedy which does not meet the requirement of 'effectiveness' as defined by the ICCPR and as understood by the UNHCR.

8.38 Fourth, relying solely on the discretionary powers under section 417 for Australia's non-refoulement obligations is placing considerable burden on a part of the system that is already stressed by the large number and variety of requests made under section 417. Providing alternative administrative arrangements to enable Australia to fulfil its non-refoulement would ease the burden on the current (over) use of ministerial discretion.

8.39 Fifth, the existing discretionary system is particularly detrimental to CAT, CROC and ICCPR asylum seekers. The current policy of mandatory detention of unauthorized non-citizens means that non-Convention asylum seekers will be detained for an extended period in order to make section 417 requests at the end of a process which has no direct application to them. HREOC is of the view that the often long

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38 HREOC, Submission no. 13, p.7

39 HREOC, Submission no. 13, p.9

periods of arbitrary detention for these asylum seekers is neither necessary nor proportional as required by article 9(1) of the ICCPR and article 37(b) of the CROC.

8.40 Sixth, the requirement under the Migration Act that the minister only exercise his discretion *after* an unfavourable decision of the RRT might preclude the timely consideration of some matters that fall within the 'exceptional or unique circumstances' provided for in the ministerial guidelines. For example, under article 3 of the CROC, which refers to the best interest of the child, a child might have a compelling and urgent reason to be granted a visa on compassionate grounds before activating Australia's non-refoulement obligations (as early as the primary applications stage). This would minimise the risk of the child being exposed to physical and mental harm while in detention. HREOC believes consideration of the exercise of ministerial discretion (including assessment of claims by departmental officers) should be given *prior to* an applicant receiving an unfavourable decision from the RRT, particularly in cases involving Australia's international human rights obligations.

8.41 These concerns are almost identical to those raised by the Refugee Council of Australia which argues that the present system results in the inefficient use of resources because 'it forces people with no claim to [Refugee] Convention status to go through a lengthy and expensive process in order to have their actual claims or protection assessed at the Ministerial level'.[40]

8.42 The concerns raised by HREOC about the inappropriateness of the discretionary powers in enabling Australia to meet its non-refoulement obligations are echoed by other organisations. The Catholic Commission for Justice, Development & Peace (CCJDP), for example, states that:

> It is unfortunate that many people, who are potentially eligible for consideration of their cases on humanitarian grounds under s417, cannot have their particular circumstances considered earlier. They must wait until their claim has failed under the Refugee Convention…Such delay is unnecessary, causes additional suffering for the person making the claim, clogs up the bureaucracy and wastes taxpayer dollars by putting him or her through processes that are not suitable to their circumstances.[41]

8.43 The Uniting Church also holds the view that a non-compellable power 'is not appropriate for assessment of routine…claims such as those arising from obligations under international treaties'. Asylum seekers who require non-refugee convention protection 'require a consistently applied test of their case against a set of clearly defined obligations arising from international treaties'.[42]

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40 Refugee Council of Australia, Submission no. 12, Appendix A, *Position Paper on Complementary Protection*, May 2002, p.3

41 CCJDP, Submission no. 15, p.6

42 Uniting Church of Australia, Submission no. 19, p.5

8.44 The Committee notes that with one exception DIMIA did not respond to the various criticisms advanced by HREOC, the Refugee Council of Australia, the CCJDP and the Uniting Church. It did, however, express a view in relation to the concern that a significant number of CAT, CROC and ICCPR asylum seekers are detained for extended periods in order to make section 417 requests at the end of a process which has no direct application to them. In response to the argument that humanitarian intervention earlier in the determination process would be more efficient and compassionate, DIMIA told the Committee that the current filtering process was probably less resource intensive than the alternative of setting up new visa classes to address international convention obligations:

> You would…end up in a situation potentially of people applying for multiple visa classes for different convention obligations…I think it would open up…whole new areas for people to apply to remain in Australia…The net result could be many thousands more applications and more litigation…and potentially it would be much more expensive than the current system.[43]

Parliamentary scrutiny of Australia's international obligations

8.45 The option of creating an onshore humanitarian stream that would enable Australia to fulfil its international obligations was addressed by the Joint Committee on Migration in its 1999 review of Migration Regulation 4.31B. That Committee's report is relevant to this inquiry because although its primary focus was on possible alternatives to the existing $1000 fee on unsuccessful applicants to the RRT, it assessed the merits of introducing an onshore humanitarian stream to complement the existing reliance on the minister's discretionary powers.[44]

8.46 While noting several likely problems that would follow the introduction of a humanitarian visa class and recommending that the proposal should not be followed, the Committee did not wish to foreclose supporting a humanitarian visa 'at a later time'. It maintained that 'the issue deserves consideration as part of any detailed review of the entire refugee determination process'.[45]

8.47 A review of the refugee and humanitarian determination system was precisely the issue referred to the Senate Legal and Constitutional References Committee by the Senate in May 1999. The Committee's report, *A Sanctuary Under Review*, provided a detailed assessment of Australia's international obligations and the principle of non-refoulement.[46] Under its terms of reference, the report addressed the following specific questions: does Australia meet the obligation of non-refoulement under the

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43 Mr Hughes, DIMIA, *Committee Hansard*, 5 September 2003, p.34

44 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*, May 1999

45 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*, May 1999, p.41

46 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000

CAT and the ICCPR, and can ministerial discretion be used to give effect to international obligations?

8.48 In its attempt to answer this question, the report noted that the Australian government was exercising its sovereign right consistent with the principles of international law by choosing to give effect to the obligation of non-refoulement under the CAT and the ICCPR through the provision of the ministerial discretion.[47]

8.49 However, consideration of non-incorporation of these conventions into domestic law drew out some major concerns regarding the use of ministerial discretion powers to fulfil non-refoulement obligations. It is significant that each of these concerns has also been raised during the course of this inquiry. Specifically, the report identified four areas of concern:

- Discretion is non-reviewable and non-compellable, and therefore is an unacceptable means for determining the fate of persons claiming protection under an international obligation;
- The circumstances in which the minister is able to exercise the discretionary power is too narrow (only after the relevant review tribunal has made a decision in a particular case);
- The pathway to ministerial discretion is too long, resulting in a number of unintended adverse consequences (prolonged periods of mandatory detention); and
- The absence of a formal mechanism for the referral of cases to the minister.[48]

8.50 The report concluded by observing that some aspects of the present structure of ministerial discretion under section 417 'seem to run counter to the absolute nature of the obligations under the CAT'.[49]

8.51 To summarise, while the report found the discretionary power was a vehicle that *could* be used to facilitate compliance with Australia's obligations under the CAT, CROC and ICCPR, it concluded that the power was not a sufficient safety net to *ensure* compliance with these obligations in so-called 'near miss' refugee cases. A number of organisations had concluded that non-refoulement provisions under the

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47 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.59

48 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, pp.61-64

49 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.64

various international conventions should be clearly and fully incorporated into domestic legislation.[50]

8.52 In light of this finding, recommendation 2.2 states:

> The Committee **recommends** that the Attorney-General, in conjunction with DIMA, examine the most appropriate means by which Australia's laws could be amended so as to explicitly incorporate the non-refoulement obligations of the CAT and ICCPR into domestic law.[51]

8.53 Dr Mary Crock has noted that in reaching its conclusions, the Committee did not recommend the creation of an alternative on-shore humanitarian mechanism to the section 417 discretion.[52]

Complementary protection for refugees

8.54 The Committee heard evidence from HREOC that applications based upon Australia's protection obligations under the CAT, CROC and ICCPR should in principle be treated in a manner similar to those invoking Australia's protection obligations under the Refugee Convention. This is because Australia's non-refoulement obligations are no less important than those under the Convention and, according to HREOC, 'the potential harm flowing from an error in a decision regarding those obligations is equally severe'.[53]

8.55 To achieve this outcome, HREOC and Amnesty International have urged the government to revisit recommendation 2.2 of *A Sanctuary Under Review* by considering the most appropriate means of fully implementing its obligations of non-refoulement. Specifically, HREOC and the Refugee Council of Australia would like to see Parliament institute what is most commonly referred to as a system of 'complementary protection', known also as 'subsidiary protection' in the European Union and, in other countries, 'de facto refugee status', 'exceptional leave to remain', 'B status' and 'humanitarian protection'.

8.56 According to law lecturer, Ms Jane McAdam, complementary protection refers to the role of human rights law in broadening the categories of persons to whom international protection is owed beyond article 1A(2) of the Refugee Convention. The categories, however, specifically exclude protection granted on purely compassionate

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50 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.64

51 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.60

52 Dr Mary Crock, 'A Sanctuary Under Review: Where to From Here for Australia's Refugee and Humanitarian Program?', *The University of New South Wales Law Journal*, vol.23, no.3, 2000, p.282

53 HREOC, Submission no. 13, p.10

grounds such as age, health or family ties because these do not stem from an international protection need.[54]

8.57 The grounds upon which Member States offer complementary protection are varied which leads to different outcomes – for example, in Austria, Luxembourg and Spain complementary protection is simply an obligation not to remove a person, whereas in Sweden, the UK and Italy it requires the grant of a residence permit of some kind.[55]

International developments

8.58 The Committee took note of a number of important recent developments which have resulted in an emerging international consensus on the issue of complementary protection. The Committee believes that recent international trends on this issue have implications for how Australia fulfils its international humanitarian obligations now and in the future.

8.59 Following a two-year consultative process on the future of the 1951 Refugee Convention, known as Global Consultations on International Protection, a number of States, including Australia, affirmed a framework document called *Agenda for Protection* which was adopted by the Executive Committee of the UNHCR in September 2001. According to the Refugee Council of Australia, the Agenda sets out a framework for action by UNHCR, States and other players to further the cause of refugee protection.[56]

8.60 The Executive Committee of the High Commissioner's Programme (EXCOM) Standing Committee meeting of June 2000 identified two categories for cases where there is an international need for protection:

- Persons who shall fall within the terms of the 1951 Convention relating to the Status of Refugees or its 1967 Protocol – for example, cases involving gender-related persecution – but who may not be so recognised by a State as a result of varying interpretation; and
- Persons who have valid reasons for claiming protection, but who are not necessarily covered by the terms of the 1951 Convention.[57]

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54 Ms Jane McAdam, Submission no. 35, p.2

55 Ms Jane McAdam, *The European Union Proposal on Subsidiary Protection: An Analysis and Assessment*, New Issues in Refugee Research Working Paper No. 74, UNHCR, Evaluation and Policy Analysis Unit, Geneva, December 2002, p.9

56 Refugee Council of Australia, Submission no. 12, p.2

57 United Nations High Commissioner for Refugees, Submission no. 36, pp.4-5. The categories are discussed in the EXCOM Standing Committee paper entitled 'Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime', UN Doc EC/50/SC/CRP.18, 19 June 2000

8.61 The Committee's attention was also drawn to a proposal by the European Union on complementary protection which was finalised in September 2001, and which is expected to be adopted in April 2004.[58] Ms Jane McAdam stressed that the proposal was the result of unprecedented regional attention in Europe on the issue of complementary protection, and that it represents:

> …the first supranational codification of [a] complementary protection regime…and a significant contrast to Australia's discretionary system, which is an inadequate and fraught protection mechanism that does not adequately give effect to Australia's international protection obligations.[59]

8.62 In a separate detailed analysis and assessment of the proposed EU Directive, Ms Jane McAdam states that the proposal divides protection into two categories: refugee protection (based on the Convention) and subsidiary protection (based on international human rights instruments). Subsidiary protection takes effect where an applicant: 'can demonstrate a well founded fear of being subjected to torture, inhuman or degrading treatment…a violation of other human rights…or a threat to life, safety or freedom as a result of indiscriminate violence in armed conflict or generalized violence'.[60] The Directive's main objective is:

> …to ensure that the laws and practices of the European Union…member states are harmonised to provide a minimum level of protection to persons determined to be Convention refugees or beneficiaries of subsidiary protection, so as to prevent refugee flows based solely on differing levels of protection in member states' legal frameworks.[61]

Should Australia introduce complementary protection?

8.63 Complementary protection is largely an underdeveloped concept in Australian asylum law.[62] In fact, Australia is one of the few countries in the developed world that does not have a system for complementary protection.[63] According to the UNHCR, most Western and European countries have a mechanism which allows a flexible application of the Convention to provide safeguards for people who do not meet the

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58 Commission of the European Communities Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection, COM (2201) 510 final, Brussels 12 September 2001 (EU Directive), at: http://www.ecre.org/eu_developments/qual.shtml

59 Ms Jane McAdam, Submission no. 35, p.3

60 Ms Jane McAdam, *The European Union Proposal on Subsidiary Protection: An Analysis and Assessment*, New Issues in Refugee Research Working Paper No. 74, UNHCR, Evaluation and Policy Analysis Unit, Geneva, December 2002, p.2

61 Ms Jane McAdam, *The European Union Proposal on Subsidiary Protection: An Analysis and Assessment*, New Issues in Refugee Research Working Paper No. 74, UNHCR, Evaluation and Policy Analysis Unit, Geneva, December 2002, p.1

62 Ms Jane McAdam, Submission no. 35, p.3

63 Mr David Bitel, Parish Patience Immigration Lawyers, Submission no. 26, p.2

strict criteria but are still protected: 'They may receive a lesser range of rights, but at least they receive some kind of protection'.[64]

8.64 By way of background, Australia did have an onshore humanitarian visa system until July 1993. The onshore humanitarian visa class inserted into the Migration Act in 1981, which applied in cases where there were 'strong compassionate or humanitarian' grounds, was abolished when s417 replaced the former 6A(1)(e) humanitarian visa class. According to Dr Mary Crock, the decision not to replace this section of the Migration Act with an equivalent general power to grant visas to individuals with strong compassionate or humanitarian grounds for remaining in Australia, represented 'the first and most significant legislative shifts' in migration law since 1989:

> With one stroke of the legislative pen, the generic power to act with compassion and humanity was removed from mainstream decision making – to be channelled ultimately into the hands of a single politician, the Minister for Immigration.[65]

8.65 A number of submissions argued strongly that Australia should examine the possibility of introducing a system of complementary protection, and look for guidance to the various models already in place in a number of countries. The Committee notes in particular a draft model of complementary protection which has been developed by the Refugee Council of Australia, and published in a draft paper entitled *Complementary Protection: The Way Ahead*. The model, which is endorsed by the National Council of Churches in Australia and Amnesty International, aims to provide '…constructive guidance for those responsible for formulating Australia's policy' to ensure that Australian practice 'is fair, transparent, timely, efficient and legally defensible'.[66]

8.66 According to the Refugee Council of Australia, under the proposed model: 'an applicant's eligibility for complementary protection can be assessed at each stage of the determination process, thereby ensuring that those entitled to protection receive it at the earliest possible time'.[67] Complementary protection would be offered to people who:

- have no nationality or right of residence elsewhere;
- would face torture if returned to their country of origin;

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64 Mr Mignone, UNHCR, *Committee Hansard*, 18 November 2003, p.23

65 Dr Mary Crock, Submission no. 34, p.2

66 Refugee Council of Australia, Additional information, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004

67 Refugee Council of Australia, Additional information, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004, p.4

- come from countries where their lives, safety or freedom is likely to be threatened by the indiscriminate effects of generalised violence, foreign aggression or internal conflict;
- come from countries where there is significant and systemic violation of human rights and/or a breakdown in the rule of law; and
- would face serious human rights violations if compelled to return.[68]

8.67 The introduction of this model would require an amendment to section 36(2)(b) of the Migration Act to include a new section which would set out the criteria for the grant of a visa, introduce a new visa subclass, set out any necessary limitations, and stipulate that nothing in this section removes or otherwise affects the exercise of the minister's discretion. It would also require a new regulation to set out the framework for the grant of a visa on the grounds of the need for complementary protection and the rights and entitlements afforded to successful applicants.[69]

8.68 HREOC supported the creation of a specific visa class directed to Australia's international obligations under the CAT, CROC and ICCPR as this would provide for administrative and judicial review as well as the ultimate 'safety-net' of the minister's discretionary power.[70]

8.69 The Committee, however, notes that the creation of a specific humanitarian visa class, as previously reported by the Joint Committee on Migration, is a matter of some contention. Mr David Prince, for example, told the committee that a general humanitarian class of visa is not necessary. However, he does support the introduction of a separate visa sub-class for very serious cases that fall under the CAT and ICCPR and which are considered by the minister. This would remove some of the 'significant inequities' which asylum seekers experience as a result of 'well-meaning but uninformed members of the public or unscrupulous individuals', without challenging the fundamental structure of the current migration system.[71]

8.70 The Refugee Council of Australia argued that although establishing in Australia a separate humanitarian stream with established criteria would be a challenging task:

> …serious consideration should be given to replacing the present process with one which recognises the protection needs of de facto refugees in a transparent and cost-effective manner. The models presented by the

68 Refugee Council of Australia, Additional information, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004, p.6

69 Refugee Council of Australia, Additional information, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004, pp.8-9

70 HREOC, Submission no. 13, p.13

71 Mr Prince, *Committee Hansard*, 22 September 2003, p.68

> Scandinavian countries of Denmark and Sweden deserve further attention…from the point of view of program management.[72]

Government views on complementary protection

8.71 Successive governments have not supported the introduction of a system of complementary protection. Government responses to previous committee report recommendations relating to Australia's international humanitarian obligations have supported the view that ministerial discretion under section 417 is an adequate safety-net mechanism to ensure compliance with various international treaties.

8.72 During this inquiry, DIMIA expressed serious reservations about proposals for a new humanitarian visa class as part of a complementary protection system. It did so, in the first instance, by drawing the Committee's attention to Australia's past experience with an onshore humanitarian category and to the immigration policies of other countries.

8.73 To begin with, DIMIA argued that Australia's experience with an onshore humanitarian category under section 6A(1)(e) had negative and unforseen consequences. It was unsatisfactory principally because of the sudden and unexpected rise in the number of approvals of entry permits under this provision – from 226 in 1981-82 to 3,260 in 1987. Apparently, at the section was repealed there were in excess of 8,000 applications outstanding.[73] Ms Philippa Godwin told the Committee that the insertion of section 6A(1)(e) into the Migration Act:

> …was an attempt to codify [the] concept of discretionary compassionate circumstances. It essentially just blew out and blew out until it became largely meaningless. Phrases that would raise sympathy in the minds of the Australian community crept in. It lost that exceptional circumstance focus and became a much broader and much less containable concept.[74]

8.74 Later during the same public hearing she expanded on these comments by noting that section 6A(1)(e):

> …started out as a compassionate or humanitarian visa class. All of the information around its creation indicated that it was meant to be used in exceptional circumstances…The difficulty was that it was hard to prescribe objectively what those circumstances were.
>
> Over time, it started to expand. It partly – very significantly – started to expand as a result of challenges to decisions in courts. Someone would get a decision saying, 'No, that is not a compelling or compassionate circumstance', go to court, the court would expand it and say, 'Yes, it is', and

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72 Refugee Council of Australia, Submission no. 12, Appendix A, p.4

73 DIMIA, Submission no. 24, p.43. See also Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, pp.63-64

74 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, pp.61-62

> that would then become, in a sense, integrated into the decision or the consideration that case officers had to bring to bear in deciding these cases.[75]

8.75 At the same public hearing, Mr Rizvi, a First Assistant Secretary in DIMIA, speculated at length on the possible negative implications of supplementing the system of ministerial discretion with a humanitarian visa class. He drew the Committee's attention to international comparisons, especially the United States, Canada and Europe which are facing similar demographic challenges to those currently faced by Australia. He was at pains to contrast how Australia deals with migration issues, which has provided an 'extraordinary beneficial impact' to the domestic economy, with the situation in a number of overseas countries, which has 'led to situations where their ability to control and manage migration has been severely undermined'.[76] The three main areas of concern with the situation in Europe are the significant increase in the population of failed asylum seekers, the undermining of public confidence with immigration processes, and a lack of confidence by authorities to manage their immigration programs.

8.76 In response to a question on notice about the possibility of creating a new visa subclass for applicants who would be willing to waive their rights to merits review in order to seek the minister's intervention at the beginning of the determination process, DIMIA told the Committee that the issue: 'has been considered from time to time in the Department since the establishment and subsequent winding up of section 6A(1)(e)'. In the light of the experience with the s6A(1)(e) process, DIMIA repeated its concerns with a new visa subclass:

- making the intervention powers compellable would establish an opportunity for litigation with the potential for the test for intervention being widened and lowered;
- unsuccessful applicants would probably want to restore their access to a merits review process. This would create the potential for misuse of the process by those wishing to prolong their stay and frustrate their removal from Australia; and
- the protection visa process identifies and protects the large majority of individuals owed non-refoulement protection under the CAT and ICCPR.[77]

8.77 It is noteworthy that DIMIA addressed the issue of Australia introducing an onshore humanitarian stream in its submission to the Joint Committee on Migration's 1999 inquiry into Regulation 4.31B of the Migration Regulations. In response to the argument that an onshore humanitarian stream should be introduced to reduce the number of protection visa applicants, DIMIA argued that the creation of a new humanitarian visa class had the potential to generate a number of problems:

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75 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, pp.63-64

76 Mr Rizvi, DIMIA, *Committee Hansard*, 5 September 2003, p.65

77 DIMIA, Submission no. 24E, 5 September 2003

- judicial review might extend the applicability of the class beyond its intended narrow parameters (this had occurred with the previous onshore system);
- the misuse problem with the protection visa system might be duplicated or transferred to the new class;
- the new class would allow people to extend their time in Australia by adding another layer to the process; and
- the class might contribute to the belief that it was acceptable to enter Australia under false pretences.[78]

8.78 The Committee notes that DIMIA was not able to substantiate the claim that introducing special categories of visas will place considerable pressures on Australia's ability to protect its borders, and result in the Minister for Immigration losing his or her control of the migration determination process. In fact, other witnesses rejected these arguments outright. Dr Mary Crock, for example, told the Committee that:

> The criteria for the exercise of such powers can be articulated without opening the floodgates and [government] losing precious control of the migration process. The criteria are to be found in the human rights enshrined in international law…[79]

8.79 The Committee is also not convinced that DIMIA's evaluation of the previous operation of s6A(1)(e) of the Migration Act has direct relevance to the complementary protection systems advocated by the Refugee Council of Australia and HREOC.

8.80 In the light of these developments, the Committee is concerned that Australia is one of the few countries in the developed world that does not have a system of complementary protection. The Committee is left in no doubt that the current Australian practice of relying solely on ministerial discretion places it at odds with emerging international trends.

8.81 The Committee believes that the concerns raised by DIMIA about the old s6A(1)(e) process should no longer be used by the department as an excuse for casting doubts on the suitability for Australia of complementary protection, especially when the concept has not received the attention from government it now clearly deserves.

Recommendation 19

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

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78 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*, May 1999, p.32

79 Dr Mary Crock, Submission no. 34, p.4

Monitoring of returnees

8.83 Amnesty International argued that there should be a process of informal monitoring of returnees, consistent with recommendation 11.1 of *A Sanctuary Under Review*.[80] This stems from Amnesty's experience where many asylum seekers forcibly removed from Australia and other countries are 'not heard of again – either through assimilation into local society or for more sinister reasons'.[81] Amnesty International is concerned that the current lack of monitoring of returnees 'may result in a risk assessment culture which may not be as in-depth as it otherwise could be, where the consequences of forcible removal to certain countries is not fully appreciated'.[82]

8.84 The Committee acknowledges the rising level of concern among certain community and religious groups over 'Reports of death, disappearance, imprisonment and torture, of fear-filled lives spent in hiding, privation and despair' which have allegedly filtered back to Australia about people removed after their claims for protection on refugee or humanitarian grounds were disallowed.[83] The level of community disquiet resulted in 2002 in a coalition of religious groups, the Coalition for the Protection of Asylum Seekers and leaders from major religious denominations, petitioning the Federal Government 'to heed the reports of terrible things happening to some deportees and cease sending people to countries where protection of their safety and rights is very problematic'.[84]

8.85 As a result of this petition, the Coalition for the Protection of Asylum Seekers has undertaken a study 'designed to clarify the situation behind this widespread disquiet'. To date, the study has involved interviews with 20 people from the following countries: Iran, Syria, Iraq, Afghanistan, Nigeria and Zimbabwe. It has also drawn on eight other authenticated accounts as well as reliable accounts from deportee contacts and expert respondents in Australia.[85] The study's preliminary findings express concern that Australia is sending, or attempting to send, refugees to places which are not safe, a situation which places Australia is in breach of its non-refoulement obligations under international law.

Conclusion

8.86 The Committee heard from a number of refugee advocacy groups that protection from refoulement should not be left solely to the minister's discretionary

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80 Recommendation 11.1 states: 'The Committee recommends that the Government place the issue of monitoring on the agenda for discussion at the Inter-Government/Non-Government Organisations Forum with a view to examining the implementation of a system of informal monitoring', p.343

81 Amnesty International Australia, Submission no. 23, p.6

82 Amnesty International Australia, Submission no. 23, p.7

83 Coalition for the Protection of Asylum Seekers, Submission no. 29C, p.1

84 ibid.

85 Coalition for the Protection of Asylum Seekers, Submission no. 29C, p.2

powers under sections 351 and 417 of the Migration Act, given that the powers are non-compellable, non-reviewable and non-delegable. There is a serious risk that Australia is in continuing breach of Article 2 of the ICCPR because it does not have appropriate systems in place to provide 'effective remedies' for breaches of human rights instruments. It also seems likely that the discretionary process is an inadequate mechanism for offering protection from refoulement because it is incompatible with the obligation under Article 3 of the CAT, which is considered to be 'absolute'.

8.87 The Committee heard from various witnesses that reliance on the discretionary powers places considerable burden on Australia's migration system and results in non-Convention asylum seekers being detained for extended periods in order to request the minister's intervention at the end of a determination process which is not relevant to them.

8.88 The Committee accepts the general thrust of these criticisms and concludes that Australia continues to be at risk of breaching its international legal obligations under the CAT, CROC and ICCPR not to refoule individuals in fear of torture or other forms of cruel and inhuman treatment. The Committee, therefore, cannot accept assurances from DIMIA that the minister's discretionary powers always enable Australia to meet those international obligations in respect of individual applicants. This assessment from the department contradicts the weight of evidence before the Committee.

8.89 The Committee is concerned that DIMIA's assurances could not be supported by any data or analysis on the number of occasions the discretionary powers are used specifically for humanitarian reasons under various international treaties. The Committee believes that nothing short of a major overhaul of the current use of the minister's discretionary powers and improvements to standards of reporting would alleviate this area of concern. While taking note of DIMIA's observation that most people who might have claims under international conventions are picked up in a 'positive protection visa decision',[86] the Committee would like to point out that this situation overlooks those individuals who are not covered by the Refugee Convention and who are at risk of the severest form of inhuman treatment if they are returned to their own country.

8.90 The Committee believes the government should consider criticisms aired during this inquiry and, in line with its recommendations, investigate ways to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR. The aim of such an investigation should be to establish an alternative process for non-Convention refugees that would assist Australia in addressing administrative problems arising from reliance on section 417 powers and in better managing the refugee determination process. The Committee believes that whilst addressing these problems, the government should also examine the feasibility of complementary protection models

86 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, p.33

such as the one proposed by the Refugee Council of Australia, the National Council of Churches in Australia and Amnesty International.[87]

8.91 In considering the question of which system would best enable Australia to meet its international humanitarian obligations, the Committee examined recent international developments on the issue of complementary protection, in particular the UN consultative process which resulted in a framework document called *Agenda for Protection*. The document, which was affirmed by a number of countries including Australia, was adopted by the Executive Committee of the UNHCR in September 2001.

8.92 While the Committee finds that support for the concept of complementary protection is widespread amongst Australia's peak non-governmental bodies concerned with refugee and asylum seeker issues, it is reluctant to recommend any particular system of complementary protection for Australia. The Committee's view stems from the varied experience with complementary protection in Europe and Australia's past experience with the section 6A(1)(e) process.

8.93 The Committee takes seriously the practical and policy challenges being experienced by European countries which have implemented complementary protection. These challenges are readily acknowledged by even the most ardent supporters of complementary protection, but they are not considered to be insurmountable.[88] Having said that, the Committee does not wish to overstate the relevance to Australia of the European experience.

8.94 The Committee concludes that in the future complementary protection might be a significant and positive development towards eliminating the risk of Australia being in breach of its international human rights obligation. Complementary protection has the potential to enable migration and humanitarian programs to be delivered with certainty and transparency, and to assist non-Convention asylum seekers who are in genuine need of humanitarian protection. However, the Committee finds that complementary protection is a relatively undeveloped concept in the Australian context. It is for this reason that the Committee recommends that the Government give consideration to a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its international humanitarian obligations.

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87 Additional information, Refugee Council of Australia, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004.

88 Jane McAdam, *The European Union Proposal on Subsidiary Protection: An Analysis and Assessment*, New Issues in Refugee Research Working Paper No. 74, UNHCR, Evaluation and Policy Analysis Unit, Geneva, December 2002

Chapter 9

Appropriateness of the minister's discretionary powers

9.1 This chapter looks at some of the points of view raised during the Committee's inquiry on the appropriateness of the minister's discretionary powers within the broader migration system under term of reference (b). Having examined aspects of the recent operation of the powers in earlier chapters, this chapter looks chiefly at the desirability of vesting all discretionary powers in the migration system in the hands of the minister alone.

9.2 As we have seen in earlier chapters, the ministerial discretion powers were inserted during the 1989 codification process to provide an outlet to deal with difficult cases that did not fit statutory visa criteria. It was parliament, not the incumbent minister, that insisted on the discretion resting with the minister rather than a departmental delegate. This approach was different from that suggested in the Committee to Advise on Australia's Immigration Policies' (CAAIP) report and model migration bill, which advocated building some room for discretion into the migration regulations themselves so that departmental officers would have some room to grant visas in difficult cases.

9.3 Since the powers were inserted in the Act, we have seen a gradual increase over time in their use, to the point that in 2002-03 the minister personally intervened in some 483 cases using these powers, having presumably considered many more. Essentially, powers designed to take care of a few difficult cases each year seem to have become an established path of review for visa applicants. In light of this, the question of whether the ministerial discretion powers remain the best way to deal with difficult cases needs to be reviewed.

9.4 This chapter notes the reasons put forward for maintaining an outlet for the exercise of discretion in an otherwise codified visa system. It discusses why governments have opted to retain the discretion solely in the hands of the minister and some of the concerns raised by witnesses about this approach.

9.5 Finally, this chapter considers the appropriateness of the minister's discretionary powers continuing to exist in their current form under term of reference (d). It proposes a new model to make the operation of the powers more transparent and accountable.

The need for discretion in the migration system

9.6 Almost all witnesses to this inquiry have agreed that some capacity for discretion needs to be built into what is otherwise a highly codified visa system. No legislation or regulations could be expected to anticipate all possible life circumstances, and an immigration system bound strictly by codified visa criteria with no room for discretion could result in harsh and unintended consequences for individuals and communities.

9.7 DIMIA's submission noted that:

> The discretionary powers are integral features of the legal framework of the [Migration] Act, providing a 'safety net' for the exercise of migration laws which are generally fair but may, in certain exceptional cases, lead to an unintended harsh result.[1]

9.8 It went on to say that:

> Given the highly prescriptive nature of the statutory framework, the discretionary powers allow cases that do not fit neatly within that framework to be resolved at minimum cost to the applicant where:
>
> - there are compelling individual circumstances, such as where the person has strong family ties in Australia;
>
> - they would meet criteria for a visa, but are barred from making a further application while in Australia;
>
> - their circumstances do not fit within the statutory criteria, due to a deficiency with those criteria which may have been subsequently changed; or
>
> - they face removal from Australia and significant international obligations for Australia may arise.[2]

9.9 While expressing reservations about the current form of the ministerial discretion powers, the Migration Institute of Australia described the powers as 'an important safety valve in an otherwise discretionless system' and argued strongly for the discretion to be maintained.[3]

9.10 Legal practitioners who gave evidence to the inquiry were in general agreement that there needs to be some discretionary power in the area of migration law. Mr Paul Fergus suggested that:

> …a largely discretionless system works hardship on individuals in many instances since it cannot address all the circumstances of all cases that come before departmental officers. It is necessary, therefore, to provide a mechanism to overcome this and the Ministerial discretions to grant visas are appropriate to achieve this end.[4]

9.11 Mr George Lombard had the following to say on the need for discretionary powers in the system:

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1 DIMIA, Submission no. 24, p.14

2 DIMIA, Submission no. 24, p.8

3 Migration Institute of Australia, Submission no. 32, pp.6-8

4 Mr Paul Fergus, Submission no. 4, p.1

> We are very much in favour of the continued availability of discretionary powers to overcome the straightjacket of strict regulation under the Migration Act…In effect, the existence of this power acknowledges that there are imperfections with the Migration Act and Regulations and that instead of attempting to foresee and forestall each and every possible negative eventuality through legislation, it is more convenient to offer this failsafe mechanism for protecting the innocent.[5]

Humanitarian cases

9.12 As discussed in Chapter 8, the minister's discretionary powers are the primary means which humanitarian claims not falling within the Refugee Convention definition can be recognised onshore. While questions have been raised about their adequacy in this regard, most asylum-seeker advocates supported their retention, especially in the absence of any complementary protection system. Amnesty International, for example, argued that:

> The Ministerial Discretion under s417 of the Act is an essential part of the current system, as it is the only opportunity for those with a well founded fear of returning to their country (though not for reasons as set out in the 1951 Convention…) to be granted protection.[6]

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

Should the discretion rest only with the minister?

9.14 While some submissions to this inquiry have argued that the current ministerial discretion powers are in fact the best way of allowing for the exercise of discretion,[7] many of the submissions appear to have supported the existence of the ministerial discretion powers simply in preference to having no capacity in the legislation for the exercise of discretion. Ms Jennifer Burn summed up this view in evidence to the Committee, saying:

> My view would be that because the migration jurisdiction is so codified there has to be some kind of method to ameliorate the strict effect of the regulations. The only method that we have, really, is the Minister for Immigration and Multicultural and Indigenous Affairs exercising his personal discretion…[8]

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5 Mr George Lombard, Submission no. 16, pp.1-2

6 Amnesty International Australia, Submission no. 23, p.2

7 See, for example, Mr Paul Fergus, op. cit

8 Ms Jennifer Burn, *Committee Hansard*, 23 September 2003, p.22

9.15 Other witnesses supported the minister having a power to intervene in truly exceptional cases but advocate some discretion being built into the system at a lower level to deal with many of the cases that can now be decided only by the minister.

9.16 In justifying the existence of the ministerial discretion powers on the grounds that they offer necessary flexibility in an otherwise rigid system, DIMIA's submission fails to acknowledge that alternative approaches could have been taken to provide the same degree of flexibility. It appears to assume that demonstrating a need for discretion in the system is enough to demonstrate the appropriateness of ministerial discretion.

9.17 In considering the appropriateness of the ministerial discretion powers, then, it should be pointed out that ministerial discretion was not the only way that some discretion could have been built into the legislation. In this context, it is worthwhile noting briefly the approach suggested by the CAAIP before the migration reforms took place in 1989.

Building discretion into the regulations: CAAIP's approach

9.18 DIMIA's submission suggests that the ministerial discretion powers inserted in the Migration Act in 1989 were in line with the views of the CAAIP and supported by parliamentarians and all parties.[9] This does not seem consistent with the evidence discussed in Chapter 2 showing that the powers were not initially supported by the minister of the day, but were in fact inserted at the insistence of the opposition parties late in December 1989. This Committee has heard persuasive evidence that the powers are not in a form recommended by CAAIP.

9.19 Mr Michael Clothier, who was a member of the legal panel responsible for drafting CAAIP's model migration bill in 1987, points out in his submission that that bill did not give the minister the power to overrule the regulations.[10] Instead, a degree of discretion was built into every statutory rule, as described in the following excerpt from the CAAIP report:

> Each rule will feature both a policy objective and the criteria for making a decision. Some criteria will be essential, some will not. A decision maker will be expected to consider all the criteria in reaching a decision. However, in exceptional cases where strict application of the criteria would produce an unfair or unjust result, there will be room for discretion in favour of the applicant. The rules are intended to give a high degree of predictability of decisions for the people affected by them and those who act as advisers.[11]

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9 DIMIA, Submission no. 24, p.26

10 Mr Michael Clothier, Submission no. 20, p.1

11 Mr Michael Clothier, *Committee Hansard*, 18 November 2003, p.31. The extract is from *Immigration: A Commitment to Australia*, Report of the Committee to Advise on Australia's Immigration Policies, Australian Government Printing Service, Canberra, 1988, p.113.

9.20 The CAAIP report advocates a pivotal role for the minister in setting rules that define the criteria for decision making under the bill. It envisages that all powers under the Act would be vested in the minister. However, the power to exercise discretion in individual cases is delegated to decision makers at the departmental level, who can act with the authority of the minister.[12]

9.21 Both Mr Michael Clothier and Dr Mary Crock suggested to the Committee that an approach devolving the capacity to exercise discretion to primary decision makers would be preferable to one that channels all power to make such decisions into the hands of the minister.

9.22 Mr Clothier expressed the opinion that the immigration department had 'botched' the codification reforms in 1989 by refusing to build appropriate discretions into the regulations themselves. This led, he suggests, to:

> Enormous pressure on the Minister to intervene when the Department's regulations produced many absurd outcomes and failed to allow discretion in cases where it was needed.[13]

9.23 Dr Crock also felt the current system had gone 'off the rails' by not giving some discretion to primary decision makers. She spoke of a draining of power from the bureaucracy, accompanied by a 'loss of belief in notions that individuals should be able to choose and to exercise balancing functions in a way that is legitimate'. She said:

> With one stroke of the legislative pen in 1989 we had removed from the Migration Act the power to grant visas on strong humanitarian or compassionate grounds. That was never replaced, except with this residual discretion that we have vested in the minister. Therein, I think, lies the main problem.[14]

9.24 Ms Jennifer Burn expressed a similar view to Dr Crock, stating that:

> My feeling is that the problem is not just that the minister has been given more discretion but rather that everybody else has had their discretion taken away from them. The thrust of my submission is that it is not bad per se to have discretion in a system. On the contrary: I would advocate the reintroduction of discretion. The problem with the system is that the discretion is focused in one person. What we need to see happen is the diversification of power again.[15]

9.25 Having established that there was an alternative to ministerial discretion advocated by the government's expert advisory body prior to the powers being

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12 *Immigration: A Commitment to Australia,* Report of the Committee to Advise on Australia's Immigration Policies, Australian Government Publishing Service, Canberra, 1988, p.113

13 Mr Michael Clothier, Submission no. 20, p.1

14 Dr Mary Crock, *Committee Hansard*, 23 September 2003, p.19

15 Mr Jennifer Burn, *Committee Hansard*, 23 September 2003, p.23

inserted in their current form, the Committee next considers the factors that have led governments to adopt and support this approach.

Why ministerial discretion?

9.26 In Chapter 2 the Committee noted the reservations of then minister Robert Ray about placing the discretion in the migration system in the hands of the minister rather than a departmental delegate. On Parliament's insistence, however, the final form of the legislation as amended in December 1989 gave the minister a non-compellable, non-delegable, non-reviewable discretion in individual cases rather than giving any discretion to departmental decision makers.

Political responsibility for migration decisions

9.27 In parliamentary debate on the 1989 codification reforms, Mr Philip Ruddock, as shadow minister, opposed vesting the discretion in the Secretary of the immigration department as proposed in the original legislation. His reasoning was that:

> …it is inappropriate for the Minister to divest himself of that discretion, a discretion which was seen by us to be important and, certainly, was seen to be important to ethnic communities in Australia.[16]

9.28 The Opposition's view was put more expansively by Senator Richard Alston, who said:

> We welcome the Government's ultimate decision to retain in the Minister the discretion to make the ultimate decision on who should enter this country and who should remain here. As the Minister said previously, it is necessary to detach final decisions from political influence but, at the end of the day, there are some decisions the Government simply cannot shirk. It is a responsibility of the Government, not the bureaucracy, and there are and always will be hard cases.[17]

9.29 He also expressed a view that it is not appropriate to vest real decision making power in the bureaucracy, saying:

> It has been a change for the better that the Minister, to his credit, has been prepared to rethink the matter and to have the discretion vest where it ought to vest and not be devolved to bureaucrats, who should not be put in the invidious position of having to make hard decisions.[18]

9.30 Initially, then, the discretionary powers were vested in the minister rather than the bureaucracy at least in part because of a view that, ultimately, it is politicians, not bureaucrats who should be responsible for migration decisions.

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16 *House Hansard*, 1 June 1989, p.3484

17 *House Hansard*, 29 May 1989, p.2958

18 *House Hansard*, 29 May 1989, p.2958

Flexibility

9.31 A clear advantage for the government in having a ministerial discretion is the flexibility it allows to deal with difficult cases quickly without needing to change the legislation or regulations. DIMIA's submission states:

> The Minister's non-compellable discretionary powers provide the flexibility to address specific individual circumstances (for those groups of people for whom access to review rights is warranted) that were not intended or envisaged by the strict statutory rules governing the grant of visas. This flexibility is provided in a manner that ensures factors such as relevant international obligations are respected, and broader public interest factors can be addressed.[19]

9.32 The ministerial discretion powers enable such flexibility in individual cases without ceding any influence to the courts, or setting precedents that would broaden the scope of migration regulations, as discussed below.

Government control over immigration intake

9.33 DIMIA's submission and evidence to this Committee reflected a view that retaining the ministerial powers as the only place for the exercise of discretion in the migration system is necessary to maintain government control over immigration. DIMIA's submission stressed Australia's 'rigorous and transparent approach' to selecting migrants, and the risk of 'informal and unregulated movements' breaking down public confidence in the system.[20] It stated that:

> The migration selection criteria have been framed to ensure that those criteria cannot be interpreted such that the government loses its ability to effectively manage its migration program. Immigration is about people's lives and people do not always fit neatly within visa categories. The Ministerial discretion powers provide a mechanism for dealing with people in extenuating or exceptional circumstances that cannot be easily legislated in visa rules.[21]

9.34 It went on to argue that:

> Without the Ministerial discretion 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.[22]

9.35 This paragraph appears to suggest that building discretion into the regulations themselves, or allowing anyone other than the minister to exercise discretion in

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19 DIMIA, Submission no. 24, p.51

20 DIMIA, Submission no. 24, p.13

21 DIMIA, Submission no. 24, p.13

22 DIMIA, Submission no. 24, p.13

interpreting and applying migration law would lead to a watering down of the criteria and result in less meritorious applicants being granted a visa.

9.36 DIMIA's submission also suggested that keeping the discretion in the minister's hands only is necessary to prevent 'unmeritorious' applicants using review processes to prolong their stay in Australia, saying, for example that:

> These powers provide flexibility in an otherwise highly prescriptive visa process with set criteria. The flexibility provided by the scheme enables the government to provide responsive visa solutions in exceptional and unforeseen circumstances in a way which retains its capacity to manage the onshore visa framework and also limits the scope for unmeritorious applicants to use processes to frustrate and delay removal from Australia.[23]

9.37 It stated that suggestions in the Sanctuary Under Review report on aspects of the powers' operation have been ignored 'due to the capacity to undermine or remove the Government's ability to effectively manage its migration program.'[24]

9.38 Maintaining control over the outcome of onshore applications appears to be one factor behind former Minister Ruddock's preference for using ministerial discretion to deal with difficult categories of case, such as the East Timorese, rather than create regulations to deal with systemic problems affecting large numbers of people. DIMIA's submission stated in relation to this that:

> The Government's approach has been to work within the existing legislative framework including the exercise of the Minister's public interest powers to resolve the status of large numbers of people. This represents a move away from adopting broad group resolution approaches, which tend to grant permanent residence without regard to the strength of the individual's claims for residence and more importantly without weeding out those group members who clearly would have little personal claim for special treatment.[25]

9.39 In justification of this position, DIMIA's submission stated that the approach taken by previous ministers of creating special visa classes:

> …was not based on a full case by case assessment of the person's circumstances, it did not address whether there were individual compelling circumstances, nor did it address the outcome for those who did not meet the criteria for a special category visa.[26]

9.40 It seems a somewhat surprising admission to say that the regular assessment process for a visa in any category is not based on a full case by case assessment of a person's circumstances. Also, given that the former minister personally decided some

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23 DIMIA, Submission no. 24, p.7

24 DIMIA, Submission no. 24, p.33

25 DIMIA, Submission no. 24, p.44

26 DIMIA, Submission no. 24, p.45

203 individual cases in his last week in that office,[27] at least 129 of which were East Timorese,[28] the Committee wonders how thoroughly he was able to assess each individual case on its merits.

9.41 It would seem to the Committee that creating regulations to account for such large groups of cases would at least provide clear criteria against which a case could be assessed and a degree of certainty in the process for the applicants concerned. Instead, this government has chosen to use an inscrutable ministerial discretion power which provides no criteria other than the 'public interest' against which to assess individual cases. Additionally, there is no avenue of review at all for those who are not granted ministerial intervention at the end of the day.

9.42 The government's preference for using the ministerial discretion power to determine cases such as the East Timorese reflects a key benefit of this type of system from the government's point of view: it enables the minister of the day to retain tight control over the immigration intake, to the point of retaining final decision making power over individual cases.

Limiting the influence of the courts

9.43 From the government's point of view, another key benefit of having the discretionary power in the hands of the minister stems from its non-compellable and non-reviewable nature. As seen in Chapter 7, this means that a court cannot compel the minister to consider exercising his discretion in a particular case, and thus enables a minister to make decisions on individual cases that cannot be reviewed or challenged in the courts.

9.44 As also pointed out in Chapter 7, DIMIA's submission states that the non-compellable nature of the power was carefully framed to prevent abuse of court processes to avoid deportation. Elsewhere, DIMIA suggests that making the powers compellable:

> …would establish an opportunity for litigation with the potential for the test for intervention being widened and potentially lowered.[29]

9.45 During his tenure as immigration minister, Mr Ruddock was outspoken on his views on the desirability of keeping the courts from interpreting migration law in ways the government did not intend, as was noted in Dr Mary Crock's submission. Dr Crock cited as an example the following excerpt from a speech by Mr Ruddock:

> It is the government, not some sectional interests or loud intolerant individual voices or ill-defined international interests, or, might I say, the

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27 Senate Legal and Constitutional Legislation Committee *Hansard* (Budget Estimates Supplementary Hearings), 4 November 2003, p.43

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

29 DIMIA, Submission no. 24E, Answer to question on notice from 5 September 2003

> courts that determines who shall and shall not enter this country, and on what terms.
>
> …Only two weeks ago a decision to deport a man was overturned by the Federal Court although he had been convicted and served a gaol sentence for possessing Heroin with an estimated street value of $3 million. Again, **the courts have reinterpreted and re-written Australian law – ignoring the sovereignty of Parliament and the will of the Australian people. Again, this is simply not on.**[30]

9.46 DIMIA's submission makes it clear that vesting the only discretionary power in the hands of the minister is designed to limit the influence of the courts and maintain executive control over the administration of the migration program, noting that:

> The statutory framework ensures that external influences such as the courts and various commentators can not expand the statutory rules to include circumstances never intended by the government. The expansion of these provisions, together with large number of persons seeking to advantage themselves by claiming to come within those interpretations could jeopardise, and render meaningless, the careful and considered settings of the government's migration and humanitarian programs.[31]

9.47 In sum, vesting the discretion in the hands of the minister reflects a view that ultimately it is the minister, rather than officials, who should be responsible for decisions on who is and is not granted a visa to Australia. This approach has a number of advantages for the government, by limiting the influence of external bodies such as the courts on migration decisions and enabling tighter government control of the immigration intake.

Arguments against ministerial discretion

Challenges to the separation of powers and the rule of law

9.48 This report is not the place for a full length dissertation on the subtleties of the notions of the separation of powers and the rule of law as foundations of Australia's political system. However, the Committee must note concerns expressed by several witnesses that the structure of the current migration system, with its largely unfettered ministerial discretion powers to determine individual cases as well as set migration policy, undermines these important principles.

9.49 Dr Mary Crock suggests that the former minister's statements on the desirability of keeping the courts out of the migration process show disregard for notions of separation or balancing of official powers.[32] She notes the worrying implications of

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30 Dr Crock, Submission no. 34, pp.2-3, citing Mr Ruddock, Address to the National Press Club Canberra, 18 March 1998 (emphasis added by Dr Crock).

31 DIMIA, Submission no. 24, p.52

32 Dr Mary Crock, Submission no. 24, p.3

the stance apparently taken by the former minister that, because a minister is an elected representative, his should be the final word in any administrative process. She writes:

> This way of thinking is predicated on very simplistic notions of both democracy and the Rule of Law…the Minister appears to be alleging that because he is elected, he alone should be the source and voice of government policy; and that for the courts or other 'unelected' body to oppose his policies or interpretations of the law is anti-democratic and anti 'the rule of law'.[33]

9.50 Dr Crock's argument is that vesting the minister alone with the power to exercise discretion in individual administrative decisions conflates the power to set policy and introduce legislation into parliament, which is the legitimate power of an elected government, with the power to make the ultimate choices in individual cases.[34] She cautions against making the leap to say that, just because a minister has the legitimate power to set policy, he or she should therefore be the only one to determine the outcome of particular cases.[35] She argues that:

> To accept that one individual should be vested uniquely with this power to choose, or to exercise power, is to render indiscernible the divide between democracy and tyranny. [36]

9.51 Mr Michael Clothier also voiced concerns about the current system of ministerial discretion undermining the rule of law. His evidence to the Committee suggests a view that the current situation, where thousands of cases are considered each year for ministerial discretion and hundreds are decided in person by the minister, in effect takes us back to the days before codification. It places excessive power in the hands of the minister to 'micro-manage' Australia's immigration discretions without appropriate checks and balances.[37]

9.52 In short, the argument has been put forcefully to this committee that placing the only discretionary power in the migration system in the hands of one person, albeit an elected minister, with no opportunity for judicial or meaningful parliamentary scrutiny, undermines the notions of separation or balancing of official powers. Without wishing to engage in a long theoretical debate on Australia's political system, the Committee notes the question mark that has been raised about whether the ministerial discretion powers as currently framed are appropriate in this context. In light of the increasing use of these powers to determine hundreds of cases every year free from any meaningful scrutiny or accountability, and with nothing to ensure

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33 Dr Mary Crock, Submission no. 24, p.3

34 Dr Mary Crock, Submission no. 24, pp.3-4, and *Committee Hansard*, 23 September 2003, pp.31-33

35 Dr Crock, *Committee Hansard*, 23 September 2003, p.31

36 Dr Mary Crock, Submission no. 24, p.4

37 Mr Michael Clother, Submission no. 20, and *Committee Hansard*, 18 November 2003, p.35

natural justice for those not granted intervention, it would seem that some concern on this front is justified.

A system open to corruption?

9.53 Several witnesses to this inquiry have expressed concern that a system which places the only meaningful discretionary power in the hands of the minister without meaningful scrutiny is open to corruption, if not inherently corrupt. Dr Crock suggested that:

> Any system will become corrupt when one person alone has the power to choose, particularly where the responsible individual is not accountable in any meaningful sense.[38]

9.54 In response to questioning on whether she saw the current system as being actually corrupt, Dr Crock stressed her point that it is 'corruptible', meaning open to corruption and certainly open to the perception of corruption.[39] She suggests that, even if the politicians involved are 'as pure as the driven snow', by concentrating all discretionary power in one individual, the system itself encourages unscrupulous behaviour behind the scene.[40]

9.55 Mr Clothier expressed a similar view, suggesting that a system where a minister has a 'completely unfettered power' and will be influenced by people connected to him has led to:

> …growing corruption in that area. You have to have, because if you have unsupervised power you are going to get corruption. It is axiomatic.[41]

9.56 Mr Clothier later made the point that the sort of corruption to which he refers is not in the form of direct bribes for the exercise of ministerial discretion, but rather the wooing of ethnic communities using that special power.[42]

9.57 Mr Marc Purcell also had similar concerns, suggesting that Lord Acton's famous quote 'Power corrupts and absolute power corrupts absolutely' is relevant here as:

> S417 has all the elements of unfettered power inherent in its operation, which could undermine the integrity and probity of the most scrupulous of Immigration Ministers.[43]

9.58 Leaving aside for the moment arguments about systemic corruption, claims that the structure of the system inevitably leads to the perception of corruption have been a

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38 Dr Mary Crock, Submission no. 24, p.4

39 *Committee Hansard*, 23 September 2003, p.36

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

41 *Committee Hansard*, 18 November 2003, p.35

42 Mr Clothier, *Committee Hansard*, 18 November 2003, p.34

43 Catholic Commission for Justice, Development and Peace, Submission no. 15, p.22

constant refrain throughout this inquiry. Many witnesses argued that, while they had seen no suggestion of actual corruption in the way ministers have used the power, the structure of the system, with its lack of accountability and lack of public information leaves it open to the perception of corruption in the form of favouritism and influence peddling. This view was put by Mr George Lombard, who, without suggesting that there is actual corruption in the system at present, submitted that:

> The volume of discretions exercised by the present government is of course at record levels, and to exercise these discretions in this secret way invites patronage, inconsistency and uncertainty.[44]

9.59 Other witnesses were concerned that vesting the discretionary power in the immigration minister, whose work inevitably involves maintaining relationships with representatives of ethnic and community groups, will invite suspicion that the minister's personal relationships will influence the exercise of the discretionary power. This point was made by Ms Judith Burgess of the Immigration Advice and Rights Centre, who said that:

> We are concerned that such a perception could discredit the process of Ministerial intervention and ultimately make the Minister less inclined to use the power.[45]

9.60 While ultimately in favour of retaining a discretionary power as a safety net in the migration system, Ms Burgess made the point that this need not be done by the minister personally. Her suggestion was that the public interest power could be exercised by a panel of people appointed by the minister, instead of by the minister personally.[46]

9.61 The point here is that while discretionary powers may be necessary, a system which vests all power in the hands of one individual without proper checks or accountability is open to the perception of corruption. This is ultimately undesirable, as it undermines confidence in this part of the migration system, and leaves room for unscrupulous behaviour at all levels.

Prolonging the visa determination process

9.62 A final point worth considering is whether, in the broader context of the application, decision-making and review process, the discretionary power should be available only at the end, once an applicant has exhausted all avenues of merits review. DIMIA told the Committee that making the powers available only after a visa applicant had exhausted their merits review rights was an important factor in their development.[47] Putting them at the end was presumably designed to preserve the

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44 Mr George Lombard, Submission no.16, p.2

45 Immigration Advice and Rights Centre, Submission no. 22, pp.5-6

46 Immigration Advice and Rights Centre, Submission no. 22, p.6

47 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, p.3

statutory basis and consistency of visa decision making generally, while having a last avenue of redress in circumstances where the system had produced a manifestly harsh or unreasonable outcome.

9.63 While the intention seems sound, as has been seen in Chapter 5 the Committee has heard evidence from many witnesses that having this discretion available only at the end of the decision-making and review process can cause unnecessary delay and hardship for individuals in unusual or difficult circumstances. There is also the issue considered in Chapter 8 of non-Refugee convention related humanitarian claims, which can only be considered after a lengthy assessment and review process against irrelevant criteria.

9.64 Worth noting here is a perhaps unintended consequence of having this unusual discretionary power at the end of the merits review stage: namely, that it has apparently come to be seen by many as, in effect, a supplementary tier of merits review. The department and/or former minister evidently did not see this state of affairs as desirable, and the reduction in the number of protection visas granted following section 417 ministerial intervention was in part designed to suppress this view.[48] Ms Godwin stressed that the ministerial discretion process was not a third tier of review, but a safety net after all of the formal processes have concluded.[49]

9.65 The Committee suggests as a possibility that placing the only discretionary power at the end of the appeals process may in fact detract from the finality of the established decision-making and merits review system. While the intention of limiting discretion throughout the decision-making process is to limit the grounds for appeal, thus streamlining the visa determination process, an open ended, vaguely defined discretionary power coming after the merits review stage appears to prolong it in the eyes of many determined visa applicants.

A flawed approach?

9.66 Ms Jennifer Burn argued in her submission that the current Migration Act and Regulations represent a flawed approach to migration decision-making, suggesting that:

> The legislative scheme fails to offer a framework for decision-making in situations that fall outside a strictly prescriptive codified fact situation. The failure of the legislation to deal in a sensible and legally appropriate way with non-citizens who make humanitarian and compassionate claims has led to a situation where an approach to the Minister for the exercise of his discretion in the public interest is the last legislative resort.[50]

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48 DIMIA, Submission no. 24D, Answer to question I3

49 Ms Godwin, DIMIA, *Committee Hansard*, 23 September 2003, p.48

50 Ms Jennifer Burn, Submission no. 30, p.2

9.67 Several other witnesses, such as Dr Crock and Mr Clothier already extensively cited above, maintain that the system put in place in 1989, by placing all discretion in the hands of one person, is inherently problematic.

9.68 Yet in spite of these concerns, by far the majority of witnesses were in favour of retaining the ministerial discretion powers at the end of the process as a final safety-net for difficult cases. Indeed, most witnesses were more concerned with the powers not being used enough for deserving cases than with their existence per se.

9.69 Whatever the flaws in the migration system as a whole that have led to serious complaints about the recent operation of the ministerial discretion powers, most of the evidence put to this committee has supported their existence in some form. The general view is that, while they are not perfect, they are currently a necessary part of a system that would otherwise provide no outlet to recognise difficult cases not dealt with adequately by existing regulations.

Appropriateness of the present ministerial intervention processes

9.70 The Committee accepts the compelling evidence put to it that there needs to be some provision for discretion in an otherwise highly codified visa system. While noting the concerns aired above about the way the ministerial discretion powers themselves are framed, the Committee's chief concerns are not so much with the existence of these powers themselves, but with the problems in their recent operation outlined in previous chapters. Briefly restated, these are: weaknesses in administrative procedures, which can lead to problems for some visa applicants; a perception of favouritism or bias in the way the powers are used, heightened by the apparent influence of certain advocates with the minister; a lack of transparency and accountability, due to the inadequacy of statements tabled in parliament and lack of public information on the operation of the powers; concerns about the adequacy of discretionary powers to implement international legal obligations that are not discretionary.

9.71 The Committee finds that ultimately it would be desirable to consider improvements to the overall migration system to reduce the number of cases currently coming before the minister. However, on balance it seems appropriate to maintain the ministerial discretion powers in some form as a final safety net in cases where the system appears to have produced an unduly harsh or unreasonable outcome.

9.72 Having said that, immediate steps need to be taken to improve accountability and transparency to prevent the risk of corruption endemic to such an unfettered ministerial power.

Recommendation 20

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

9.74 In this context, the Committee notes one of the suggestions put forward by the Migration Institute of Australia for improving the transparency of the ministerial discretion process. MIA's submission contained an option to replace the existing process with one in which a committee reviews the decisions. According to MIA:

> This may best be achieved through the establishment of a statutorily appointed committee, comprising a range of informed parties who are vested with the power to make a decision or recommendation - this could include representatives from DIMIA, a member of a merits review Tribunal, a community representative, a member of parliament, an international representative such as the International Organisation for Migration or the United Nations High Commissioner for Refugees and a migration agent recommended by the MIA.
>
> This group could be either tasked with making the decision or making a recommendation. If the group was tasked with making the decision, then the Minister may wish to retain a veto power. In all cases, the recommendation and the reasons, or an executive summary, could and should be provided to the Minister, the Parliament and the person seeking the intervention as a means of providing transparency and procedural fairness.[51]

9.75 The Committee sees some merit in establishing a system along these lines, although further consideration would be needed to determine the committee's membership. While the Committee believes that the ultimate decision making power should remain with the minister, a statutory committee or independent panel of experts could be formed to review DIMIA's submissions and schedules and make a recommendation to the minister on which cases it considers should receive ministerial intervention. While this recommendation should not be binding on the minister, the statements tabled in parliament should indicate whether the minister's decision is in line with the committee's recommendation.

9.76 The Committee considers that bringing the views of an independent panel of experts into the ministerial intervention process could help improve the equity and transparency of the process and restore public confidence in the system.

Recommendation 21

9.77 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.

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51 Migration Institute of Australia, Submission no. 32, pp.10-11

Conclusion

9.78 This Committee's inquiry has highlighted a pressing need for reform of the ministerial discretion system. While not opposed to maintaining the powers in some form, the Committee considers that immediate steps must be taken to improve the transparency and accountability of their operation. The Committee's recommendations are therefore aimed at generating more information about the use of the powers and improving the transparency of the decision making process.

9.79 The problems encountered by the Committee in obtaining relevant information to assist its inquiry detailed in Chapter 1 demonstrate the lack of adequate accountability in the recent operation of the powers. If a minister can use the ministerial discretion powers without the possibility that parliament can scrutinise the decision making process then an important check on the workings of executive government is missing, opening the way for corruption and misuse of power. The Committee has ongoing concerns about the recent operation of the powers that have not been alleviated during the course of this inquiry because of the current minister's refusal to provide relevant information as requested.

Finding

9.80 In particular, the refusal by the minister and the department to provide certain key documents and case files has resulted in the Committee being unable to form a view as to the number of matters which were properly the subject of its inquiry. These include:

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

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

9.82 While appreciating that DIMIA made a significant effort to compile statistical data on the use of the powers to assist this inquiry, the Committee has found that this has not been done as a matter of course, and hence until now parliament and the public have had limited information to understand the operation of the ministerial discretion system as a whole. The Committee considers it essential that statistical data on the operation and use of the powers be routinely kept and published so that parliament and the community can gain an understanding of how the minister's discretion is exercised overall.

9.83 Although the discretionary powers are the minister's alone to exercise, the Committee notes the important role that DIMIA plays in assessing possible intervention cases and preparing briefing for the minister. The Committee considers that DIMIA must take steps to ensure that its processes are rigorous and fair to all applicants, which is why it has recommended that a system of internal and external audit be established to scrutinise the department's decision making processes in this area.

9.84 In light of the concerns about current procedures expressed by many representatives of visa applicants, the Committee has made a number of recommendations to make the system work better for the people it is designed to assist. It is hoped that increased availability of information will reduce the scope for exploitation of vulnerable people caused by the seemingly Byzantine nature of the system at present.

9.85 A key area of concern for the Committee has been to understand all the factors that may influence a minister in the exercise of the discretionary powers. It is clear that representations to the minister made by parliamentarians, lawyers, migration agents and community leaders can be influential. While recognising the importance in a democracy of people being able to make representations to a minister, the Committee is concerned about the perception of bias and favouritism that can be created when access to the minister is seen as necessary to gain a favourable outcome. The Committee considers that improvements to the accountability and transparency of this aspect of the system are essential to address this problem.

9.86 In assessing the appropriateness of the ministerial discretion powers overall, the Committee has concerns that vesting a non-delegable, non-reviewable, non-compellable discretion in one person's hands without an adequate accountability mechanism creates both the possibility and perception of corruption. More potential for external scrutiny of decisions is necessary to bring a greater degree of transparency into the decision making process and reduce the scope for corruption of the system. It is for this reason that the Committee recommends that the Government consider establishing an independent committee to inform the minister's decision making.

Senator Joseph Ludwig

Chair

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]
>
> 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

Electorate Office

204 Nicholson Street
Footscray, Victoria 3011

Telephone (03) 9687 7355
Facsimile (03) 9689 6523

Canberra Office

Parliament House
Canberra, Act 2600

Telephone (02) 6277 2039
Facsimile (02) 6277 8405

www.nicolaroxonmp.com
Nicola@nicolaroxon.com

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.

Additional Comments

Senator Andrew Bartlett

I support the recommendations of the Senate Select Committee on Ministerial Discretion in Migration Matters and agree with the thrust of the report. I share the concerns raised in the report regarding the lack of transparency around the ministerial discretion system. The reluctance of DIMIA and the Minister for Immigration to assist with providing records and other material pertinent to the Committee's investigation illustrates that the system is a major accountability problem that all parliamentarians should be concerned about.

The political genesis of this Inquiry related to specific allegations against the then Immigration Minister, Philip Ruddock. Whilst any allegations of serious impropriety should be examined, the Inquiry demonstrated that the real problems are with the way the power of ministerial discretion has evolved and expanded into so many aspects of migration law.

Whilst the current Minister's refusal to allow proper access to records was frustrating and unacceptable, I believe it must be said that no solid evidence at all was presented to suggest that the so-called 'cash for visas' allegations had any real substance. I have been and remain very critical of many of Minister Ruddock's policies towards migration and refugee issues and the way those are implemented, but I have seen nothing that leads me to think that there is likely to be direct corruption of the sort that had been alleged or implied. Similarly, I have seen nothing which gives weight to any of the claims against Mr Kirswani, the member of the public most frequently mentioned in regard to these allegations.

I believe the 'cash for visas' allegations are a distraction from the main issue of concern, which is the decline in transparency, independence, consistency and fairness in the migration area, particularly (but by no means only) in regard to asylum claims.

I support retaining ministerial discretion, but it needs to be in a far more limited capacity. I believe the use of the discretionary powers has grown much larger and wider than is desirable. The Committee's report details the expansion in the minister's use of these powers in recent years. I would like to see ministerial discretion restored to it's original intention of being for unusual and extraordinary circumstances. This would mean reducing some of the areas where discretion is now available and introducing codified criteria for visas in areas where discretion has now become commonplace.

I am pleased that the Committee has made recommendations to this effect, particularly in relation to adopting a system of complementary protection. However, I would have liked to have seen the Committee present a stronger, more detailed case for such a measure. I wish here to highlight a number of options that merit examination in any consideration of implementing a complementary protection regime in Australia.

The need for Australia to adopt a complementary protection system

I remain concerned that Australia is one of the few countries in the developed world that does not have a system of complementary protection. I believe that the Government is turning a blind eye to the merits of complementary protection, which are well documented in evidence to this inquiry. I am left in no doubt that the current Australian practice of relying solely on ministerial discretion places it at odds with emerging international trends and that the risks involved in relying solely on this mechanism are not acceptable.

The Committee has been made aware that most European countries and Canada have adopted a visa category which addresses the issue of complementary protection. The UNHCR advised the Committee that a number of countries have in place administrative or legislative mechanisms for regularising the stay of persons who are not formally recognised as refugees, but who are in need of protection or for whom return is not possible or advisable.[1] Amnesty International also told the Committee that the international community is in the process of moving towards developing systems which have a complementary protection component.[2] UNHCR explained recent international developments regarding complementary protection in the following terms:

> Every country has cases which fall in the difficult grey area between those of people who have experienced high levels of discrimination or come from countries with recognised human rights concerns, and those of people who cross the threshold of persecution on convention grounds and are recognised as refugees. The committee can think of that as a spectrum with people at one end with no international protection concerns and people at the other end who are recognised as refugees.[3]

The UNHCR also points out that there are significant differences in the way countries interpret inclusion criteria set out in Article 1 of the 1951 Convention.[4] This means that some persons who are recognised as refugees in one country may be denied such status in another country. At least three categories of persons are currently the subject of varying State interpretations of the refugee definition criteria: those who fear persecution by non-state agents for 1951 Convention reasons; those who flee persecution in areas of on-going conflict; and those who fear or suffer gender-related persecution.[5]

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1 UNHCR, Submission no. 36, p.2

2 Mr Gee, Amnesty International, *Committee Hansard*, 23 September 2003, p.3

3 UNHCR, *Committee Hansard*, 18 November 2003, p.18

4 UNHCR, Submission no. 36, p.5

5 ibid

The reliance of ministerial discretion to meet the protection needs of those who fall outside of the Refugee Convention's definition of a refugee ignores the real dangers facing thousands of people who seek protection from Australia.

I believe that relying on ministerial discretion in this way leaves no safeguards to ensure that those whom Australia has protection obligations under international treaties receive this protection.[6]

The Refugee Council of Australia has presented the Committee with a proposal for a model of complementary protection. This model allows decision makers to grant protection at all stages of the process. As Figure 1 shows, the model uses a single administrative procedure to determine whether a person is eligible for complementary protection and is therefore efficient and cost effective.

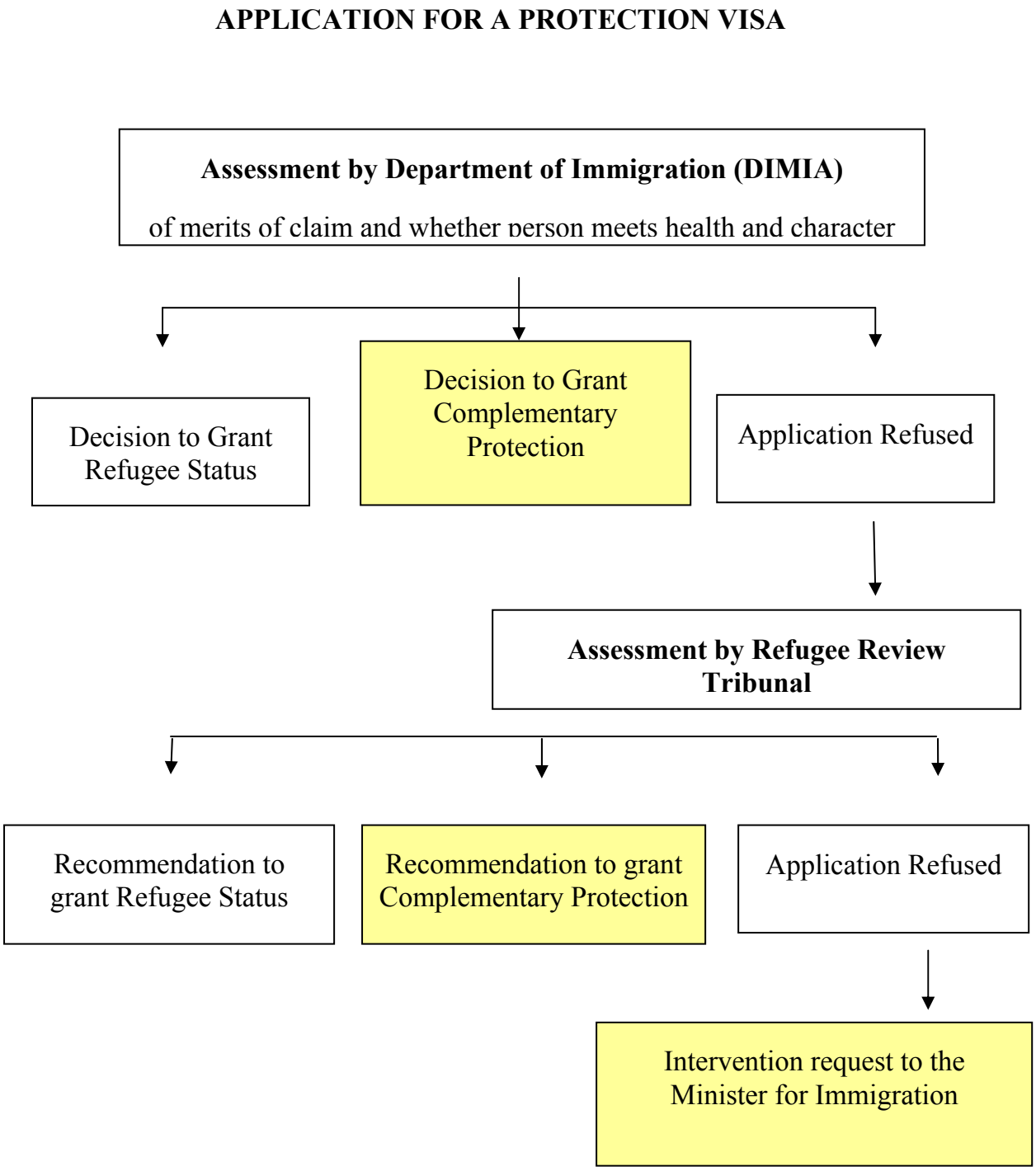
I believe this model deserves serious consideration on the part of the government. Adopting such a model will ensure that Australian policy is consistent with not only internationally recognised best practice but also an Australian Government commitment to the framework document *Agenda for Protection*[7] which was adopted by the Executive Committee of the UNHCR in September 2001.

6 Additional information, Refugee Council of Australia, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004, pp.2–3

7 *Agenda for Protection.* from http://www.unhcr.ch

Figure 1: Proposed Model of Complementary Protection

(Refugee Council of Australia)



The UNHCR also presented a compelling case for the adoption of a system of complementary protection, one that would overcome some of the problems that beset the government's current policy towards people who fall outside the Refugee Convention. The UNHCR told the Committee:

> This approach would ensure that key concerns—such as the threat of torture, the rights of children, or the non-returnability of a stateless person—are dealt with … certainty and clarity from the outset, rather than relying on a non-compellable, non-reviewable executive power at the very end of the process. UNHCR believes that this is a better risk management and more humanitarian approach which would avoid prolonged detention and prevent any chance of people being refouled without these issues being raised and considered properly.[8]

The UNHCR advised the Committee that in 2002 it had requested the Government to provide complementary forms of protection to all Afghans and, more recently, to all Iraqis seeking refugee status 'because we know that even rejected Iraqis cannot be returned at present—certainly not in large numbers'. The UNHCR clarified its position by stating that complementary protection should only be temporary: 'We review the situation in principle in the countries of origin every six months and we brief the government on what our view is of the situation'.[9] In addition: 'For a complementary form of protection, we certainly would not suggest that the traditional rights that we would request be granted to convention refugees be applied'.[10] In other words, the UNHCR is proposing a flexible solution that would be able to respond to changing circumstances in countries of origin as required.

In addition to the above proposals, there are a number of other options that should be noted. HREOC advised the Committee that all models of complementary protection should at the very least incorporate the following three features:

- clear criteria setting out when a person should be protected from non-refoulement under the ICCPR, CROC and CAT;
- procedures that protect against errors in applying that criteria (due process); and
- mechanisms to implement Australia's protection obligations for those who meet the criteria (visas).

The CCJDP and the Uniting Church also advocate the introduction of a complementary protection scheme into Australian law based on the various refugee

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8 UNHCR, *Committee Hansard*, 18 November 2003, p.19

9 UNHCR, *Committee Hansard*, 18 November 2003, p.24

10 UNHCR, *Committee Hansard*, 18 November 2003, p.23

determination systems currently in operation in countries such as Canada, the Netherlands, Sweden, Denmark, the UK and the US.[11] The Refugee Council of Australia points out that Denmark and Sweden have comprehensive legislation which recognises fully the protection need of certain groups of people who fall outside the terms of the Refugee Convention, but who have compelling humanitarian reasons to stay.[12]

The CCJDP argues that the government should seriously consider two options as a potential solution to the 'unaccountable', 'vague' and 'unwieldy' mechanism embodied in section 417.[13] The first involves the introduction of a new humanitarian visa class which would have at least two distinct advantages over the current sole reliance on the section 417 discretionary powers:

- it would remove the administrative burden, inconsistency and arbitrary decision making inherent in the section 417 powers by de-linking the compassionate and humanitarian program from the onshore refugee program; and

- it would preclude the continuation and use of section 417 in certain circumstances, and increase the discretion available to case managers and the RRT to deal with more humanitarian claims at a much earlier stage of the refugee determination process.

The second option would involve amending section 36 of the Migration Act to give DIMIA case officers and the RRT jurisdiction to grant protection visas to persons who meet the requirement for protection under the CAT, CROC and ICCPR. According to the CCJDP, this would enable decision makers at both the primary and merits review stages to consider relevant human rights conventions as well as the Refugee Convention, thus 'improving the criteria for their discretion, [saving] time, and [reducing] the number of cases currently made under s417'.[14]

The change would empower decision makers in much the same way as currently exists for temporary protection visas introduced in 2001. These visas which apply to those who fall under the umbrella of the Pacific Solution include criteria that are outside of the Refugee Convention.

I want to also note that DIMIA was unable to substantiate its claim that introducing special categories of visas will place considerable pressures on Australia's ability to protect its borders, and result in the Minister for Immigration losing his or her control

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11 CCJDP, Submission no. 15, pp.19–21; Uniting Church of Australia, Submission no. 19, p.5

12 Refugee Council of Australia, Submission no. 12, Appendix A, p.2

13 CCJDP, Submission no. 15, p.22

14 CCJDP, Submission no. 15, p.19

of the migration determination process. This claim is simply alarmist and exaggerated. In fact, other witnesses rejected these arguments outright. Dr Mary Crock, for example, told the Committee that:

> The criteria for the exercise of such powers can be articulated without opening the floodgates and [government] losing precious control of the migration process. The criteria are to be found in the human rights enshrined in international law…[15]

Whilst I remain supportive of the concept of ministerial discretion, various changes in circumstances and wide-ranging changes to Australia's Migration Act have left many thousands of people in a vulnerable position. Currently we face the prospect of those who were granted temporary protection remaining in an unprocessed state for months or maybe years to come. The situation is so dire that those who have argued ministerial discretion adequately meets these needs can no longer logically do so. The expense, inefficiency and the human costs of the current system make it absolutely necessary for steps to be taken to alleviate the problem.

I believe it is time that Australia accepted and acted upon its international obligations and joined the global community in offering protection to refugees for non-convention reasons. The concerns about the flaws and limitations of ministerial discretion have been raised before Senate Committees many times and outlined in previous reports, but have not been addressed by government. I therefore strongly urge the government to accept recommendation 17 of the Committee report and give priority to implementing a system of complementary protection in Australia.

Andrew Bartlett

Australian Democrats

15 Dr Mary Crock, Submission no. 34, p.4

Appendix 1

List of Submissions, Additional Information and Tabled Documents

Submissions

1. Dr Andreas Schloenhardt
2. Confidential
3. Confidential
4. Mr Paul Fergus
5. Ms Sue Hoffman
6. Christopher Levingston & Associates
7. Australian Political Ministry Network
8. A Just Australia
9. the Coalition for Asylum seekers, Refugees and Detainees (CARAD (WA Inc))
10. Ms Johanna Stratton
11. Migration Review Tribunal and Refugee Review Tribunal

11a. Migration Review Tribunal and Refugee Review Tribunal (Supplementary Submission)

11b. Migration Review Tribunal and Refugee Review Tribunal (Supplementary Submission)

12. Refugee Council of Australia
13. Human Rights and Equal Opportunity Commission

13a. Human Rights and Equal Opportunity Commission (Supplementary Submission.

14. Mr Clive Troy
15. Catholic Commission for Justice Development and Peace, Melbourne

16. Mr George Lombard

16a. Mr George Lombard (Supplementary Submission)

16b. Mr George Lombard (Supplementary Submission) (Confidential)

17. Legal Aid New South Wales

17a. Legal Aid New South Wales (Supplementary Submission)

18. Law Society of New South Wales

19. UnitingJustice Australia

19a. UnitingJustice Australia (Supplementary Submission)

19b. UnitingJustice Australia (Supplementary Submission)

19c. UnitingJustice Australia (Supplementary Submission) (Confidential)

19d. UnitingJustice Australia (Supplementary Submission) (Confidential)

20. Mr Michael Clothier

21. The South Brisbane Immigration and Community Legal Service Inc

22. Immigration Advice & Rights Centre

23. Amnesty International Australia

23a. Amnesty International Australia (Supplementary Submission)

24. Department of Immigration and Multicultural and Indigenous Affairs

24a. Department of Immigration and Multicultural and Indigenous Affairs (Supplementary Submission 15 September 2003)

24b. Department of Immigration and Multicultural and Indigenous Affairs (Supplementary Submission 19 September 2003)

24c. Department of Immigration and Multicultural and Indigenous Affairs (Supplementary Submission 23 September 2003)

24d. Department of Immigration and Multicultural and Indigenous Affairs (Supplementary Submission 9 October 2003)

24e. Department of Immigration and Multicultural and Indigenous Affairs (Supplementary Submission 16 October 2003)

24f. Department of Immigration and Multicultural and Indigenous Affairs (Supplementary Submission 31 October 2003)

24g. Department of Immigration and Multicultural and Indigenous Affairs (Supplementary Submission 12 November 2003)

24h. Department of Immigration and Multicultural and Indigenous Affairs (Supplementary Submission 14 November 2003)

24i. Department of Immigration and Multicultural and Indigenous Affairs (Supplementary Submission 5 December 2003)

24j. Department of Immigration and Multicultural and Indigenous Affairs (Supplementary Submission 15 January 2004)

25. Name Withheld

26. Mr David Bitel, Parish Patience Immigration Lawyers

26a. Mr David Bitel, Parish Patience Immigration Lawyers (Supplementary Submission)

27. Vietnamese Community in Australia

28. The Commonwealth Ombudsman

28a. The Commonwealth Ombudsman (Supplementary Submission)

29. Coalition for the Protection of Asylum Seekers

29a. Coalition for the Protection of Asylum Seekers (Supplementary Submission)

29b. Coalition for the Protection of Asylum Seekers (Supplementary Submission)

29c. Coalition for the Protection of Asylum Seekers (Supplementary Submission) (Confidential)

29d. Coalition for the Protection of Asylum Seekers (Supplementary Submission) (Confidential)

30. Ms Jennifer Burn

31. Mr Sergey and Mrs Olga Dranichnikov

32. Migration Institute of Australia

32a. Migration Institute of Australia (Supplementary Submission)

33. Administrative Review Tribunal

34. Dr Mary Crock

34a. Dr Mary Crock (Supplementary Submission)

35. Jane McAdam

36. UNHCR Regional Office – Canberra

37. Migration Agents Registration Authority

37a. Migration Agents Registration Authority (Supplementary Submission) (Confidential)

37b. Migration Agents Registration Authority (Supplementary Submission)

38. Southern Communities Advocacy and Legal Education Services (SCALES) and Murdoch University

39. Ms Tamara Cole

40. Ms Debby Nicholls

41. Ms Gilda Ponferrada

42. Ms Rebecca Blaxland

43. Office of the Federal Privacy Commissioner

Additional Information

Department of Immigration and Multicultural and Indigenous Affairs, Additional information received 4 and 5 September 2003

Department of Immigration and Multicultural and Indigenous Affairs, Correspondence of 12 December 2003

Ministerial Discretion in Migration Matters, Brief prepared for Senate Select Committee on Ministerial Discretion in Migration Matters, Department of the Parliamentary Library, September 2003

Complementary Protection: The way ahead, Paper submitted by the Refugee Council of Australia, January 2004

Tabled Documents

22 September 2003

Photos of Buddhist monastery, Galston, tabled by Mr Clive Troy

23 September 2003

Video of *Lateline* segment, "Sex Slave Trade in Australia", October 2000, tabled by Dr Graham Thom, Amnesty International

Committee to Advise on Australia's Immigration Policies, *Immigration: A Commitment to Australia—Legislation* (1988), tabled by Dr Mary Crock

Daniel Kanstroom, "Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law", *Tulane Law Review* Vol.71, p.703, tabled by Dr Mary Crock

21 October 2003

Photo of children at Baxter immigration detention centre, tabled by Mr Howard Glenn, A Just Australia

Appendix 2

Public Hearings

Friday, 5 September 2003 – Canberra

Department of Immigration and Multicultural and Indigenous Affairs

Ms Philippa Godwin, Deputy Secretary

Mr Peter Hughes, First Assistant Secretary, Refugee, Humanitarian and International Division

Mr Abul Rizvi, First Assistant Secretary, Migration and Temporary Entry Division

Mr Des Storer, First Assistant Secretary, Parliamentary and Legal Division

Mr Robert Illingworth, Assistant Secretary, Onshore Protection Branch

Mr Douglas Walker, Assistant Secretary, Visa Framework Branch

Mr Frank Johnston, Director, Special Residence Section

Mr Nick Nicholls, State Director, Department of Immigration and Multicultural and Indigenous Affairs, New South Wales

Mr Peter Knobel, Departmental Liaison Officer, Minister's Office

Mr Michael Christopher, former Departmental Liaison Officer, Minister's Office

Ms Johanna Stratton (Private capacity)

Monday, 22 September 2003 – Sydney

Refugee Review Tribunal and Migration Review Tribunal

Mr Steve Karas OAM, Principal Member

Mr John Blount, Deputy Principal Member

Mr John Lynch, Registrar

Legal Aid Commission of New South Wales

Ms Teena Balgi, Legal Officer

Ms Elizabeth Biok, Legal Officer

Immigration Advice and Rights Centre

Ms Judith Burgess, Solicitor and Registered Migration Agent

George Lombard Consultancy Pty Ltd

Mr George Lombard, Principal

Mr Nico Federmann, Research Officer

Christopher Levingston and Associates

Mr David Prince, Associate

Migration Institute of Australia

Ms Laurette Chao, National President

Mr Arnold Conyer, NSW State President

Mr Clive Troy (Private capacity)

Tuesday, 23 September 2003 – Sydney

Amnesty International Australia

Dr Graham Thom, Refugee Coordinator

Mr Alistair Gee, Member, National Refugee Team

Dr Mary Crock (Private capacity)

Ms Jennifer Burn (Private capacity)

Department of Immigration and Multicultural and Indigenous Affairs

Ms Philippa Godwin, Deputy Secretary

Mr Robert Illingworth, Assistant Secretary, Onshore Protection Branch

Ms Louise Lindsay, New South Wales Manager, Onshore Protection Branch

Mr Nick Nicholls, State Director, Department of Immigration and Multicultural and Indigenous Affairs, New South Wales

Mr Douglas Walker, Assistant Secretary, Visa Framework Branch.

Tuesday, 21 October 2003 – Sydney

UnitingJustice Australia

Reverend Elenie Poulos, National Director

Mr Grant Mitchell, Project Coordinator, Asylum Seeker Project, Hotham Mission

A Just Australia

Mr Howard Glenn, National Director

South Brisbane Immigration and Community Legal Service

Mr Clyde Cosentino, Caseworker

Parish Patience Immigration Lawyers

Mr David Bitel, Managing Partner

Wednesday, 23 October 2003 – Sydney

Migration Review Tribunal and Refugee Review Tribunal

Mr Steve Karas OAM, Principal Member

Mr John Blount, Deputy Principal Member

Mr John Lynch, Registrar

Migrations Agents Registration Authority

Mr David Mawson, Executive Officer

Mr David Moss, Member

Human Rights and Equal Opportunity Commission

Mr Stephen Duffield, Manager, Human Rights Unit

Ms Vanessa Lesnie, Senior Policy Officer

Ms Susan Newell, Policy/Research Officer

Coalition for the Protection of Asylum Seekers

Ms Frances Milne, Convenor

Mr Paul Fergus (Private capacity)

Monday, 17 November, 2003 – Sydney

Department of Immigration and Multicultural and Indigenous Affairs

Ms Philippa Godwin, Deputy Secretary

Mr Robert Illingworth, Acting GFirst Assistant Secretary, Refugee, Humanitarian and International Division

Ms Louise Lindsay, New South Wales Manager, Onshore Protection

Mr Nick Nicholls, State Director, Department of Immigration and Multicultural and Indigenous Affairs, New South Wales

Mr Douglas Walker, Assistant Secretary, Visa Framework Branch

Catholic Commission for Justice, Development and Peace

Mr Marc Purcell, Executive Officer

Refugee Council of Australia

Mr David Manne, Board Member and Coordinator, Refugee and Immigration Legal Centre

Mr Bruce Haigh (Private capacity)

Tuesday, 18 November, 2003 – Canberra

Office of the Commonwealth Ombudsman

Professor John McMillan, Commonwealth Ombudsman

Mrs Rosemarie Hawke, Senior Investigation Officer

United Nations High Commissioner for Refugees

Mr Michel Gabaudan, Regional Representative

Mr Alvin Gonzaga, Legal Officer

Mrs Ellen Hansen, External Relations Officer

Mr Roberto Mignone, Deputy Regional Representative

Mr Michael Clothier (Private capacity)

Ms Marion Le (Private capacity)

Department of Immigration and Multicultural and Indigenous Affairs

Ms Philippa Godwin, Deputy Secretary

Mr Robert Illingworth, Acting First Assistant Secretary, Refugee, Humanitarian and International Division

Mr Frank Johnston, Director, Special Residence Section, Migration Branch, Migration and Temporary Entry Division

Mr Abul Rizvi, First Assistant Secretary

Mr Des Storer, First Assistant Secretary, Parliamentary and Legal Division

Mr Douglas Walker, Assistant Secretary, Visa Framework Branch

Appendix 3

Sections 351 and 417 of the *Migration Act 1958*

351 Minister may substitute more favourable decision

(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 349 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

(2) In exercising the power under subsection (1), the Minister is not bound by Subdivision AA or AC of Division 3 of Part 2 or by the regulations, but is bound by all other provisions of this Act.

(3) The power under subsection (1) may only be exercised by the Minister personally.

(4) If the Minister substitutes a decision under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the decision of the Tribunal; and

(b) sets out the decision substituted by the Minister; and

(c) sets out the reasons for the Minister's decision, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement made under subsection (4) is not to include:

(a) the name of the applicant; or

(b) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in anyway with the matter concerned – the name of that other person.

(6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the decision is made between 1 January and 30 June (inclusive) in a year – 1 July in that year; or

(b) if a decision is made between 1 July and 31 December (inclusive) in a year – 1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

417 Minister may substitute more favourable decision

(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

(2) In exercising the power under subsection (1) on or after 1 September 1994, the Minister is not bound by Subdivision AA or AC of Division 3 of Part 2 or by the regulations, but is bound by all other provisions of this Act.

(3) The power under subsection (1) may only be exercised by the Minister personally.

(4) If the Minister substitutes a decision under subsection (1), he or she must cause to be laid before each House of the Parliament a statement that:

(a) sets out the decision of the Tribunal; and

(b) sets out the decision substituted by the Minister; and

(c) sets out the reasons for the Minister's decision, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement made under subsection (4) is not to include:

(a) the name of the applicant; or

(b) any information that may identify the applicant; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned - the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the decision is made between 1 January and 30 June (inclusive) in a year - 1 July in that year; or

(b) if a decision is made between 1 July and 31 December (inclusive) in a year - 1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

Appendix 4

Correspondence with Senator Vanstone and DIMIA over requests for case file and other information

SUMMARY OF CASE FILE AND RELATED INFORMATION REQUESTED FROM DIMIA

Date of request	Information requested
23 September 2003, public hearing	Case files involving Mr Karim Kisrwani and a registered migration agent such as Marion Le
16 September 2003, correspondence	Case files for cases supported by the 'top ten' sponsors in each group (parliamentarian and individual/ community organisation)
15 October 2003, correspondence	Notebooks recording telephone conversations kept by Mr Peter Knobel and other DLOs serving in Mr Ruddock's office
29 October 2003, correspondence	Case histories of the 17 cases referred to in Mr Ruddock's letter to Ms Gillard of 16 June 2003. (Cases in which Mr Kisrwani was suspected to have made representations on behalf of a ministerial intervention applicant)
11 November 2003, correspondence	Case histories of cases other than the East Timorese cases where Mr Ruddock used the intervention power during his last week as immigration minister
11 November 2003, correspondence	Case histories of cases where Mr Ruddock intervened after requesting a full submission on a scheduled case
17 November 2003, public hearing	Repeat request for case histories where Mr Ruddock requested a full submission on a scheduled case
18 November 2003, public hearing	Information on the cases of Ibrahim Sammaki and Bedweny Hbeiche
11 February 2004, correspondence	Case files of four cases where Mr Ruddock intervened after representations by Mr Fahmi Hussain

AUSTRALIAN SENATE

SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

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27 October 2003

Senator the Hon Amanda Vanstone
Minister for Immigration and Multicultural
and Indigenous Affairs
Parliament House
CANBERRA ACT 2600

Dear Senator Vanstone

On behalf of the Senate Select Committee on Ministerial Discretion in Migration Matters I congratulate you on your recent appointment as Minister for Immigration and Multicultural and Indigenous Affairs. As you are no doubt aware, the Senate established this Select Committee to inquire and report on the use, operation and appropriateness of the Ministerial discretion powers under sections 351 and 417 of the *Migration Act 1958*. As the new Minister for Immigration in whom these powers are vested, the Committee invites you to express your views on their use and operation.

In particular, the Committee seeks answers to the following questions:

- What are your intentions with regard to exercising the discretionary powers under sections 351 and 417 of the *Migration Act 1958*?
- In light of the recent controversy, do you intend conducting an independent inquiry into past use of the powers?
- Do you intend instituting new processes and/or guidelines for departmental officials on the use of the powers?
- Do you intend to conduct a broader examination of the appropriateness of these powers in the Act in light of evidence presented to this Committee to date?

I hope that you will take this opportunity to state your views for the record and indicate what approach you will take in your personal use of these powers.

Yours sincerely

Joseph Ludwig
Chair

DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

Deputy Secretary

Senator Joe Ludwig
Chair
Select Committee on Ministerial Discretion
in Migration Matters
Parliament House
CANBERRA ACT 2600

Dear Senator Ludwig

Inquiry into Ministerial Discretion in Migration matters

Thank you for your letter of 28 October 2003, advising me of the Committee's intention to table a report by the end of February 2004 and seeking this Department's continuing cooperation in providing information to assist the Committee's inquiry.

The Department is continuing to assign considerable resources to responding to the Committee's requests for information in as thorough a manner as possible. I note that in separate correspondence the Secretariat has outlined its understanding of the questions still to be answered, and has asked the Department to provide those by noon on 12/11/03. This includes all the questions taken on notice at the hearing on 23/9, as well as a number of written questions on notice submitted to the Department.

I have enclosed the answers to those questions submitted prior to the public hearing on 23 September i.e. the remaining question taken on notice at the public hearing on 5 September as well as the 2 questions emailed to Andrew Endrey on 16 September (now referred to as set O). We are also working to provide answers to the remaining questions, including another group of questions submitted on 29 October, by 12 November as requested. However, if there is any indication that we will not be able to meet this deadline for any of the questions we will advise the Secretariat as soon as possible.

You also refer to your particular interest in your "request for documentation demonstrating (the) Department's processes in handling ministerial intervention requests made at the public hearing on 23/9/03". While this is one of the questions included in the group to be answered by 12 November, I understand that you are keen to have some indication of the Department's views on this as soon as possible.

DIMIA

Benjamin Offices, Chan Street Belconnen ACT 2617
PO Box 25 Belconnen ACT 2616 • Telephone (02) 6264 2522 • Facsimile (02) 6264 2670

I have considered the request carefully, but must advise that the provision of personal files presents considerable difficulties.

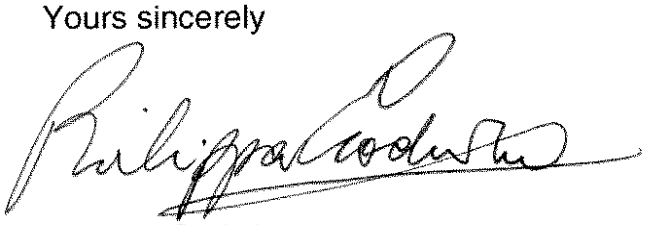
First, there are significant workload implications. The Department has examined the resource implications of providing case files in all cases where Mr Kisrwani and Ms Le made requests for intervention, as you requested at the public hearing on 23 September, 2003. Once the files have been obtained, it is estimated that it would take in the order of 120 person days to prepare the files for the Committee's perusal. This estimate is based on a total of 75 cases, averaging 2 files per case (approximately 150 files) and 150 folios (or pages) per file. We estimate that each file will require 6 hours work for identification of, and consultation in relation to, any privacy and other potential public interest immunity or legal issues, file preparation copying and file management.

Secondly, apart from the workload implications, the Department has some broader concerns about the provision of files. I have not been able to identify any precedent for a request of this nature. The files relate to individuals who are not themselves the subject of the Inquiry. As with all visa applicants the subjects of the files were assured that the personal details they provided to the Department in relation to their applications would not be used or disclosed except for certain purposes, which do not include the purpose now proposed. There is a point of principle as to whether it is fair to breach the legitimate expectation of the individual concerned about how their personal information would be dealt with by the Department.

In view of the very significant workload and other issues that this request raises, I do not believe the provision of the individual case files is appropriate. However, I recognise that the Committee is keen to fully understand the department's processes in handling ministerial intervention requests and has sought the Department's co-operation in the provision of case studies. To assist the Committee, the Department is proposing to construct a series of case studies taken from a sample of actual files. The case studies would be anonymous - that is, they would not name the individual applicant(s) or anyone else referred to in the file - but would trace, folio by folio, the processing of the case to the point of Ministerial intervention. So that the Committee can see what such a case study would look like, we are proposing to provide 2 or 3 case studies to the Secretariat as soon as possible.

I assure you that the Department is continuing to make every effort to provide information that will most usefully assist the Committee. Should you wish to do so, I would be pleased to discuss any of these matters with you and/or the Secretariat. I can be contacted on 62642522.

Yours sincerely



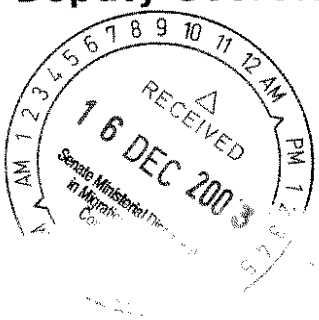
Philippa Godwin

31 October 2003

Australian Government

Department of Immigration and Multicultural and Indigenous Affairs

Deputy Secretary



Senator Joe Ludwig
Chair
Select Committee on Ministerial Discretion in Migration Matters
Parliament House
CANBERRA 2600

Dear Senator Ludwig

I am writing further to our meeting at Parliament House on 27 November 2003 with regard to this Department's continuing cooperation in providing information to assist the Committee's Inquiry into Ministerial Discretion in Migration Matters.

2. At that meeting you advised revised requirements in relation to a number of questions. Mr Storer and I agreed that the Department would conduct a scoping exercise in respect of the case information requested by the Committee to ascertain timeframes, resource demands, and other considerations involved in responding to the request.

3. Despite this further refinement of the Committee's requirements, there remain around 130 cases requested. In respect of each of these cases you have asked for either the complete file or for detailed case chronologies with some documents. We have assessed it would require an average of one person day of work per case to prepare the material the Committee has requested. For the current DIMIA team of five officers, on the most conservative estimate the task would take around 5 weeks to complete. Adding to this timeframe elapsed time for gathering together the files from their current locations, public holidays and staff absences on leave over the Christmas/New Year period, as well as legal and clearance processes, we estimate that it would take 8 to 10 weeks for the information to be ready for presenting to the Committee.

4. A substantial amount of work therefore would still be required to supply even this reduced amount of material. In addition, the nature of the requests for this information raises a number of concerns. I am advised that the requests are unprecedented, and have implications going well beyond this particular Inquiry. They raise, in particular, privacy concerns, given that the files and/or case chronologies the Committee has requested relate to individuals who are not themselves the subject of the Inquiry.

5. We have therefore consulted the Minister's office. In view of the considerable workload implications and unprecedented nature of the request, the Minister, Senator

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Vanstone has not authorised the Department to provide such a broad ranging and significant amount of personal material.

6. You have indicated that you are looking for information which would assist the Committee to understand the way in which a case moves through the process leading up to a decision by the Minister to intervene under s351 or s417. In order to assist the Committee, the Minister has agreed that the Department provide to the Committee 10 – 12 case studies. The case studies would be randomly selected, and would be based on the information you have sought in relation to Q.T4, but would not include any material which would identify the person whose file it is.

7. Based on the estimated timeframes outlined above, we would expect to be able to have these case studies prepared for forwarding to the Committee by Friday 19 December.

8. If it would assist the Committee, I would be pleased to discuss any of these matters with you or the Secretariat. I can be contacted on (02) 6264 2522.

Yours sincerely

Philippa Godwin

12 December 2003

Australian Government

Department of Immigration and Multicultural and Indigenous Affairs

Senator Joe Ludwig
Chair
Select Committee on Ministerial Discretion in
Migration Matters
Parliament House
CANBERRA 2600

Dear Senator Ludwig

Please find enclosed 14 case studies provided in the format advised in Ms Godwin's letter of 12 December 2003.

2. Also enclosed are responses to Questions on Notice:

- **U** - Intervention requests by Mr Fahmi Hussain;
- **V** - Individuals about whom further information was requested at the Public Hearing of 18 November 2003;
- **W** - Representational Allowance to return hospitality;
- and to Questions on Notice taken at the 17 and 18 November 2003 hearings.

3. In the course of preparing a response to **V** above we have been advised by our Special Counsel (AGS) that in regard to detailed information on Mr HBEICHE and Mr SAMMAKI we would need to seek their permission to release such information to your Committee.

4. We are therefore in the process of contacting these two individuals to gain their permission. Once permission is received we will forward the information.

Yours sincerely

Des Storer

Des Storer
First Assistant Secretary
Parliamentary and Legal Division

14 January 2004

Sen the Hon Amanda Vanstone

Minister for Immigration and Multicultural and Indigenous Affairs

Minister Assisting the Prime Minister for Reconciliation

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2 3 JAN 2004

Senator Joe Ludwig
Chair
Select Committee on Ministerial Discretion in
Migration Matters
Parliament House
CANBERRA ACT 2600

Dear Senator Ludwig Joe

I have been informed that your Committee has been seeking to obtain copies of the notebooks maintained by the Departmental Liaison Officers (DLOs) who worked in my predecessor's office and currently work in my office, that contain records of some of the phone calls made to the Minister's office over past years.

I am concerned at the broad nature of the request, which I am advised is unprecedented. In my own experience I cannot recall the Senate making such a request. It has implications going well beyond this particular inquiry.

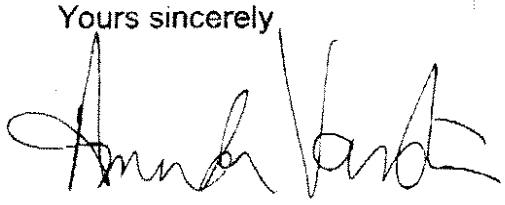
In considering your request, it may be helpful if I outline what is actually recorded in the notebooks. I am advised that, just as occurred in my predecessor's office, there are hundreds of phone calls made to my office each week. These phone calls from the public, Members of Parliament and electorate offices, are extremely diverse, covering a myriad of topics across all areas of the portfolio. Many callers seek information, others seek advice, others might phone to offer views or criticism. The majority of the phone calls coming into the office are handled by the DLOs. Comparatively, only a few are phone calls related to requests for Ministerial intervention.

In responding to phone calls, DLOs may be able to deal with the queries 'on the spot' without making any record. On other occasions, where some follow up is necessary, the phone number may be recorded in the notebooks as an aide memoire, but in many cases they do not provide details about the context of the calls, or information, even on the subject matter of the calls. Without such contextual information, the notebooks would not in my view be helpful to your Committee and could in fact give quite misleading impressions.

Further, given that the vast majority of calls received and noted by DLOs in the notebooks have not been about Ministerial intervention issues, but instead have related to people whose affairs are right outside the scope of the inquiry, it is therefore completely inappropriate to pass on this information in this fashion. In addition, even in matters that may touch on Ministerial intervention, I do not believe it is consistent with normal privacy principles to pass on information in relation to specific individuals without first seeking their approval.

For these reasons, I have decided to not accede to your request to obtain the notebooks. If, however, the Committee has a particular point or question that may be clarified by checking whether there is a specific entry in the notebooks, I could facilitate the checking of such a specific request.

Yours sincerely



AMANDA VANSTONE

AUSTRALIAN SENATE

SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

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11 February 2004

Senator the Hon Amanda Vanstone
Minister for Immigration and Multicultural
and Indigenous Affairs
Parliament House
CANBERRA ACT 2600

Dear Senator Vanstone

I am writing on behalf of the Committee in response to your letter of 23 January 2004 regarding the Committee's request for copies of the notebooks of Departmental Liaison Officers who worked in your predecessor's office and who work currently in your office. I am also writing in relation to a letter of 12 December 2003 from Ms Godwin, Deputy Secretary in DIMIA, regarding the Committee's attempts to obtain case files relating to its inquiry. A copy of Ms Godwin's letter is attached.

In your letter you cite the 'broad' and supposed 'unprecedented' nature of the request, the lack of contextual material in the notebooks which could lead to misleading impressions and privacy concerns as grounds for refusing to provide the notebooks to the Committee. Ms Godwin cites similar grounds in her letter before stating that you have not authorised the department to provide the Committee with case files. Ms Godwin also refers to workload implications as a further ground for not providing this information.

In the first instance, you would be aware that the Committee has the general power, delegated by the Senate, to order the production of documents for the purposes of the

Committee's inquiry. There are no limitations in law to this power, nor are there any other constraints relevant to the Committee's purpose in requesting the above information.

With respect to the grounds you and the department cite, it is important that I draw your attention to the following general principles and points:

- As you would know, it is common for committees to require large amounts of documents and information for the purposes of their inquiries, not least because the terms of reference for those inquiries are broadly defined. This is the case in relation to the Committee's inquiry.

- There are numerous precedents of committees asking for documents similar to DLO notebooks that relate to the records of office transactions. The Senate itself has on several occasions required the production of file notes, diary entries, notes of conversations, minutes of meetings and so on, and such documents have been provided.

- It is for the Committee to determine whether any information before it is helpful for the purposes of the inquiry. Equally, it would be open to the Committee to request additional 'contextual' information if this were needed to clarify any matter.

- In relation to the issue of privacy for third parties who you and the department say are not in themselves the subject of this inquiry, it is up to the Committee in the first instance to determine what is and is not relevant to its inquiry. Secondly, neither the Senate nor its committee are bound by privacy legislation or privacy principles, but may choose to respect them in practice (a point I return to below). I should also note that this issue was raised during the Senate Legal and Constitutional Affairs Committee's inquiry into Australia's refugee and humanitarian determination processes. The *Sanctuary Under Review* report found that:

  > Although the Committee agrees that certain papers, including medical records of individuals should be protected on the grounds of privacy, it nonetheless notes that Parliamentary privilege can override such considerations.

- As for the workload implications Ms Godwin cites, the Committee notes that it has already made significant concessions to accommodate these concerns. In so doing the Deputy Chair, Senator Santoro, and I met with Ms Godwin and another senior departmental officer to refine the Committee's request and attempt to address the department's concerns. At that meeting, I indicated that the Committee would also consider requests from the department to omit certain categories of sensitive information.

It is important that I explain the reasons for the Committee's request for this information. You would no doubt be aware of the allegations aired in parliament and the media last year about a number of individual cases involving use of the ministerial discretion powers. Without examining the actual case files of certain individuals to understand all the circumstances leading to a ministerial intervention, the Committee will be in no way

able to allay the doubt and suspicion that has arisen about the way these powers may have been used. The same applies to the records of ministerial office transactions with other parties.

In short, the Committee considers that the information it has requested is essential if it is to address fully the issues referred to it by the Senate, particularly those that relate to the operation of discretionary powers available under sections 351 and 417 of the Migration Act and the criteria and other considerations applied where those powers have been exercised.

In view of the above, I am writing to you directly to request that you reconsider your decision in relation to providing the Committee with the DLO notebooks and case files. A list of the case files that the Committee requests is attached. Taking into account the department's advice on the time estimated to prepare the documents, the Committee would hope to receive the information by no later than 19 March 2004.

In making this request, the Committee recognises that these documents may contain sensitive personal information that is not directly relevant to its inquiry and it does not wish to intrude unduly on the private affairs of individuals. The Committee has agreed that it will not consider anything in the documents that is not relevant to the inquiry and will ensure that any such material is not disclosed.

I would be grateful if you would address the Committee's request as a matter of urgency. I am happy to discuss it with you if required.

Yours sincerely

Joseph Ludwig
Chair

SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

Case file information requested from DIMIA

The following represents the case file information the Committee has requested the department provide to the inquiry. It is organised by category or the date on which the information was requested and reproduces the original question where relevant.

Question on notice from 23 September 2003 (Chair, pp.42-45): Files where Karim Kisrwani and Marion Le made representations.

Will the Department provide case files for the Committee to examine that clearly demonstrate the correspondence and other associated processes including the contents of the orange briefing folders provided to the Minister? It would be particularly useful to obtain files involving both a registered migration agent and a non-agent, such as Karim Kisrwani and Marion Le.

It would be helpful to see examples of:
- Cases assessed by the department as not meeting the public interest guidelines and placed on a schedule
- Cases assessed as meeting the guidelines, including the submission prepared for the Minister; and
- Cases not initially referred by the department to the Minister but where the Minister has requested a submission.

S2. Case histories of the 17 cases referred to in Mr Ruddock's letter to Ms Gillard

With reference to the letter from the Minister Ruddock to the Shadow Minister for Immigration and Aboriginal and Indigenous Affairs, 16 June 2003, please provide by reference to DIMIA file numbers only:

(i) the RRT/MRT outcome in relation to each file;
(ii) the outcome of the Minister's consideration pursuant to s.351 or s.417, and the date of the Minister's decision;
(iii) an indication of whether the case at any stage was assessed by DIMIA officers as falling outside the Minister's Guidelines;
(iv) the date of such assessment;
(v) the date on which each case was first referred to the Minister's office, and an indication of whether at that stage the case was a scheduled case (assessed outside the Guidelines) or a full submission
(vi) the date on which the file was the subject of a submission (other than on the schedule) to the Minister's office;

(vii) details of the requests by the Minister's office for a submission in relation to any of the files, as referred to in the letter, including the date, and any documentary record, of such request;
(viii) details of the date(s) and nature of the contact with Mr. Kisrwani referred to in the letter; and
(ix) copies of any correspondence or other documentation evidencing such contact.

T4. Cases other than East Timorese cases where Minister Ruddock intervened in October 2003

At the Legal and Constitutional Committee estimates hearing on 4 November 2003 the department provided figures for Mr Ruddock's use of the s351 and s417 powers from 1 to 6 October 2003 as 65 and 138 respectively. From these figures can you identify how many cases are East Timorese. For those which are not East Timorese can you provide an outline of the case history, including:

(i) nationality of the applicant

(ii) a timeline of the application process including processing of the ministerial intervention request subsequent to the review tribunal decision

(iii) details of decisions made by departmental officials and review tribunals

(iv) whether the case was assessed by the department as meeting the guidelines for ministerial intervention or placed on a schedule as outside the guidelines

(v) details of any communication from the Minister or his office regarding the case

(vi) names of any persons who made representations on behalf of the applicant

The Committee also requests case files where representations have been made by one of the following:

- Mr Karim Kisrwani
- Gateway Pharmaceuticals
- Mr Ross Cameron
- Mr Tony Abbott
- K C Partners

T5. Cases where the Minister requested a full submission on a scheduled case.

Can the department provide a list of the 105 cases where the Minister requested a full submission on a scheduled case, indicating which of those cases received ministerial intervention? For those cases where the Minister intervened after requesting a submission, can the department provide a brief case history covering the points in T3?

O1. Case files for top ten sponsors in each group

In addition to the approval rates for the top ten sponsors in each group, can the Department provide the dates on which approval was granted? Can the Department provide the files for these cases?

Question on notice from public hearing on 17 November 2003 (Senator Wong, p.12): Cases where the Minister has requested a full submission on a scheduled case.

In respect of the files you have identified where the department has assessed them as being outside the ministerial guidelines and the minister has requested a full submission nonetheless, I am going to ask you to provide the following information: the RRT and MRT outcome in relation to each file; the outcome of the minister's consideration pursuant to section 351 or section 417 and the date of that decision; the date of the initial assessment of the file as falling outside the ministerial guidelines; the date on which the full submission was requested; details of any persons making representations on behalf of the applicant…In respect of the last issue, can you also provide the date on which the third party representations were made.

Individuals about whom further information was requested at public hearing on 18 November 2003

Ibrahim SAMMAKI – requested clarification of the steps leading to ministerial intervention in this case (Chair, Hansard pp.76-80)

Bedweny HBEICHE – requested further information on the steps leading to ministerial intervention (Chair, Senator Wong, Hansard pp.80-90, pp.96-97)

U. Questions about Mr Fahmi Hussain

In its answers of 14 January 2004, the department reported that former Minister Ruddock intervened in four cases involving representations by Mr Fahmi Hussain, granting three visas under s351 and 1 visa under s417.

Please provide the case files for those four cases.

Sen the Hon Amanda Vanstone

Minister for Immigration and Multicultural and Indigenous Affairs

Minister Assisting the Prime Minister for Reconciliation

Parliament House, Canberra ACT 26

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2 March 2004

Senator Joe Ludwig
Chair
Select Committee on Ministerial Discretion in Migration Matters
Parliament House
CANBERRA ACT 2600

Dear Senator Ludwig

Thank you for your letter of 11 Feb regarding the request by your committee for access to the notebooks of Departmental Liaison Officers and case files.

First, I recognise the importance to the Committee of having access to a broad range of information in relation to the operation of the Ministerial intervention powers. It has been my intention throughout your inquiry that my department provide whatever assistance it reasonably can to the Committee. To this end, the Department has 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.

While I am anxious that my Department co-operate fully with the Committee in the provision of information, requests to provide the notebooks kept by DLOs and a large number of case files present me with very real concerns. I set out those concerns in relation to the notebooks in my letter to you of 23 January 2004, and Ms Godwin set out the concerns in relation to the case files in her letter of 12 December.

You have asked that I reconsider these decisions. It is important that you understand that I am not intent on refusing to provide the Committee with information, but I do not believe that it is appropriate to provide it in the way that it has been sought. In particular, I remain concerned that you are seeking such a broad ranging and significant amount of personal information in relation to individuals who are not themselves the subject of your inquiry. Your letter does not address the concerns that I raised and still hold about the unprecedented, broad ranging and open ended request for information.

However, I remain committed to co-operating with the Committee in its inquiry and I reiterate the offer made in my letter of 23 January. If the Committee has specific questions that may be clarified by reference to the notebooks or other documents that the Department holds, I could facilitate the checking of such a specific request.

Yours sincerely

AMANDA VANSTONE

Sen the Hon Amanda Vanstone
Minister for Immigration and Multicultural and Indigenous Affairs
Minister Assisting the Prime Minister for Reconciliation

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Senator Joseph Ludwig
Chair
Senate Select Committee on Ministerial Discretion in Migration Matters
Parliament House
CANBERRA ACT 2600

Dear Senator Ludwig Joe

Thank you for your letter of 27 October 2003 regarding the Senate Select Committee on Ministerial Discretion.

As you would recall, there was a significant level of interaction and correspondence between my Office and my Department and your Committee in the latter part of last year. Unfortunately, in that context, a specific response to your letter of 27 October was overlooked.

In my view, it was not appropriate then and nor is it now, for me to comment or speculate on the issues under ongoing consideration by your Committee.

I await with interest the outcomes of the Committee's deliberations on the matter.

Yours sincerely

Amanda Va

AMANDA VANSTONE

Appendix 5

Migration Series Instructions 386 and 387

Department of Immigration and Multicultural and Indigenous Affairs

MIGRATION SERIES INSTRUCTION

Instructions in this **Migration Series (MSIs)** relate to: the ***Migration Act 1958***; the ***Migration Regulations 1994*** and other related legislation [as amended from time to time].

MSIs are a temporary instruction format only; they are intended for ultimate incorporation into *PAM3.* It is the responsibility of the program area to ensure that the information in this MSI is up-to-date. It will be reviewed 12 months from date of issue but will remain current until formally replaced or deleted. For information on the status of this MSI see the latest **Instructions and Legislation Update** or contact Instructions and LEGEND Section (ILS).

MSI No.:	**File no.: 99/10635**	**No. of pages: 9**
Author Section:	**Special Residence / Protection Services**	
Date of issue:	[Refers to date of registration of the signed original instruction by Instructions and LEGEND Section (ILS).	
Title:	**GUIDELINES ON MINISTERIAL POWERS UNDER SECTIONS 345, 351,391, 417, 454 AND 501J OF THE *MIGRATION ACT 1958***	

This instruction replaces MSI 225.

THIS INSTRUCTION CONTAINS THE FOLLOWING LEGISLATIVE REFERENCES

***Migration Act 1958*:**	***Migration Regulations 1994*:**	**Other legislation:**
Sections 198, 345, 351, 391, 417, 454 and 501J.		*Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Covenant on Civil and Political Rights; Convention relating to the Status of Refugees, as amended by the Protocol relating to the Status of Refugees*.

Effect on other MSIs: **Replaces MSI 225**

Distribution: Release on LEGEND and paper distribution to overseas posts and limited outlets within Australia is managed by Information Distribution Section (IDS) and necessarily occurs after date of issue. MSIs are available for inspection and purchase at DIMIA Freedom of Information Units.

CONTENTS

1 PURPOSE OF THESE GUIDELINES

1.0.1 The purpose of these Guidelines is to:

- explain the circumstances in which I may wish to consider exercising my public interest powers under s 345, 351, 391, 417, 454 or 501J of the *Migration Act 1958* (the Act) to substitute for a decision of a review tribunal a decision which is more favourable to the visa applicant(s);
- explain how a person may request my consideration of the exercise of my public interest powers, and
- inform officers of the Department of Immigration and Multicultural and Indigenous Affairs when to refer a case to me so that I can decide whether to consider exercising such powers in the public interest.

2 THE POWERS AVAILABLE UNDER LEGISLATION

2.1 Public interest powers

2.1.1 Under s 345, 351, 391, 417, 454 and 501J of the Act, I have the power to substitute, for a decision made by one of the review tribunals, a decision that is more favourable to the visa applicant(s), if I consider it is in the public interest to do so. In this MSI, these powers are referred to as my public interest powers.

2.2 Review tribunals

2.2.1 These public interest powers are available in respect of decisions that have been taken by the following review tribunals:

- the former Migration Internal Review Office (MIRO - ceased operation on 31 May 1999);
- the former Immigration Review Tribunal (IRT - ceased operation on 31 May 1999);
- the Migration Review Tribunal (MRT - commenced operation on 1 June 1999);
- the Refugee Review Tribunal (RRT); and
- the Administrative Appeals Tribunal (AAT).

2.3 Powers are non-compellable

2.3.1 My public interest powers are *non-compellable*: that is, the powers are available to me, but under the legislation, I do not have a duty to consider whether to exercise those powers (see s 351(7) and 417(7)).

3 WHEN THE POWERS ARE NOT AVAILABLE

3.1 Only a more favourable decision

3.1.1 As my public interest powers only allow me to substitute a more favourable decision for a decision of one of the review tribunals (see 2.2.1 above), I am not able to use these powers until *after* a decision has been made by the relevant review tribunal.

3.2 When powers are not available

3.2.1 These public interest powers are not available:

- if the primary decision was not reviewable by the relevant tribunal, or
- if no review decision has been made, or
- if the review tribunal has made a decision to remit the matter to DIMIA and a departmental decision-maker has made a subsequent decision on the case;
  - in this situation, there is no longer a review decision available for me to substitute a more favourable decision.

if a decision is quashed or set aside by a Court and the case is remitted to the review decision maker to be decided again, I am not able to use my public interest powers. This is because there is no longer a review decision in existence for which I can substitute a more favourable decision.

3.3 When I consider a case "inappropriate to consider"

3.3.1 I consider the following types of cases inappropriate to consider:

- Cases where there is migration-related litigation that has not been finalised;
- Cases where there is another visa application concerning the subject of the review authority decision ongoing with my Department;
- Cases where there is an ongoing Ministerial request under a different public interest power;
- Cases where there has been a remittal or a set aside from a review authority; and
- Cases which were decided by MIRO and are now at the MRT.

3.3.2 Case officers should generally not bring these cases to my attention.

3.4 Court proceedings may affect use of public interest powers

3.4.1 Because it may affect the exercise of my public interest powers, case officers **must,** when referring a case to me, inform me of the commencement and outcome of Court proceedings challenging a decision in relation to any case that is being referred to me for possible consideration of my use of the public interest powers.

4 UNIQUE OR EXCEPTIONAL CIRCUMSTANCES

4.1 Public interest

4.1.1 The public interest may be served through the Australian Government responding with care and compassion where an individual's situation involves unique or exceptional circumstances. This will depend on various factors, which must be assessed by reference to the circumstances of the particular case.

4.1.2 I will generally only consider the exercise of public interest powers in cases that exhibit one or more unique or exceptional circumstances.

4.2 Unique or exceptional circumstances

4.2.1 The following factors may be relevant, individually or cumulatively, in assessing whether a case involves unique or exceptional circumstances.

- Particular circumstances or personal characteristics of a visa applicant which provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity on return to their country of origin, including:
  - persons who may have been refugees at time of departure from their country of origin, but due to changes in their country, are not now refugees; and it would be inhumane to return them to their country of origin because of their subjective fear. For example, a person who has experienced torture or trauma and who is likely to experience further trauma if returned to their country; or
  - persons who have been individually subject to a systematic program of harassment or denial of basic rights available to others in their country, but where such mistreatment does not amount to persecution under the Convention relating to the Status of Refugees 1951, as amended by the Protocol relating to the Status of Refugees 1967 (Refugees Convention) or has not occurred for a Convention reason.
- Substantial grounds for believing that a person may be in danger of being subject to torture if returned to their country of origin, in contravention of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
  - Article 3.1 of the CAT states:

    No State Party shall expel, return ("refoule") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".
  - ***Torture*** is defined by Article 1.1 as:

    "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".
- Circumstances that may bring Australia's obligations as a signatory to the Convention on the Rights of the Child (CROC) into consideration.
  - Article 3 of the CROC provides:

    "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." [1]
- Circumstances that may bring Australia's obligations as a signatory

[1] The best interests of the child must be treated as a primary consideration, but this needs to be balanced against any countervailing considerations.

to the International Covenant on Civil and Political Rights (ICCPR) into consideration. For example:

- A non-refoulement obligation arises if the person would, as a necessary and foreseeable consequence of their removal or deportation from Australia, face a real risk of violation of his or her rights under Article 6 (right to life), or Article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment) of the ICCPR, or face the death penalty (no matter whether lawfully imposed);
- Issues relating to Article 23.1 of the ICCPR are raised. Article 23.1 provides:

  "The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State." [2]

- Circumstances that the legislation does not anticipate.
- Clearly unintended consequences of legislation.
- Circumstances where application of relevant legislation leads to unfair or unreasonable results in a particular case.
- Strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident).
- Circumstances where exceptional economic, scientific, cultural or other benefit to Australia would result from the visa applicant being permitted to remain in Australia.
- The length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community.
- Compassionate circumstances regarding the age and/or health and/or psychological state of the person.

5 POSSIBLE ADVERSE INFORMATION

5.1 Relevant information

5.1.1 Cases identified as involving unique or exceptional circumstances will sometimes raise other issues that I may wish to take into account, in considering whether to exercise my public interest powers.

5.1.2 Whilst the following issues are relevant, officers should bring to my attention any information that they consider may be relevant to my consideration.

5.2 Relevant issues

5.2.1 Where cases are assessed as involving unique or exceptional circumstances and are referred to me, the following issues, if relevant, should be brought to my attention:

- whether the continued presence of the person in Australia would pose a threat to an individual in Australia, to Australian society or security, or may prejudice Australia's international relations,
- whether Australia's international obligations in relation to matters of

[2] This needs to be balanced against any countervailing considerations.

extradition, or other relevant multilateral or bilateral agreements may be engaged,

- whether there are character concerns in relation to the person, particularly in relation to criminal conduct,
  - information regarding any offence or fraud involving the migration legislation is relevant and should be specifically brought to my attention,
- whether the person would not be required to return to a country where a significant threat to their personal security, human rights or human dignity has occurred or is likely to occur, because they are able to enter and stay in another country,
- where the person is likely to face a significant threat to their personal security, human rights or human dignity if they return to a particular area in their country of origin and they could safely and reasonably relocate elsewhere within that country; and
- the degree to which the person co-operated with the Department and complied with any conditions on their visa.

6 APPLICATION OF THESE GUIDELINES

6.1 Minister's instruction

6.1.1 The procedures set out below are to be followed, in order to ensure the efficient administration of my public interest powers.

6.2 Action to be taken after a decision by a review tribunal

6.2.1 When a case office receives notification of a review tribunal's decision to affirm a primary decision, they may assess the visa applicant's circumstances against these Guidelines, and:

- if the case falls within the ambit of these Guidelines, bring the case to my attention in a submission, so that I may consider exercising my public interest powers, or
- if the case falls outside the ambit of these Guidelines, write a file note to that effect.

6.2.2 When a review tribunal member holds the view that a case falls within the ambit of these Guidelines, they may refer the case to my Department and their views will be brought to my attention using the process outlined in 6.3.3 below:

- comments by members of review tribunals in their decision records do not constitute an initial 'request' for the purposes of 6.3 below.

6.3 Requests for the exercise of my public interest powers

6.3.1 A person can request the exercise of my public interest powers in writing or by electronic transmission.

6.3.2 Their agent or supporters can also make the request relating to the person's case.

6.3.3 When a first request for me to exercise my public interest powers is received, an officer is to assess that visa applicant's circumstances against these Guidelines, and:

- for cases falling within the ambit of these Guidelines, bring the case to my attention in a submission so that I may consider exercising my power, or
- for cases falling outside the ambit of these Guidelines, bring the case to my attention through a short summary of the issues in schedule format, so that I may indicate whether I wish to consider the exercise of my power.

6.3.4 Where a case is in the process of being litigated, indicated above at 3.1, case officers are to advise me of the status of the case.

6.3.5 Where a case is in the process of being litigated, the following approach should be adopted depending on the circumstances:

- where a visa applicant has started the litigation, I generally consider it inappropriate to consider as specified in paragraph 3.3.1.
- where there is a class action, started before 1 October 2001[3] , involving the visa applicant(s), the case officer may use their discretion to process the request;
- where there is a Bridging E visa refusal, the case officer may use their discretion to process the request if it falls within these guidelines.

6.4 Subsequent requests for the exercise of my public interest powers

6.4.1 If a request for me to exercise my public interest powers in respect of a person is received and I have previously considered the exercise of my public interest powers (whether in a schedule or as a submission) in respect of that person (whether in respect of the person's present or any previous visa application) a case officer is to assess the request, and:

- for such cases falling within the ambit of these Guidelines, bring the case to my attention as a submission so that I may consider exercising my power, or
- for such cases remaining outside the ambit of these Guidelines (because the request does not contain additional information or the additional information provided, in combination with the information known previously, does not bring the case within the ambit of these Guidelines), reply on my behalf that I do not wish to consider exercising my power.

7 OUTCOME OF MINISTER'S CONSIDERATION

7.0.1 If I choose to consider a case for substitution of a decision for that of a review tribunal, I may ask that health and character assessments be carried out, or some form of surety be arranged before I determine whether or not I wish to substitute a more favourable decision.

7.0.2 If I choose to consider a case for substitution of a decision, I may choose not to substitute a more favourable decision for that made by a review tribunal.

7.0.3 If I choose to substitute a more favourable decision for that of a review tribunal by granting a visa, I will grant what I consider to be the most appropriate visa.

7.0.4 If I choose to consider the substitution of a more favourable decision for that of a review tribunal, I must be kept informed of any cases that may

[3] New s 486B of the Act, in force from 1 October 2001, prevents class or similar actions except in limited circumstances.

amount to a potentially high health cost to the Australian community.

7.0.5 Every person whose case is brought to my attention is to be advised of the outcome of my consideration, whether I decline to consider exercising public interest powers, or a determination following consideration of the exercise of that power.

8 NO LIMITATION TO MINISTER'S POWERS

8.01 These public interest powers exist whether or not a case is brought to my attention in the manner described above (providing that a review tribunal decision has been made and that review decision has not been overtaken by subsequent events).

8.02 Where I consider it appropriate, I will seek further information to enable me to make a determination on whether to consider application of my public interest powers, or whether to consider the exercise of my public interest powers.

9 REMOVAL POLICY

9.0.1 Section 198 of the Act, broadly speaking, requires the removal of unlawful non-citizens in immigration detention who are not holding or applying for a visa.

9.02 A request for me to exercise my public interest powers is not an application for a visa and, unless the request leads to grant of a bridging visa, such a request has no effect on the removal provisions.

Philip Ruddock
Minister for Immigration and Multicultural and Indigenous Affairs

Department of Immigration and Multicultural and Indigenous Affairs

MIGRATION SERIES INSTRUCTION

Instructions in this **Migration Series (MSIs)** relate to: the ***Migration Act 1958***; the ***Migration Regulations 1994*** and other related legislation [as amended from time to time].

MSIs are a temporary instruction format only; they are intended for ultimate incorporation into *PAM3.* It is the responsibility of the program area to ensure that the information in this MSI is up-to-date. It will be reviewed 12 months from date of issue but will remain current until formally replaced or deleted. For information on the status of this MSI see the latest **Instructions and Legislation Update** or contact Instructions and LEGEND Section (ILS).

MSI no.:	**File no.:**	**No. of pages: 34**
Author Sections:	**Special Residence / Protection Services**	
Date of issue:	[Refers to date of registration of the signed original instruction by Instructions and LEGEND Section (ILS).	
Title:	**MINISTER'S PUBLIC INTEREST POWERS**	

This instruction is intended to assist departmental staff in the application of the *Guidelines on Ministerial Powers under sections 345, 351, 391, 417, 454 and 501J of the Migration Act 1958*.

THIS INSTRUCTION CONTAINS THE FOLLOWING LEGISLATIVE REFERENCES

***Migration Act 1958*:**	***Migration Regulations 1994*:**	**Other legislation:**
Sections 48A, 48B, 72, 84, 200, 345, 349, 351, 391, 417, 454, 494D, 501J.	Regulations 1.08, 1.20, 1.20J, 4.31C; Schedule 1 (1305); Schedule 2 (050).	*Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Covenant on Civil and Political Rights; Convention relating to the Status of Refugees, as amended by the Protocol relating to the Status of Refugees, Freedom of Information Act 1982.*

Effect on other MSIs:

Distribution: Release on LEGEND and paper distribution to overseas posts and limited outlets within Australia is managed by Information Distribution Section (IDS) and necessarily occurs after date of issue. MSIs are available for inspection and purchase at DIMIA Freedom of Information Units.

CONTENTS

1 INTRODUCTION

1.0.1 Under the *Migration Act 1958* (the Act), both the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) and the Minister for Citizenship and Multicultural Affairs have non-compellable, non-delegable powers that enable them to substitute a more favourable decision for a decision of a review authority, if they consider it in the public interest to do so.

Separate instructions will be circulated identifying any areas where matters are to be referred to the Minister for Citizenship and Multicultural Affairs. In the absence of such instructions, references to the Minister should be read as being to the Minister for Immigration and Multicultural and Indigenous Affairs.

1.0.2 The generic term **'review authority'** refers to decisions by the:

- Former Migration Internal Review Office (MIRO);
- Former Immigration Review Tribunal (IRT);
- Migration Review Tribunal (MRT);
- Refugee Review Tribunal (RRT); or
- Administrative Appeals Tribunal (AAT) on referral from the MRT or RRT or in respect of a protection visa decision within the AAT's jurisdiction.

1.0.3 The Minister has issued a set of Ministerial Guidelines for the identification of cases involving unique or exceptional circumstances where it may be in the public interest to substitute a more favourable decision under s 345, s 351, s 391, s 417, s 454 or s 501J of the Act (the Guidelines). These Guidelines are embodied in Migration Series Instruction XXX.

1.0.4 The instructions contained in this MSI are intended to assist departmental staff in the application of the Guidelines.

2 THE LEGISLATIVE FRAMEWORK

2.0.1 The relevant provisions in the Act are:

- Minister may substitute a decision of a review officer for another decision in terms to which the applicant agrees whether or not the review officer (MIRO) had the power to make that other decision (prior to 1 June 1999) (s 345);
- Minister may substitute a more favourable decision for a decision of the IRT (prior to 1 June 1999) or the MRT (from 1 June 1999) (s 351);
- Minister may substitute a more favourable decision for a decision of the AAT in relation to an MRT- reviewable decision (s 391);
- Minister may substitute a more favourable decision for a decision of the RRT (s 417); and
- Minister may substitute a more favourable decision for a decision of the AAT in relation to an RRT-reviewable decision (s 454);
- Minister may set aside an AAT protection visa decision and substitute another decision that is more favourable to the applicant in the review (s 501J).

2.0.2 The provisions of the six sections are similar except in their reference to the relevant decision of the review authority for which the Minister may substitute a more favourable decision.

2.0.3 The public interest powers are *non-compellable*: that is, the Minister does not have a duty to consider the exercise of the powers (see, for example s 351(7) and s 417(7)).

3 INTERPRETING THE LEGISLATION

3.0.1 The Act provides a power for the Minister to substitute a more favourable decision for that of a review authority if the Minister considers it to be in the public interest to do so.

3.0.2 Requests relating to review authority decisions prior to 1 September 1994, however, are outside the Minister's power (apart from the limited exception referred to in 3.1 below).

3.1 Minister's power only available in certain circumstances

3.1.1 The Minister's power to substitute a more favourable decision for that of a review authority is only available if:

- a relevant review authority has made a decision:
  - when a review authority is in receipt of an application but has not yet made a decision the Minister cannot exercise his public interest powers;
  - the Minister can only exercise his public interest powers once the review authority makes a decision;
  - however, where an application has been reviewed by MIRO, the Minister has the power under s 345 to substitute a more favourable decision, but if review by the MRT has been sought following the MIRO decision, and the case is as yet undecided, the Minister generally considers it inappropriate to consider using his public interest powers.
- the relevant review authority's decision was made under the appropriate section of the Act. For example, a decision under s 349 (which provides the MRT the power to make decisions) is necessary to trigger the power in s 351.
  - a decision of the relevant review authority made prior to 1 September 1994 is outside the operation of the current provisions of the Act;
    - while unlikely to arise, the only exception to this is if action had commenced to 'enliven' the power before 1 September 1994, that is, a request had been made in respect of the power before that date. In these cases the doctrine of 'accrued rights' allows the Minister to exercise his public interest power after that date;
- the relevant review authority has made a decision under the required section of the Act in respect of the particular person:
  - a member of a family unit who was not included in a review authority decision, is not the subject of a review authority decision and therefore the Minister cannot substitute a more favourable decision for that person. (It does not matter what the reason, if the review authority has not made a decision on an application, then there would be no decision for which the Minister could substitute a more favourable decision. The Minister does not have the power under the legislation to exercise discretion in such cases);

- If the Minister decides to substitute a more favourable decision, and there are family members (including new born children) that have not been the subject of a decision of a review authority, case officers should contact Special Residence Section for non-humanitarian cases and Protection Services Section for humanitarian cases.

- the relevant review authority decision continues to exist:
  - Where a Court quashes or sets aside a decision of a review authority and the matter is remitted to the review authority to be decided again, the Minister is unable to use his public interest power as there is no longer a review decision to be substituted.
  - The Minister may exercise his public interest power irrespective of a review authority decision to affirm, set aside or remit the decision in question. In some cases, for example, a decision to set aside and substitute a decision to grant would be a more favourable decision than a decision to set aside and remit for health and character processing and reconsideration. The Minister has the power to exercise his public interest powers in such a case should the Minister wish to do so. In general, however, the Minister would consider such cases inappropriate to consider (see 5.5.6).

When the Minister has no power

3.1.2 The Minister's power is not available if:

- No review authority decision has been made, or
- If the review authority has made a decision to remit the matter to DIMIA and a departmental decision-maker has made a subsequent decision on the case (there is no longer a review authority decision available for the Minister to substitute a more favourable decision), or
- If a decision set aside by a Court and the case is remitted to the review authority. This is because there is no longer a review authority decision in existence for which the Minister can substitute a more favourable decision.

3.1.3 The Minister does not have the power to substitute a more favourable decision in respect of the following decisions:

- a 'no jurisdiction' decision (eg a finding that the Department's decision is not 'MRT-reviewable');
- an 'invalid application' decision (eg because an application is not made to the review authority within the required timeframe);
- a decision of the AAT that is NOT in respect of an MRT reviewable decision, or a protection visa decision;

3.2 Public interest

3.2.1 Whether or not it would be in the public interest to exercise the power is for the Minister to decide.

3.2.2 Case officers cannot determine whether or not it may or may not be in the public interest for the Minister to exercise his public interest powers. They should, however, provide all relevant information to allow the Minister to make such a determination.

3.2.3 Cases that are identified as involving unique or exceptional circumstances will sometimes also raise other issues relevant to the Minister's consideration of whether or not it may be in the public interest to exercise his power in that case.

3.2.4 Relevant factors may include, for example, whether the person is a risk to security and may jeopardise the wellbeing of Australians if allowed to remain in Australia, or the cost of required medical treatment to the Australian community.

3.2.5 The Minister may also wish to consider the balance between Australia's international obligations (depending on the nature of those obligations), the integrity of Australia's migration program and the State's sovereign right to determine who enters and remains inside its borders, when making a decision to exercise his public interest powers.

3.2.6 International obligations that are general in nature can at times be outweighed by countervailing considerations specific to an individual, or vice versa. Section 5 of the Guidelines provides a non-exhaustive listing of relevant countervailing issues that a case officer should draw to the Minister's attention.

3.2.7 The role of a case officer is to assess cases against the Guidelines for the identification of unique or exceptional circumstances, and to identify any countervailing issues which should be brought to the Minister's attention.

3.3 Unique or exceptional circumstances

3.3.1 The case officer is required to fully inform the Minister of any information relevant to his consideration of this matter.

3.3.2 It is then for the Minister to decide whether or not to exercise his public interest power.

3.3.3 Sections 3 and 4 of the Guidelines contain examples of the items that the Minister considers may characterise a case in which it may be in the public interest to substitute a more favourable decision.

3.3.4 The Guidelines are not exhaustive, nor do they establish precedents. Each case is considered in isolation and on its merits.

3.3.5 Cases are assessed on a case by case basis and previous decisions of the Minister have no impact on the assessment of each case against the Guidelines.

3.3.6 There is a range of factors outlined in the Guidelines which also need to be considered such as the obligations under the Convention on the Rights of the Child ("CROC"), the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment ("CAT") and the International Covenant on Civil and Political Rights ('ICCPR').

Convention on the Rights of the Child (CROC)

3.3.7 There are circumstances that may bring Australia's obligations under the CROC into consideration. The circumstances of any children in Australia under the age of 18 must be assessed in the light of those obligations.

3.3.8 Particular attention should be given to the obligation at Article 3 of the CROC that requires that the 'best interests' of the child be 'a primary consideration'.

3.3.9 What those best interests are depends on the circumstances of each case. It should be noted that each case involving a child will not necessarily meet the requirements of section 4.2 of the Guidelines.

3.3.10 When the best interests of the child are considered it may be found that there is nothing to suggest the best interests of the child will be served by remaining in Australia. Such a case, unless there were other issues

raised, may be neither unique nor exceptional.

3.3.11 The CROC also includes implicit obligations that require that a child not be returned to a country where there is a real risk that they would subject to cruel, inhuman or degrading treatment.

Convention Against Torture (CAT)

3.3.12 There are circumstances that may bring Australia's obligations under the CAT into consideration. When assessing a case against the Guidelines for CAT issues, certain elements must be determined.

3.3.13 The key element is an assessment of whether or not there are substantial grounds for believing that the person would be in danger of being subjected to torture in the State to which they would be returned.

3.3.14 In assessing this element regard should be had to the definition of "torture" as defined in article 1 of the CAT:

> *"(1)… any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain and suffering arising only from, inherent in or incidental to lawful sanctions."*

Also see section 4.2 of the Guidelines.

3.3.15 An assessment involving CAT issues must take into account any past experiences of torture or similar acts and how the primary and review authority decision-makers explored these issues.

3.3.16 The current situation in the State to which the person would be returned is also relevant.

3.3.17 In addition, any distinguishing or particular features of the person or their circumstances/claims that may indicate that torture is more likely because of these features, such as gender, religion, or political activism, must be addressed.

3.3.18 Under the CAT there are no exceptions in relation to the character of the person concerned – the obligation not to *refoule* exists irrespective of whether or not the person is of bad character.

3.3.19 Where character issues are involved, this information is to be brought to the Minister's attention to enable him to decide if the public interest were to be served in exercising his powers.

International Covenant on Civil and Political Rights (ICCPR)

3.3.20 There are circumstances that may bring Australia's obligations under the ICCPR into consideration. When assessing a case against the Guidelines in relation to the *non-refoulement* obligation under ICCPR certain elements must be determined.

3.3.21 The key element is an assessment of whether there is a real risk the person would be subjected to treatment contrary to article 6 or article 7 of the ICCPR, taking into account the circumstances of the case and all relevant considerations.

3.3.22 Article 6(1)of the ICCPR provides:

> *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

3.3.23 Article 7 of the ICCPR provides:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

3.3.24 Australia's adherence to the Second Optional Protocol to the ICCPR, which abolishes the death penalty, means that to refoule a person to a country where there is a real risk that they will face the death penalty is likely to amount to a breach of Australia's obligations under the ICCPR.

3.3.25 The position of the Australian Government is that the implicit non-*refoulement* obligation applies to all of the rights contained in Article 6 (right to life) and Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) of the ICCPR.

3.3.26 A flagrant breach of other rights in the ICCPR may give rise to the obligation especially where the alleged violation could result in severe or irreparable harm to the person concerned.

3.3.27 There is a range of other obligations under the ICCPR that must also be considered, in particular those provisions relating to family unity and the rights of all persons to be free from arbitrary interference with the family).

3.3.28 Article 17 of the ICCPR provides:

> *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*

3.3.29 Article 23 of the ICCPR provides:

> *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right of men and women of marriageable age to marry and to found a family shall be recognized. No marriage shall be entered into without the free and full consent of the intending spouses. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

3.3.30 Article 24 of the ICCPR provides:

> *Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. Every child shall be registered immediately after birth and shall have a name. Every child has the right to acquire a nationality.*

3.3.31 In circumstances where removal may result in separation of a family, particular consideration must be made to these provisions.

3.4 A more favourable decision

What is a more favourable decision?

3.4.1 The primary requirement for the Minister to exercise his public interest powers to substitute a decision of the relevant review authority is that the decision must be one that is more favourable to the applicant than the decision of the review authority (see 3.1.1).

3.4.2 For example, if the decision of the review authority is to affirm the primary decision to refuse the grant of a visa, then a decision of the

Minister to grant a visa would clearly be more favourable to the subject of the request than the review authority's decision.

3.4.3 This would be so whether or not the subject of the request agreed with the grant decision or whether or not the visa granted was the same as that originally applied for.

3.4.4 However, under the public interest power in the former s 345, the requirement in this regard is different.

> The Minister can only substitute a decision, where the decision would be that originally sought by the subject of the request or another decision in terms to which the subject of the request agreed.

(Note: there are transitional provisions relating to the continued use of s 345 in certain circumstances.)

3.4.5 Review authorities are bound by all of the provisions of the Act and the *Migration Regulations 1994* (the Regulations).

3.5 Minister is not bound by Subdivision AA or AC of Division 3 of Part 2 of the Act or by the Regulations

3.5.1 When substituting a more favourable decision for that of a review authority the Minister is not bound by the Regulations or by Subdivision AA or AC of Division 3 of Part 2 of the Act.

3.5.2 The Minister may exercise his powers even where the review authority did not have the power (jurisdiction) to make the decision.

3.5.3 In practical terms this means that the Minister may substitute a more favourable decision irrespective of the usual requirements for application and the grant of visas under the Act and Regulations:

- it is not necessary for the person to meet the criteria for the visa in question eg qualifications, English language, sponsorship, age, Assurance of Support (AOS), health etc;
- various bars under the Act on the making of valid applications do not apply; and
- none of the other requirements of Subdivision AA or AC of Division 3 of Part 2 of the Act applies.

3.5.4 Although the Minister is not bound by certain requirements of the Act or by the Regulations, when considering whether or not exercise his public interest power the Minister may seek information similar to that required for grant under the Regulations.

3.5.5 Accordingly, the Minister may wish to know:

- the outcome of a health and character assessment;
- how much a person may cost the Australian taxpayer for health treatment if granted a visa; or
- whether or not an Assurance of Support could be paid.

3.5.6 This type of information may assist the Minister to determine whether or not it is in the public interest to exercise the public interest power in a particular case.

3.5.7 It is important to note that the absence of an Assurance of Support, or the fact of a person failing to pass a health assessment etc does not mean that the Minister cannot, or will not, decide to exercise his public interest power.

3.5.8 A case officer should provide this information to the Minister in a Stage Two Submission (see from 5.3.20). If, however, the information is

already known then it should be provided in the Stage One submission (see from 5.3.1).

If a Health Assessment is still valid, this should be pointed out in a Stage One Submission. If it has expired at Stage Two Submission, this should also be pointed out.

3.6 Minister's power cannot be delegated

3.6.1 The power to substitute a more favourable decision for that of a review authority can only be exercised by the Minister personally and the Minister cannot delegate that power to any other person.

3.6.2 However, all other aspects of identifying review authority decisions or examination and referrals of requests where it may be in the public interest for the Minister to exercise his public interest power, may be carried out by others at the Minister's direction.

3.6.3 Justices Black, Keifel and Emmett in a joint judgement in the Full Federal Court case of *Jennifer J. Bedlington & Anor v Ana Cecilia Enciso Chong (1998) 157 ALR 436* which looked at s 48B of the Act (which is similar to s 417 etc in key respects) stated:

> "The Guidelines constitute the Minister's determination, in advance, of the circumstances in which he would consider exercising his power under s.48B;
>
> There is no reason why the Minister should not lay down guidelines for the assistance and guidance of Departmental staff, such as the Secretary, indicating the circumstances in which he was prepared to consider the exercise of the power conferred at s.48B(1); and
>
> So long as the Secretary was acting in accordance with the Guidelines, she had no duty to refer Ms Chong's application to the Minister."

3.6.4 The Minister has issued Guidelines for the identification of cases in relation to which he may think that it is in the public interest to substitute a more favourable decision. However, this does not mean that the Minister has delegated his power to substitute a more favourable decision, only that the Minister has identified the characteristics that may indicate the type of case where he may consider it in the public interest to substitute a more favourable decision.

3.7 Minister does not have a duty to consider

3.7.1 The Minister's power is 'non-compellable'. The Minister does not have a legal obligation to consider substituting a more favourable decision in a case, whether it is brought to his attention or not.

3.7.2 If a case is brought to the Minister's attention, the Minister may first consider whether or not he wishes to consider substituting a more favourable decision in the case.

3.7.3 Cases referred to the Minister in a Schedule (5.3.24) or a Stage One Submission (see 5.3.1) where the Minister declines to consider fall under this category.

4 ROLES AND RESPONSIBILITIES OF RELEVANT WORK AREAS

The following paragraphs refer to the roles and responsibilities of relevant work areas in relation to the Minister's public interest powers under sections 345, 351, 391, 417, 454 or 501J of the Act.

4.1 Protection Services Section and Special Residence Section

4.1.1 Special Residence Section and Protection Services Section provide policy advice in relation to review of decisions made under portfolio legislation and maintain liaison with the review authorities.

4.1.2 These sections are also responsible for managing the administration of the Minister's public interest powers, including policy, monitoring and reporting.

4.1.3 Special Residence Section and Protection Services Section are responsible for consistency of administration of requests and the policy of the Minister exercising his public interest powers through liaison with the Minister, State, Territory, Regional Offices and review authorities.

4.2 Parliamentary and Ministerial Services Section (PARMS)

4.2.1 The Parliamentary and Ministerial Services Section (PARMS) facilitates coordination of Departmental, Ministerial and Parliamentary correspondence and documentation.

4.2.2 All letters sent to the Minister requesting the exercise of his public interest powers are processed as ministerial correspondence without a due date.

4.2.3 Requests for the Minister to exercise his public interest powers may originate from the person who is the subject of the review authority decision, the person's legal representative or migration agent, an MP, or any other interested party.

4.2.4 PARMS places the correspondence in an easily recognisable 'orange' folder clearly labelled "Ministerial Intervention". The correspondence remains in this folder until finalisation of the case.

4.2.5 The Special Correspondence Unit (SCU) of PARMS prepares standard interim responses for requests for the Minister to exercise his public interest powers. The SCU replies to letters supporting the request for the Minister to exercise his public interest powers for the signature of the Minister for Citizenship and Multicultural Affairs (with the exception of requests emanating from the Minister's constituents and Members of Parliament which are drafted for the Minister's signature and are always signed by the Minister before any letters in regards to the case are sent).

4.2.6 Once the interim reply has been sent the request is forwarded to the Ministerial Intervention Unit (MIU), together with a copy of the signed interim response.

4.2.7 The SCU does not prepare interim responses to repeat requests, cases where the person is detained or where the Minister has no public interest power to exercise. These cases are forwarded to the relevant MIU for acknowledgment or response on receipt.

4.2.8 PARMS is also responsible for coordinating the Tabling Statement requirements of the Act. That is, PARMS takes central responsibility for collecting and tabling the original copies of Tabling Statements where the Minister has decided to substitute a more favourable decision using his public interest powers.

4.2.9 PARMS will retrieve the original copy of the Tabling Statement at the time the relevant orange folder returns to their Section from the Minister's office and will ensure that a photocopy is placed with the other

paperwork so that the relevant MIU retains a full copy on file.

4.2.10 PARMS also provides the RRT with a copy of file references of cases where the Minister has decided to exercise his public interest powers under s.417.

4.2.11 This information is forwarded after the statements have been tabled in Parliament.

4.3 Departmental Liaison Officers

4.3.1 The Departmental Liaison Officers (DLOs) provide a coordinating, guiding and liaising role for all requests for the Minister's public interest powers. Their role is to ensure that all requests for the Minister's public interest flow in and out of the Minister's office smoothly.

4.3.2 Documentation for requests that the Minister exercise his public interest power (such as schedules and submissions) is reviewed by a DLO before being forwarded on to the Minister.

4.3.3 Where necessary, the DLO coordinates with the relevant MIU or policy area on urgent cases.

4.4 Minister for Citizenship and Multicultural Affairs

4.4.1 The Minister for Citizenship and Multicultural Affairs is the appropriate signatory for:

- interim responses and replies to letters of support;
- acknowledgment letters for withdrawn requests;
- cases where the Minister has decided not to consider the exercise of his power;
- cases where the Minister has no public interest power to exercise; and
- cases that are inappropriate to consider,

other than letters from the Minister's constituents or Members of Parliament.

4.5 Litigation Officers

4.5.1 As litigation officers have first hand knowledge of comments made by the Courts in respect of the Minister's public interest powers, they should advise or liaise with the relevant Policy Section and with Special Residence Section for non-humanitarian cases and Protection Services Section for humanitarian cases when any such comments are made.

4.5.2 Litigation officers should ensure, where possible, that litigation case notes contain comments on matters that either raise issues relevant to the Guidelines or contain comments by the Courts in relation to the Minister's public interest powers.

4.6 Operational Areas

4.6.1 As at the date of this instruction the operational areas responsible for requests under the Minister's public interest powers are as follows:

- ACT Regional Office – s 345/351 and s 391
- Onshore Protection NSW – s 417, s 454 and s 501J (where primary decision was made in NSW) and detention cases for NSW,

Queensland and Northern Territory;

- Onshore Protection VIC – s 417, s 454 and s 501J (where primary decision was made in Victoria) and detention cases for Victoria, Tasmania and South Australia;
- Onshore Protection WA – s 417, s 454 and s 501J (where primary decision was made in WA) and detention cases for WA including non-boat people at Port Hedland; and
- Protection Services Section, Central Office – some s 417, s 454 and s 501J as appropriate

5 ADMINISTRATIVE GUIDELINES

(A) ASSESSMENT OF REVIEW AUTHORITY DECISIONS

5.1 Action following receipt of affirmed decision from a Review Authority (or Court)

5.1.1 In all cases where a review authority affirms a decision on a protection visa application, an assessment against the Guidelines must be undertaken. This is irrespective of whether or not a request has been made. If a review authority affirms a non-protection visa decision, an assessment under the Guidelines may be undertaken.

5.1.2 If the case falls within the Guidelines, a submission to the Minister is to be prepared to enable the Minister to decide whether he wishes to consider the case.

5.1.3 If the case does not fall within the Guidelines, a file note to that effect signed and dated by the assessing officer, is to be placed on file (a print-out of the relevant computer record noting that the case has been examined and found not to meet the Guidelines is acceptable), ICSE records are to be updated to show the outcome of the assessment, and no further action is to be taken.

5.1.4 For onshore decisions, the Minister has an expectation that the above exercise, whether a referral or a file notation outcome, if done, will be completed before the cessation of any BV where applicable – usually within 28 days of notification of a review/court decision.

5.2 Actions on referral of a decision of a Review authority or the Courts

5.2.1 Where a review authority or the courts refer cases to the Department and identify circumstances that may come within the Guidelines, an assessment is to be made against the Guidelines. These referrals are not considered 'requests', but they are brought to the Minister's attention as directed in the Guidelines.

5.2.2 If the case meets the Guidelines, it is to be referred to the Minister in a Stage One Submission or on a Schedule if it is assessed that the case does not meet the Guidelines.

5.3 Preparation of a submission for the Minister's consideration

Stage One Submission

5.3.1 If it is considered that a case falls within the Guidelines or the Minister requests further information on a case, the relevant MIU prepares a Stage One Submission for the Minister outlining the circumstances of the case.

5.3.2 The purpose of the Stage One Submission is to provide the Minister with sufficient information about the subject of the request for the Minister to consider whether he wishes to consider the exercise of his public interest power in the case. The case officer does not make a recommendation to the Minister, rather provides relevant information so that the Minister can consider whether he wishes to consider the exercise of his public interest power.

5.3.3 The submission should include reasons why the case may come within the Guidelines and any countervailing considerations.

5.3.4 The Stage One Submission also flags issues where more information may need to be sought before the Minister makes a final decision on whether to exercise his public interest powers.

5.3.5 These issues may include recommending further assessment of:

- new claims made by the subject of the request or the person making the request;
- the bona fides elements of a spouse case (where relevant); and
- health, character, AOS, or other concerns.

5.3.6 A Stage One Submission may contain the following types of information and recommendations:

- details of who is making the representation;
- case details and history of visa applications;
- the assessment against the Guidelines (includes international obligations);
- claims raised by the subject of the review authority decision (or their representative) as to why the Minister should exercise his public interest powers and reasons the case officer considers the Minister may wish to do so;
- where relevant, views of members of a review authority, the courts;
- the visa class or classes that may be most appropriate if the Minister decides to substitute a more favourable decision (although often this may be more extensively discussed in a Stage Two submission);
- the relevant financial status of the subject of the request to enable the Minister to make a decision regarding AOS;
- whether the relevant visa class recommended usually requires a sponsor eg. Spouse cases and whether there are any issues relating to the sponsor such as concerns about whether they may have difficulty meeting obligations under Regulation 1.20 or would come under sponsorship limitations of Regulation 1.20J;
- should inform the Minister that grant of a protection visa may imply a recognition of refugee status in any instance;
- submissions recommending grant of a temporary visa, including a

temporary protection visa or a safe haven visa, should fully inform the Minister that grant of such a visa may exhaust his intervention power and preclude the person from pursuing other future migration outcomes;

- should inform the Minister that the recommended visa subclass may prevent the person from accessing benefits and, where applicable, Medicare;
- whether or not the subject of the request has current medical clearances/information;
- current physical location of the subject(s) of the request (include if in detention);
- details of members of the family unit if appropriate;
- whether the person's name appears on the Movement Alert List (MAL) as a match and/or if it relates only to the $1400 post review RRT fee;
- whether the subject of the request has debts to the Commonwealth (detention/litigation debts) recorded or if they relate only to the $1400 post review RRT fee;
- relevant legal or policy advice; and
- any countervailing considerations.

5.3.7 On receipt of a Stage One Submission the Minister may:

- choose not to consider;
- decide to substitute a more favourable decision;
- decide not to exercise his power;
- or request further information;

before reaching a final decision.

5.3.8 If the Minister requires further information (for example, health and character assessment, or further assessment of spouse relationship bona fides), the relevant MIU may forward the relevant case file to the appropriate post or Regional Office with an instruction that the subject, (and family members if relevant), undergo the appropriate steps to provide the information required by the Minister. The ACT Regional Office is the relevant MIU for non-humanitarian cases where the Minister requests further information about health and character. The relevant MIU for humanitarian cases is the MIU where the case is processed.

5.3.9 When the Minister has begun considering the exercise of his power under s 345 or s 351 of the Act, and the subject of the request is offshore, the relevant post is advised.

Assurance of Support (AOS)

5.3.10 The Minister may require an AOS as part of deciding whether it is in the public interest to exercise a public interest power.

5.3.11 This is the case regardless of whether an AOS is required by the Regulations for the class of visa for which the subject of the request originally applied, or for the visa that the Minister is considering granting.

5.3.12 If a case officer gives the Minister an option to request an AOS, the type of AOS must be specified. Generally, it would be appropriate to recommend a 'required AOS'.

5.3.13 If the Minister requests an AOS and it cannot be met by the subject of the request within six months, this should be drawn to the Minister's attention in a Stage Two Submission.

5.3.14 When processing AOS case officers should refer to *PAM3: Div 2.7.*

Health and Character

5.3.15 Health and Character assessments are often requested by the Minister when considering the exercise of his public interest power.

These assessments are undertaken by the Operational Area and are independent of provision of an AOS. However, the Minister is not bound by the outcome of the health and character assessments.

5.3.16 If there are serious health or character concerns relating to the subject of the request, this should be brought to the Minister's attention in either the Stage One (if an assessment was made at the primary stage) or Stage Two Submission.

Health Issues

5.3.17 Whenever health is an issue the Minister should always be informed as to the costing of the case in either a Stage One or Stage Two Submission.

5.3.18 If not previously assessed, a health costing can be obtained from Health Services Australia.

5.3.19 When all requested information has been provided the case file must be returned to the relevant MIU which then prepares a further brief to the Minister, known as the Stage Two Submission.

Stage Two Submission

5.3.20 The Stage Two Submission advises the Minister of the outcome of the further information gathering and discusses potential visa subclasses the Minister may wish to consider if these were not discussed in the Stage One submission.

5.3.21 If it has been found, for example, that the subject of the request would not meet the usual health criteria for grant of a particular visa, the Stage Two Submission will provide the Minister with the reasons.

5.3.22 The Minister may still decide to exercise his public interest powers and substitute a more favourable decision notwithstanding the subject's failure to meet usual health requirements, because, as indicated earlier in 5.3.10, the Minister is not bound by the Regulations.

5.3.23 On receipt of a Stage Two Submission the Minister may either substitute a more favourable decision or seek further information or decide not to exercise his power.

Schedule

5.3.24 If it is considered that a case does not fall within the Guidelines, the relevant MIU prepares a Schedule for the Minister briefly outlining similar information contained in a Stage One submission.

5.4 Debt recovery

5.4.1 All Stage One Submissions to the Minister must contain advice about whether or not the relevant people have debts to the Commonwealth.

5.4.2 The Minister may seek information about whether or not such debts have been paid, or whether arrangements for payment could be or have been entered into, before deciding whether or not to exercise his public interest powers.

5.4.3 Where it is likely that there are debts to the Commonwealth and none are shown on MAL (or those shown on MAL are less than would be expected) it may be prudent to investigate other databases.

5.4.4 For instance, if it is known that the subject of the request was a detainee and MAL shows either no debts or a debt that does not appear commensurate with the length of detention, the case officer should

contact Financial Operations Section in Resource Management Branch where up-to-date records of detention costs are kept.

5.4.5 Similarly, if a subject of the request is known to have been involved in litigation which went against them and no costs are shown on MAL, the case officer should approach Legal Services and Litigation Branch in Central Office for an up-to-date account of costs (if any) currently owed by the subject of the request.

5.4.6 As noted in section 3.5 above, the Minister is not bound by Public Interest Criteria (Schedule 4 of the Regulations) when considering whether to exercise his public interest powers and, therefore, is able to grant a visa even if a debt to the Commonwealth exists and appropriate arrangements for payment of the debt are not in place.

5.4.7 Under section 34(1) of the *Financial Management Act 1997*, the Finance Minister is the only person authorised to waive debts to the Commonwealth.

5.4.8 If the Minister exercises his public interest power in these circumstances he is not 'waiving' or 'writing off' the debt. The debt continues to exist and usual recovery procedures apply.

5.4.9 The delegate (refer to appropriate Chief Executive Instructions for the recovery of debts) may think it reasonable to make an application to waive the debt where:

- the non-citizen, being a person who was reasonably suspected of being an unlawful non-citizen, was detained, but cooperated with compliance officers and was later found to be lawfully present in Australia; or
- a s 200 (criminal or security) deportee, who is also a lawful non-citizen, was detained, but the deportation order was revoked; or
- the detainee is later granted refugee status; or
- a court has quashed a deportee's conviction; or
- the Minister has exercised his powers under sections 345, 351, 391, 417, 454 or 501J of the Act; or
- it is otherwise inappropriate.

5.4.10 A waiver is unnecessary in respect of the $1400 RRT review fee.

5.4.11 If the Minister decides to exercise his public interest power and grant a visa under s 417, the person is no longer liable for the $1000 post RRT decision fee (Regulation 4.31C refers).

(B) ASSESSMENT OF REQUESTS FOR THE MINISTER TO EXERCISE HIS PUBLIC INTEREST POWER

5.5 Process to be followed by Operational Areas

Consideration of NO POWER

5.5.1 On receipt of a letter requesting the Minister to exercise his public interest powers, the relevant MIU is to carry out an immediate check to ensure that the Minister is able to exercise his public interest powers.

5.5.2 The request is then recorded in the Integrated Client Service Environment (ICSE) system as soon as possible.

5.5.3 If the Minister has no public interest power to exercise, the request is to be finalised immediately with ICSE records updated to reflect this action (section 6.6).

5.5.4 If there is an incorrect request for the Minister to exercise his public

interest powers, for example a request under s 48B of the Act, it is to be processed as if the Minister has no power to consider the request under his public interest powers (s 345 or s 351 or s 391, s 417, s 454 or s 501J of the Act). The request should then be forwarded to the relevant MIU (for example Sydney, Melbourne or Perth for s 48B requests).

- This is despite the person being eligible for consideration under one of the public interest powers.
- This is to ensure that 'first-time' requests have the best possible chance to present their case.
- Requests that refer to sections *other than* s 345 or s 351 or s 391, s 417, s 454 or s 501J of the Act should be differentiated from instances where the request simply refers to the incorrect power for example to s 351 rather than s 417**.**

Inappropriate to consider

5.5.5 Once it is determined that the request is within power, the question of "appropriateness" for the Minister to consider the exercise his public interest power is to be addressed.

5.5.6 Cases that the Minister may consider "inappropriate to consider":

- Cases where there is migration related litigation that has not been finalised;
- Cases where there is another visa application concerning the subject of the review authority decision ongoing with the Department;
- Cases where there is an ongoing Ministerial request under a different public interest power;
- Cases where there has been a remittal or a set aside from a review authority; and
- Cases which were decided by MIRO and are now at the MRT.

5.5.7 "Inappropriate to consider" cases not involving litigation should be finalised quickly. Such cases should not be stockpiled pending later outcomes.

5.5.8 For cases involved in litigation, refer to section 6.3.

Consideration against Guidelines

5.5.9 Having determined that the request is within power and that it is appropriate to consider at the outset, and ensuring that the request is entered on ICSE, the officer is then required to make an assessment against the Guidelines.

5.5.10 The Minister has issued these Guidelines to assist officers to identify the types of cases where the Minister may consider it to be in the public interest to substitute a more favourable decision for that of a review authority.

5.5.11 The Minister has directed that all initial requests be brought to his attention. Cases assessed as one the Minister may which to consider are to be forwarded in a submission format in accordance with his Guidelines so that the Minister may consider the exercise of his public interest power in the case.

5.5.12 Those that do not appear to meet the Guidelines are to be forwarded in a Schedule so that the Minister may consider whether or not he wishes to consider exercising his power.

5.5.13 Where the Minister decides not to consider exercising his public interest powers for the cases appearing on the Schedule the subject of the

request is notified.

5.5.14 For a case forwarded on a Schedule, the Minister may:

- seek additional information to allow consideration of his power to occur. The Minister will identify the case(s) concerned and seek additional information on that case(s) whilst deciding he does not wish to consider the exercise of his power in the remaining cases on the Schedule.
- decide to substitute a more favourable decision, or
- decide not to consider the exercise of his power.

5.5.15 If the Minister seeks a brief on a case on a Schedule, a Stage One Submission to the Minister is prepared when the information is available.

5.6 Preparation of a schedule for the Minister's consideration

5.6.1 A Schedule is to contain the following types of information:

- a summary of the request and the reasons for the request being made;
- the relevant history the subject of the request has with the Department
- details on who has made the representation;
- where relevant, views of review authority members, the courts; and
- an assessment against the Guidelines (includes international obligations).

5.6.2 On receipt of a Schedule, which may contain any number of case entries, the Minister may want more information about a particular case (see above).

6 PROCESSING ISSUES

6.1 Priorities

6.1.1 In general, requests for the Minister to exercise his public interest power should be processed in the following order:

- cases where the Minister has sought early advice;
- initial and repeat requests from minors or persons in detention (but priority should be given to obtaining the relevant file/s and papers, and the request should be processed immediately these are received);
- requests where the Minister has no power to exercise public interest powers;
- requests which are “inappropriate to consider”;
- cases where the Minister has considered whether to consider the exercise of a different public interest power (for example cases that the Minister has seen on a Schedule under a s417 request and now have made a s351 request);
- cases where the person (and their family members) have been in receipt of ASA payments;
- repeat requests,
- withdrawn requests; and

- the remainder of cases, in order of receipt.

6.1.2 Note that finalisation of repeat requests should be prioritised if removal is imminent.

6.2 Requests from unaccompanied minors

6.2.1 All advice to the Minister (in either a Submission or a Schedule) needs to highlight any case of an unaccompanied minor.

6.2.2 The reasons why they do not have immediate family with them and reference to the social support that is available to them should also be noted.

6.2.3 In all cases where there is a child under 18 years of age and that child is in Australia (no matter what the child's immigration status), Australia's international obligations under the CROC are to be considered (see 3.3.7).

6.2.4 A case involving an unaccompanied minor may not necessarily require a submission to the Minister. For example, on assessment against the Guidelines the case may not present any unique or exceptional circumstances, notwithstanding any obligations under the CROC, such that it would be in the public interest for the Minister to exercise his public interest powers, and it may in some cases be in the best interests of the child to be reunited with their family or returned to their home country.

6.2.5 If further information is required please refer to the Protection Services Section or Special Residence Section in the first instance.

6.3 Requests where the subject is involved in litigation

6.3.1 The Minister's general view is that cases where a request for him to exercise his public interest power has been made but the relevant persons are currently engaged in litigation in relation to Migration matters, are 'inappropriate to consider' at that time, but may make a request once litigation has been concluded.

6.3.2 However, there may be cases where it is appropriate to make an exception, such as, where the case is urgent for a reason unrelated to the litigation, for example, the subject of the request may be expecting a baby in the near future; be near death; have a medical condition requiring an urgent, major operation; be subject to other serious and credible health or life threatening situations; be in danger of missing a substantial business opportunity; or otherwise may be seriously compromised in some way.

6.3.3 Such circumstances will require close liaison with legal officers and Departmental Liaison Officers in relation to the Minister's requirements for each case.

6.3.4 There may also be cases where the Minister requests a submission on a case and may or may not be aware that litigation is in process at the time he makes that request.

6.3.5 If a case is to be brought to the Minister's attention, and litigation is in process, it is essential that the Minister is made aware of the litigation and its nature and that the Litigation Sections of the Department are also aware of the submission to the Minister.

6.3.6 There may be cases where the Court asks that the Minister be made aware of an outstanding request for him to exercise his public interest power.

6.3.7 This can occur either during the litigation proceedings or at the completion of proceedings. On these occasions, the legal officer will contact the Ministerial Intervention Unit and inform the case officer of the Court's comments.

6.3.8 The circumstances of the particular case should be considered in consultation between the legal officer and the case officer to identify an appropriate method of referral to the Minister.

6.3.9 To identify whether the subject of the request is involved in litigation, and who the relevant legal officer is, it is necessary to contact the Legal Service Section in Central Office (Tel. (02) 6264 3042 and fax (02) 6264 1401).

6.3.10 The method for keeping the Litigation area informed is to liaise with the legal officer responsible for the case in question and to send a copy of the relevant submission to either the legal officer concerned or the Assistant Secretary Legal Services and Litigation Branch.

6.3.11 It is appropriate for the relevant case officer to also contact one of the Departmental Liaison Officers at the Minister's office to discuss such a case in the first instance.

6.3.12 If a submission is prepared it should very clearly spell out the fact of the litigation and its nature so that the Minister is fully informed when considering the case.

6.4 Ministerial visa grants with which the subject of the request disagrees

6.4.1 The Minister's powers under s 345 or s 351 or s 391, s 417, s 454 or s 501J of the Act are not dependent on the subject of the request agreeing to the terms of any more favourable decision the Minister may choose to make.

6.4.2 Even if a subject of the request disagrees with the Minister's decision to substitute a more favourable decision under these powers, the decision is still valid.

6.4.3 The Minister cannot re-exercise his power in respect of a particular Review authority decision once he has substituted a more favourable decision as the power has been spent. The visa will remain valid until it ceases, according to the normal rules relating to visa cessation.

6.4.4 There are special rules (and transitional provisions) relating to the Minister's power to grant visas under the former s 345 (MIRO).

6.4.5 Under the former s 345 unless the decision was that originally sought by the applicant, this power could only be used to grant a visa in terms to which the subject of the request agreed.

6.4.6 Given the special rules and transitional provisions, advice should be sought from Special Residence Section for non-humanitarian cases where there is an issue with former s 345, and there is no review by the MRT pending, before the case is finalised.

6.5 Repeat requests

6.5.1 The Act does not impose limitations as to time and number of requests.

6.5.2 Repeat requests for the Minister to exercise his public interest powers are those that are received after the Minister has previously had the case brought to his attention under the same public interest power (in either the submission or schedule format):

- where the Minister has decided not to consider the exercise of his

power in the case; or

- the Minister has considered the case and has decided not to exercise his power.

6.5.3 If the Minister can exercise his power under more than one public interest power, then a request under one public interest power will not make a request for the other public interest power a repeat request. For example, a subsequent request under s 351, after a request under s 417 has been considered by the Minister will be considered a 'first time request' but will be processed with priority if there is no new information that brings the case within the Guidelines.

6.5.4 PARMS coordinates the initial receipt of repeat requests for redirection to the relevant MIU along with the acknowledgment replies for letters of support.

6.5.5 Repeat requests do not receive an interim reply as they are given priority processing.

6.5.6 The Minister has directed that repeat requests should not be brought to his attention unless they contain additional information that potentially brings the case within the ambit of the Guidelines.

6.5.7 If, on assessment of the repeat request, additional information is provided and the case now appears to fall within the Guidelines a submission is to be prepared.

6.5.8 In some cases it may be appropriate to expedite the Minister's personal consideration. This could be done by sending via facsimile a summary of the facts of the case to the Minister's office (see section 8).

- The fax is then followed by either a Submission or a Schedule to the Minister.

6.5.9 The submissions should always make it clear that the case has previously been brought to the Minister's attention and should identify the changes in the information that suggest that the case may now fall within the ambit of the Guidelines.

6.5.10 If the relevant person is engaged in litigation, the Minister considers this case 'inappropriate to consider' and the person should be advised accordingly and may submit another request once the litigation is concluded.

6.5.11 If, on assessment of the repeat request, it is found that no additional information is provided and that the case remains outside the ambit of the Guidelines, a file note should be made to that effect and a Departmental reply sent from the MIU to the person making the request. This reply should be signed by Departmental Staff. This procedure applies irrespective of whether or not the person is involved in litigation.

6.5.12 The Minister will reply to requests from his constituents and Members of Parliament. The Minister's reply does not delay finalisation of the repeat requests.

6.5.13 If the person has no other basis for remaining lawfully in Australia, Border Control and Compliance Division is then notified by the MIU of the need to consider the person for removal action.

6.6 Requests where the Minister has no power to exercise his public interest powers

6.6.1 Requests assessed as 'no power' requests are those where a request is made but the Minister's public interest powers are not available.

6.6.2 These requests are to be prioritised for immediate action (section 6.1).

A person is not to be granted a Bridging E (Class WE) Visa on the basis that they meet 050.212(6) until an assessment of whether or not the Minister has power has been made.

6.6.3 All replies stating that the Minister has no power are prepared by the Operational Area and signed by the Minister for Citizenship and Multicultural Affairs (other than those emanating from the Minister's constituents or Members of Parliament which are signed prior to the letters signed by the Minister for Citizenship and Multicultural Affairs being sent).

6.6.4 If the person has no other basis for remaining lawfully in Australia, Border Control and Compliance Division is then notified by the relevant MIU.

6.7 Requests which are inappropriate to consider

6.7.1 Requests assessed as "inappropriate to consider" are listed at 5.5.6. In respect of "inappropriate to consider" cases decided by MIRO but pending MRT consideration, MIUs should not initiate consideration of these cases for the exercise of the Minister's public interest power and should not stockpile them pending later outcomes.

6.7.2 These requests are to be prioritised for immediate action.

6.7.3 All replies are prepared by the relevant MIU. A letter stating that "No further action is taken on this request" is sent to the person/their representative.

6.7.4 These letters are to be prepared for signature by the Minister for Citizenship and Multicultural Affairs (other than those emanating from the Minister's constituents or Members of Parliament which are signed prior to the letters signed by the Minister for Citizenship and Multicultural Affairs being sent).

6.8 Withdrawn requests

6.8.1 A request for the exercise of a public interest power is considered to be withdrawn when the person informs the Department in writing that they withdraw their request that the Minister exercise his public interest power.

6.8.2 Withdrawn requests are also to be given processing priority. A record is to be attached to the person's file detailing the correspondence regarding the withdrawal.

6.8.3 All replies are prepared by the relevant MIU. An 'acknowledgment of the withdrawal' letter is sent to the person or their representative.

6.8.4 These letters are to be prepared for signature by the Minister for Citizenship and Multicultural Affairs (other than those emanating from the Minister's constituents or Members of Parliament which are signed prior to the letters signed by the Minister for Citizenship and Multicultural Affairs being sent).

6.8.5 If the person has no other basis for remaining lawfully in Australia, Border Control and Compliance Division is then notified by the relevant MIU.

6.9 Interaction between s 48B, s 417, s 454 and s 501J

6.9.1 A person may make a request under s 48B (Minister may determine that

s 48A does not apply to non-citizen). These requests may be made within the same letter as a request under s 345 or s 351 or s 391, s 417, s 454 or s 501J of the Act, in separate but contemporaneous letters or consecutively.

6.9.2 It is important to note that requests under s 48B and sections s 345 or s 351 or s 391, s 417, s 454 or s 501J of the Act are not the same and involve completely different issues (refer to 'Purported Further Applications' in the Protection Visa Protection Manual for purported further applications for a protection visa subject to s 48A and requests under s 48B).

6.9.3 Details of these differing requests must be recorded separately in ICSE.

6.9.4 Stage One Submissions and Schedules may both address s 345 or s 351 or s 417, and s 48B issues.

6.9.5 Letters advising persons of the outcome of their requests may address s 417, s 454, s 501J and s 48B requests.

6.9.6 It is important to note that a request for the Minister to exercise his public interest power under s 345, s 351, s 391, s 417, s 454 or s 501J of the Act, following a s 48B request, is not a repeat request but should be treated as an initial request in respect of which the Minister may substitute a more favourable decision.

6.9.7 Similarly, a request under s.48B that follows a request under s.417, s.454 or s.501J is not a repeat request but should be treated as an initial request under s.48B.

6.10 Delayed considerations of requests

6.10.1 Delayed considerations are defined as those cases where the Minister has commenced considering whether the exercise his public interest power and has asked for further information, and a period of six months or greater has elapsed without the requested information being made available.

6.10.2 Examples of delayed processing include, failing to report to an interview, or where requested AOS has not been provided.

6.10.3 In these instances a Stage Two Submission should be sent to the Minister including any information as to why there is delay in processing.

6.10.4 The Submission should include options and request an indication as to whether the Minister would prefer to wait for the information requested, or whether he wishes to make a decision on the available information.

7 VISA ISSUES AND THE MINISTER'S PUBLIC INTEREST POWERS

7.0.1 Following consideration of a particular case, the Minister may or may not decide to substitute a more favourable decision for that of a review authority.

7.0.2 If the Minister does decide to substitute a more favourable decision for that of a review authority, the visa granted would be what the Minister considers, in the circumstances, to be the most appropriate visa.

7.0.3 As the Minister is not bound by Subdivision AA (Applications for visas) or AC (Grant of visas) of Division 3 of Part 2 of the Act or Regulations, the Minister can grant any class of visa. He is not limited to the visa class for which the person applied.

7.0.4 Additionally, the Minister may grant a visa irrespective of whether or not the circumstances of the individual bear some relation to the usual criteria for that class of visa.

7.0.5 The use of the Minister's public interest powers impacts on the Migration Program as all visa grants generated by post-1 September 1994 applications are counted against the program allocation for that particular visa class.

7.0.6 Additionally, the Minister can only use his public interest power to substitute a more favourable decision once in respect of each relevant review authority decision.

7.0.7 These factors have implications for the recommendation to the Minister of the most appropriate visa classes.

7.1 What visa class to recommend?

7.1.1 The Minister is not bound by the Regulations in respect of which subclass of visa he can grant.

7.1.2 Generally it is not appropriate to recommend visa options to the Minister that are constrained by availability of places under a Program even where the particular visa class appears to be the 'closest fit' to the person's circumstances. This is for a number of reasons:

- A person does not need to meet Schedule 2 criteria for the grant of a visa under a public interest power so a 'closest fit' should not be seen as limiting the visa options available;
- It may not be appropriate that a person wait for new places to become available under a program given their circumstances.

7.1.3 If a subject of a request falls within the Minister's Guidelines, it is appropriate for case officers to recommend onshore visa subclasses if the person is onshore and offshore visa subclasses if the person is offshore.

7.1.4 There may be times when, for policy reasons, it is more appropriate for an offshore visa to be recommended for persons applying onshore (for example in the case of the East Timorese).

7.1.5 There may be times, when, for policy reasons, it is more appropriate for an offshore visa to be recommended for persons applying onshore (for example in the case of East Timorese).

7.1.6 In such cases, case officers should consult with Special Residence Section or Protection Services Section as appropriate.

7.1.7 Due to the nature of Bridging Visas, case officers should not recommend to the Minister the grant of a Bridging Visa.

7.1.8 Case managers should also take care when considering recommending a temporary visa subclass, including a temporary protection visa or a safe haven visa, as the grant of such a visa may exhaust the Minister's intervention power and preclude the person from pursuing other future migration outcomes.

7.1.9 The grant of a temporary visa subclass may also prevent the person from accessing benefits and, where applicable, Medicare.

7.1.10 For a request under s 417, 454 and 501J of the Act, visa options in addition to Protection Visas should be put to the Minister for his consideration.

7.1.11 In some circumstances, case officers may use discretion in recommending a temporary visa. For example, if the person were in Australia caring for an Australian Citizen but there is no genuine and continuing relationship, then it would be open to the case officer to recommend that the Minister grant a temporary visa.

7.1.12 Requests under s 345 or s 351 of the Act where a person has previously unsuccessfully made an application for a particular class of visa, it may

be that the visa applied for is the most appropriate one to be suggested to the Minister.

7.1.13 On the other hand, if the person's circumstances have changed, consideration may need to be given to the grant of a different class of visa.

7.2 Partner (temporary) Visa

7.2.1 Where the Minister exercises his public interest powers to grant a Partner (Temporary) visa, the subject of the request is notified of the Minister's decision and advised of details for the evidence of that visa.

7.2.2 The Partner (Temporary) visa should be evidenced in ICSE.

7.2.3 Generally, an application for a Partner (Temporary) and Partner (Residence) visa are made on the same application form. However, it is important to note that in circumstances where the Minister has exercised his public interest powers to grant a Partner (Temporary) visa, there will be no application for the Partner (Residence) visa.

7.2.4 In order to obtain a permanent visa, the visa holder must therefore apply for a Partner (Residence) visa by completing an application form and paying the appropriate Visa Application Charge.

7.2.5 The letter informing the subject of the request that the Minister has granted the Partner (Temporary) visa advises them of this requirement and encourages the visa holder to apply as soon as possible.

7.2.6 The visa holder would normally have to wait two years from the time the Minister exercised his public interest powers to grant the Partner (Temporary) visa before being eligible for the grant of the Partner (Residence) visa.

7.2.7 One exception to this is where persons are in a long-term spouse relationship which is defined in reg 1.03 as one where the parties have been in that relationship for 5 years or 2 years if there is a child of the relationship.

7.2.8 If a case officer presents to the Minister a Contributory Parent Visa subclass as an option for grant, the case officer should recommend a "visa holder contributory payment" that aligns with what other Contributory Parent Visa holders might have to pay.

7.2.9 If the Minister requests a "visa holder contributory payment" then the payment is recorded on ICSE and receipted in SAP to go to the Consolidated Revenue Fund.

7.2.10 The local CPM (Collector of Public Monies) is notified of this so they can make arrangements for the payment. A note will be recorded in ICSE as part of the event such as "...payment is recorded...".

7.2.11 If the Minister is considering requesting an equivalent contribution, the local Finance section or Financial Operations should be consulted.

7.2.12 When the purpose of the charge is determined, the case officer will send a request to Melbourne Accounts Receivable, who will produce an invoice for the applicant (with respect to the appropriate general ledger account).

7.2.13 The case officer may send the invoice to the applicant with the request for health and character checks etc.

7.2.14 A CPM in any DIMIA office would be able to accept the payment accompanied by the invoice. Once the payment has been banked, the CPM would inform the case officer, who would note that the payment has been made.

7.3 Caps and the queuing policy

7.3.1 The Government sets planning levels for the various categories of the Migration Program for each financial year. In some cases, the level of demand is greater than the number of places available.

7.3.2 The Minister's power under s.85 of the Act provides for the determination of the number of visas that may be granted in a particular class or classes in a financial year, that is, a cap.

7.3.3 Section 86 provides that if there is a cap and the number of visas of the class or classes granted in the financial year reached that maximum number, no more visas of the class or classes may be granted in the financial year.

7.3.4 When recommending to the Minister that he grant a visa of a particular subclass, it is necessary to first be satisfied that the grant of a visa in that subclass would not result in the limitation on the number of visas to be granted being breached.

7.3.5 The capped subclasses are managed on the basis of a queue whereby applicants who have met certain visa requirements are given a queue date which determines their position in the order of precedence for places under the Program.

7.3.6 In the period 1996-97 to 2002-03 the Parent and Preferential Family subclasses (103, 104, 114, 115, 116, 835, 836 and 838) have at various times been capped and queued.

7.3.7 In the interests of fairness and equity, the Minister has made Directions under section 499 of the Migration Act 1958 (the Act).

7.3.8 Direction 27 governs the way in which Program places are allocated in respect of a subclass, that has been or is capped.

7.3.9 While cases where the Minister has exercised his public interest power are given high priority in the allocation of Program places under this General Direction, a point will be reached where all places for a particular subclass under the Program have been committed.

7.3.10 When this occurs, it is not appropriate to recommend to the Minister that he grant a visa of that subclass as to do so would result in the number of places determined by the Minister being unlawfully exceeded.

7.3.11 It is essential that, where a submission to the Minister relates to a visa subclass which is (or has been) capped, officers should check with Migration Program Section (through the Migration Program Mailbox) before they make the recommendation.

7.3.12 This is because the visa is granted when the Minister signs the Decision Document provided as an attachment to the Stage 1 or Stage 2 Submission.

7.3.13 In the event that no program place can be made available at that point in time, the officer should consider the following options:

- delay forwarding the submission to the Minister's office - this is only a suitable option if the case is not urgent and/or it is relatively close to the end of the program year. The Stage Two Submission can then be sent to the Minister, at a time appropriate to ensure that, if the Minister exercises his public interest power and grants a visa, the grant will occur in the new program year (as cases where the Minister has exercised his public interest power are given priority);
- alternatively, recommend another visa subclass advising the Minister that there are no places available in the most appropriate visa subclass.

- The limitations in the Migration Program, however, should not influence whether a permanent or temporary visa is recommended.

8 GRANTING A BRIDGING VISA ON THE BASIS OF A REQUEST FOR THE MINISTER TO EXERCISE THE PUBLIC INTEREST POWER

8.1 Grounds for the grant of a Bridging E visa

8.1.1 Detailed advice concerning the criteria to be met for the grant of a BVE on grounds that a request has been made for the Minister to exercise his public interest power is provided in MSI *Bridging E Visa (subclass 050) – Legislative framework and further guidelines*.

8.1.2 The Regulations provide that the making of a request for the Minister to exercise his public interest power under s 345 or s 351 or s 391 or s 417, and s 454 is grounds for the grant of a Bridging E (Class WE) visa (hereafter BVE).

8.1.3 In summary, the criteria to be met for the grant of a BVE under this ground require that the subject of the request:

- is not an eligible non-citizen (see reg 1305(3)(ba) of the Regulations, and s 72 of the Act);
- is an unlawful non-citizen, the holder of a BVE, or the holder of a BVD (041) (see reg 050.211);
- is the subject of a decision for which the Minister may exercise his public interest power under s 345 or s 351 or s 391, s 417, or s 454 of the Act (see reg 050.212(6)(a)(i) of the Regulations) and has not previously requested the Minister exercise his public interest powers;
- is the subject of a request to the Minister to exercise the power to substitute a more favourable decision (see reg 050.212(a)(ii) and (iii), and reg 050.212(6)(b) and (c));
- unless an exemption applies, has been interviewed by a Compliance officer (see reg 050.222 of the Regulations);
- satisfies the decision-maker that they will abide by the conditions that will be imposed on the BVE (see reg 050.223); and
- if requested, has lodged a security for compliance with conditions (see reg 050.224).

8.1.4 If a person makes a request for the Minister to exercise his public interest power in respect of a particular review authority decision, and there has been no previous request in relation to that decision, the subject of the request may be eligible for a BVE during the assessment of the request by a decision maker.

8.1.5 If, however, a request has previously been made in relation to that particular review authority decision, a subject of the request will only become eligible for a BVE if:

- the Minister is personally considering whether to exercise, or to consider the exercise of, his powers to substitute a more favourable decision for a decision under section 345, 351, 391, 417 or 454 of the Act in relation to the subject of the request.
- the Minister has decided, under section 345, 351, 391, 417 or 454 of the Act, to substitute a more favourable decision for the decision of a review authority but the applicant cannot, for the time being, be granted a substantive visa because of a determination under s 85 of

the Act (see reg 505.212(6)).

8.1.6 The circumstances, therefore, where a request should be regarded as being under the Minister's personal consideration include where:

- a request is included on a schedule, or is the subject of a submission, which has been referred to the Minister for his consideration;
- the Minister is awaiting further information, or the preparation of a submission, regarding a request that was originally referred either by way of a schedule or submission; or
- an OIC of an MIU has made an assessment that a request falls within the Guidelines and, prior to the preparation of a submission, provides preliminary details of the case to the Minister's office by fax.

8.2 Consideration of BVE application by compliance

8.2.1 Any application for grant of a BVE while a request for the Minister to exercise his public interest power is being finalised should be referred to the relevant Compliance office for a decision on the application.

8.2.2 To ensure that subjects of requests to the Minister to exercise his public interest power are not unnecessarily/inappropriately detained or removed from Australia, the compliance officers should ascertain whether or not the request has been referred to the Minister.

8.2.3 Case officers should make appropriate entries in ICSE as soon as possible.

8.3 Visa period validity

8.3.1 A BVE granted on the basis of an outstanding request for the Minister to exercise his public interest power is granted for a specified period (see reg 050.517).

8.3.2 The period for which a BVE is granted should be sufficient to allow for the finalisation of the request.

8.3.3 In order to determine this period, the decision-maker should seek advice as to the status of the request from the relevant MIU that is responsible for advising the Compliance officer of the likely processing time.

8.4 Permission to work

8.4.1 A non-citizen granted a BVE on the basis of an outstanding request for the Minister to exercise his public interest power may only obtain permission to work

- where the request for the Minister to exercise his public interest power has been referred to the Minister's office for the Minister's personal consideration after assessment by a case officer; or
- the Minister has decided to exercise his public interest power but cannot, for the time being, because of a determination under section 85 to cap the number of grants of visas of a particular class. (See reg 050.212(6A) of the Regulations.)

8.4.2 In addition, an applicant for permission to work must already hold a BVE granted on the basis that the Minister is considering the exercise of his public interest power, and must demonstrate a "compelling need to work".

8.4.3 Regulation 1.08 provides that an applicant is to be taken to have a compelling need to work if he or she is in “financial hardship”.

9 NOTIFICATION OF THE MINISTER’S DECISION

9.0.1 If the Minister considers a request put to him in a submission and either grants a visa or decides not to exercise his public interest power, the subject of the request is notified of the Minister’s decision by post or fax as appropriate. This letter is prepared for the Minister’s signature by the relevant MIU and sent in accordance with s 494D of the Act.

9.0.2 The person is also advised of any subsequent requirements of the particular visa class granted and where the visa can be evidenced.

9.0.3 If the subject of the request has been brought to the Minister’s attention in a Schedule and the Minister decides not to consider the exercise of his power in the case, the subject of the request is notified in a letter prepared for the signature of the Minister for Citizenship and Multicultural Affairs.

9.0.4 MIUs should liaise with Compliance case managers concerning persons in detention.

9.0.5 If the Minister decides not to consider the exercise of the public interest power in a case or the Minister considers a case and decides not to substitute a more favourable decision and the subject of the request is in immigration detention, the detainee will receive notification from an Immigration Detention Centre (IDC) staff member rather than by post or fax.

9.0.6 If a detainee is represented by another person, that person is to be notified of the outcome of the Minister’s consideration of the case after advice from IDC staff confirms the delivery of the letter to the detainee.

9.0.7 Replies to repeat requests not brought to the Minister’s attention are prepared and signed by Departmental staff except for responses to the Minister’s constituents and Members of Parliament which are to be prepared for the Minister’s signature. These letters are to be signed by the Minister before letters signed by Departmental staff are sent.

9.0.8 If a third party makes a request on behalf of a person that is the subject of a review authority decision, but there is no express consent by the person subject of the review decision, the person making the request is not to be notified of the progress of the request. This does not apply where there is implied consent.

9.0.9 Implied consent exists for solicitors acting on behalf of their clients, doctors acting on behalf of their patients, and MPs who request information about their constituents. If the subject of the request has seen the MP to discuss their situation then there can be full disclosure of the progress of the request to the MP

9.0.10 If, however, the MP’s constituent is the sponsor or a family member of the subject of the request, then the MP may only be notified in a way that the subject of the request may reasonably be expected to tell the sponsor/family member.

9.0.11 It would therefore be reasonable to provide (orally or in writing) general information as to the progress of an application and whether or not the Minister has decided not to exercise his public interest power. It would not be appropriate to reveal sensitive personal information which may have contributed to the Minister’s decision, unless the case officer can be satisfied by a written authority from the subject of the request that they are not opposed to that course.

9.0.12 Express consent is where the subject of the review decision makes a written representation that the third party is acting on their behalf or that

the case officer is authorised to release information about the request to the third party.

9.1 Decision Document

9.1.1 The decision document is attached to a Submission and confirms the outcome of the Minister's consideration of the exercise of the public interest powers. However, if the Minister decides to grant a visa, then the visa is granted when the Minister signs the Submission (as the Minister will usually sign the Submission first).

9.1.2 Officers should make appropriate entries in ICSE in a timely manner.

9.2 Tabling Statements

9.2.1 The legislation provides that where the Minister exercises his public interest powers in a case to substitute a more favourable decision, a statement is to be laid before each House of the Parliament.

9.2.2 This statement provides the details of the subject of the request, the original and substituted decision, and the reason/s for the substitution of that decision, including why it is in the public interest to do so.

9.2.3 The name and any other identifying details of the person, and any family members, are not to be included in the statement.

9.2.4 Refer to section 4.2 above for PARMS responsibility re Tabling Statements.

9.3 Removal policy

9.3.1 Broadly speaking Section 198 of the Act requires the removal of unlawful non-citizens (whether or not they are also detainees) who are not either holding or applying for a visa.

9.3.2 As noted in the Guidelines, a request for the Minister to exercise one of the public interest powers under s 345, 351, 391, 417, or 454 or 501J is not an application for a visa and unless the request leads to the grant of a visa, such a request has no effect on the removal provisions.

9.3.3 However, note that the making of a request for the exercise of the Minister's powers may provide grounds for the grant of a bridging visa (see section 8).

10 OTHER ISSUES

10.1 Freedom of Information and the submission process

10.1.1 There are no specific exemptions or provisions in the FOI Act concerning treatment of submissions sent to, being considered by the Minister, or returned from the Minister.

It is possible that the part of a submission which provides advice, opinion, analysis or recommendations might be exempted under s 36 Internal Working Documents, as it may not be in the public interest for high level considerations by the Minister to be released prematurely, or at all.

10.1.2 If a person or their authorised agent wants to access documents, they may have to lodge more than one request, or wait till the process is finished, and then ask for all documents.

10.1.3 Where an FOI request is received which seeks documents addressed to the Minister, such as submissions or documents created in his office, the FOI decision-maker should immediately advise OPFOI, and in consultation with OPFOI, advise the Minister's office of any potentially sensitive documents, and details of any documents to be released.

OPFOI Section in Central Office can provide assistance on processing an FOI request and should also be consulted where there are any potentially sensitive documents.

10.2 Complaints

10.2.1 If an MIU case officer is the subject of a complaint, the relevant MIU should forward a copy of the letter to the relevant Section Head for their attention and information.

10.2.2 If criticism is directed at a review authority member, a copy of the letter should be referred to the Registrar of the relevant Authority.

10.2.3 Clients who express concerns about the service provided by migration agents should be advised of the formal complaints mechanism operated by the Migration Agents Registration Authority (MARA).

10.2.4 Clients could be provided with the “Fact Sheet 72 – Regulating Migration Agents”, available on Lotus Notes Bulletin Board and a MARA Complaint Form.

10.2.5 Any Departmental staff wishing to make a complaint about a registered migration agent must consult the MARA Liaison Officer in the Migration Agents and Assistance Section before making the complaint.

10.2.6 Any complaint must be treated with high levels of confidentiality and must be submitted through the MARA Liaison Officer.

10.2.7 The Administrative Circular on *Instructions for DIMA employees on making complaints about registered migration agents and unregistered persons operating as agents* also provides advice to Departmental staff who may wish to make complaints about migration agents.

10.2.8 Complaints about unregistered migration agents should be directed to the relevant Investigations Section for the State.

10.2.9 Migration Agents Policy and Liaison Section (MAPL) is the policy area responsible for monitoring conduct of Migration Agents.

10.2.10 When MIU officers receive a request where the Minister has no public interest power to exercise, a copy of the letter returned from the Minister’s office is forwarded to the Assistant Director, MAPL, Central Office.

10.2.11 MAPL will arrange for these cases to be referred to the Migration Agents Registration Authority (MARA). Where the MARA begins an investigation the client files will be requested from DIMIA. MAPL will arrange to forward the files to the MARA.

10.2.12 Further information is available from the Migration Agents Policy and Liaison Section, telephone 02 6264 3019.

Abul Rizvi
First Assistant Secretary
Migration and Temporary Entry Division

Peter Hughes
First Assistant Secretary
Refugee and Humanitarian Division

Appendix 6

Section 417 Statements

Examples of section 417 statements tabled in parliament by:

- Senator Bolkus
- Mr Ruddock
- Senator Vanstone

SECTION 417 OF THE MIGRATION ACT 1958 - STATEMENT TO PARLIAMENT

Exercising my powers under subsection 417(1) of the Migration Act 1958 ("The Act"), I have set aside a decision of the Refugee Review Tribunal (RRT) affirming a decision to refuse the grant of refugee status to the applicant and have substituted a decision to grant a Protection Visa.

1. The particular circumstances of this case were that the applicant had sought refugee status in Australia, was assessed against the 1951 United Nations Convention and the 1967 Protocol relating to the status of refugees and was determined not to be a refugee. The applicant's claims were reviewed by the RRT, and following that review, the applicant was again determined as not having the status of refugee.

2. Although the applicant has been found not to be a refugee, I have decided to exercise my discretionary powers under subsection 417(1) of the Act, as it would be in the public interest to allow the applicant to remain in Australia.

   The applicant's circumstances are such that a return to their home country would mean that the family would be subjected to harassment and intimidation by both the authorities and the general populace. The applicant's religious beliefs are in conflict with the state religion which also dominates the laws of the country. The two children of the applicant have spent their formative years in Australia having arrived in Australia at the ages of 13 years and 3 years in 1984 and would have extreme difficulty adjusting to strict religious codes in place in their home country.

   The applicant and his family have assimilated into the Australian community and it would be in the public interest to offer protection to this family.

3. In the circumstances, I have decided that, as a discretionary and humanitarian act to an individual with a genuine ongoing need, it is in the interest of Australia as a humane and generous society to grant the applicant a Protection Visa.

NICK BOLKUS
Minister for Immigration and Ethnic Affairs

7.1.8.1.95

SECTION 417 OF THE MIGRATION ACT 1958 - STATEMENT TO PARLIAMENT

Exercising my powers under subsection 417(1) of the Migration Act 1958 ("The Act"), I have set aside a decision of the Refugee Review Tribunal (RRT) affirming a decision to refuse the grant of refugee status to the applicant and have substituted a decision to grant a Protection Visa.

1. The particular circumstances of this case were that the applicant had sought refugee status in Australia, was assessed against the 1951 United Nations Convention and the 1967 Protocol relating to the status of refugees and was determined not to be a refugee. The applicant's claims were reviewed by the RRT, and following that review, the applicant was again determined as not having the status of refugee.

2. Although the applicant has been found not to be a refugee, I have decided to exercise my discretionary powers under subsection 417(1) of the Act, as it would be in the public interest to allow the applicant to remain in Australia. Although the situation giving rise to the applicant's fears has undergone fundamental changes, the applicant has been severely traumatised by his past experiences and it would be inhumane to return him to his country because of his subjective fear. Additionally, the applicant's medical condition prevents him from undertaking the necessary travel to depart Australia.

3. In the circumstances, I have decided that, as a discretionary and humanitarian act to an individual with a genuine ongoing need, it is in the interest of Australia as a humane and generous society to grant the applicant a Protection Visa.

NICK BOLKUS
Minister for Immigration and Ethnic Affairs

...../...../.....

SECTION 417 OF THE MIGRATION ACT 1958

- STATEMENT TO PARLIAMENT -

Exercising my powers under subsection 417(1) of the Migration Act 1958 ("The Act"), I have set aside a decision of the Refugee Review Tribunal (RRT) affirming a decision to refuse the grant of a Protection Visa to the applicant and have substituted a decision to grant a Protection Visa.

1. The particular circumstances of this case were that the applicant had sought the grant of a Protection Visa in Australia, was assessed against the 1951 United Nations Convention as amended by the 1967 Protocol relating to the status of refugees and was determined not to be a person to whom Australia has protection obligations. The applicant's claims were reviewed by the RRT, and following that review, the applicant was again determined as not being a person to whom Australia has protection obligations.

2. Although the applicant has been found not to be someone to whom Australia has protection obligations, I have decided to exercise my discretionary powers under subsection 417(1) of the Act, as it would be in the public interest to allow the applicant to remain in Australia. Having regard to the applicant's particular circumstances and personal characteristics, I think it would be in the public interest to allow him to remain in Australia.

3. In the circumstances, I have decided that as a discretionary and humanitarian act to an individual with a genuine ongoing need, it is in the interest of Australia as a humane and generous society to grant the applicant a Protection Visa.

PHILIP RUDDOCK
Minister for Immigration and Multicultural Affairs

13/5/1998

SECTION 417 OF THE *MIGRATION ACT 1958*

- STATEMENT TO PARLIAMENT -

Exercising my powers under subsection 417(1) of the *Migration Act 1958* ("The Act"), I have set aside a decision of the Refugee Review Tribunal (RRT) affirming a decision to refuse the grant of Protection visas to the applicants and have substituted a decision to grant subclass 856 Employer Nomination visas.

1. The particular circumstances of this case were that the applicants have sought the grant of Protection visas in Australia, were assessed against the 1951 United Nations Convention as amended by the 1967 Protocol relating to the status of refugees and were determined not to be people to whom Australia has protection obligations. The applicants' claims were reviewed by the RRT, and following that review, the applicants were again determined as not being people to whom Australia has protection obligations.

2. Although the applicants have been found not to be persons to whom Australia has protection obligations, I have decided to exercise my discretionary powers under subsection 417(1) of the Act, as it would be in the public interest to allow the applicants to remain in Australia. Having regard to the applicants' particular circumstances and personal characteristics, I consider it would be in the public interest to allow the applicants to remain in Australia.

3. In the circumstances, I have decided that as a discretionary and humanitarian act to people with a genuine ongoing need, it is in the interest of Australia as a humane and generous society to grant the applicants subclass 856 Employer Nomination visas.

PHILIP RUDDOCK
Minister for Immigration and Multicultural and Indigenous Affairs

...6.../...8.../2003

SECTION 417 OF THE *MIGRATION ACT 1958*

- STATEMENT TO PARLIAMENT -

1. Exercising my powers under section 417 of the *Migration Act 1958*, I have substituted for a decision of the Refugee Review Tribunal (RRT) not to grant Class AZ / Subclass 866 Protection Visas to the applicants, a decision to grant them Class XB / Subclass 202 Global Special Humanitarian (Offshore – Permanent) Visas.

2. The particular circumstances of this case were that the applicants had sought the grant of a Protection Visa in Australia, were assessed against the 1951 United Nations Convention as amended by the 1967 Protocol relating to the status of refugees and were determined not to be persons to whom Australia has protection obligations. The applicants' claims were reviewed by the RRT, and following that review, the applicants were again determined not to be persons to whom Australia has protection obligations.

Although the RRT applicants have been found not to be persons to whom Australia has protection obligations, I have decided to exercise my discretionary powers under subsection 417(1) of the Act, as it would be in the public interest to allow the RRT applicants to remain in Australia. Having regard to the RRT applicants' particular circumstances and personal characteristics, I have decided to grant Class XB / Subclass 202 Global Special Humanitarian (Offshore - Permanent) Visas.

3. I took the view that the circumstances in this case justify its approval in the public interest as a reflection of Australia as a compassionate and humane society.

4. Accordingly, it is appropriate in this case that I exercised my powers under section 417 of the Act.

AMANDA VANSTONE
Minister for Immigration and Multicultural and Indigenous Affairs

Dated: 3/12/03

SECTION 417 OF THE *MIGRATION ACT 1958*

- STATEMENT TO PARLIAMENT -

1. Exercising my powers under section 417 of the *Migration Act 1958*, I have substituted for a decision of the Refugee Review Tribunal (RRT) not to grant Class AZ / Subclass 866 Protection Visas to the applicants, a decision to grant them Class XB / Subclass 202 Global Special Humanitarian (Offshore – Permanent) Visas.

2. The particular circumstances of this case were that the applicants had sought the grant of a Protection Visa in Australia, were assessed against the 1951 United Nations Convention as amended by the 1967 Protocol relating to the status of refugees and were determined not to be persons to whom Australia has protection obligations. The applicants' claims were reviewed by the RRT, and following that review, the applicants were again determined not to be persons to whom Australia has protection obligations.

Although the RRT applicants have been found not to be persons to whom Australia has protection obligations, I have decided to exercise my discretionary powers under subsection 417(1) of the Act, as it would be in the public interest to allow the RRT applicants to remain in Australia. Having regard to the RRT applicants' particular circumstances and personal characteristics, I have decided to grant Class XB / Subclass 202 Global Special Humanitarian (Offshore - Permanent) Visas.

3. I took the view that the circumstances in this case justify its approval in the public interest as a reflection of Australia as a compassionate and humane society.

4. Accordingly, it is appropriate in this case that I exercised my powers under section 417 of the Act.

AMANDA VANSTONE
Minister for Immigration and Multicultural and Indigenous Affairs

Dated: 13/12/03