Senate Select Committee to Inquire into Ministerial Discretion

Submitted by
The MIA National Executive
September 2003

The Committee's Terms of Reference

This submission is in response to the call for submissions by the Senate Select Committee to Inquire into Ministerial Discretion. The Committee's terms of reference are to inquire into:

1. 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;

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

3. The operation of these discretionary provisions by ministers, in particular what criteria and other considerations applied where ministers substituted a more favourable decision; and

4. 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 of the MIA

The MIA

In less than 20 years since its establishment, the MIA is recognised as the leading professional association for migration advice professionals, representing the interests of aproximately 1100 members. This number has grown from a base of 350 in 1998. The MIA nowadays represents the interests of the great majority of the more active professionals in the migration advice profession.

The MIA's objects, drawn from its memorandum of association, are:

(i) To advance the theory knowledge practice and understanding of migration consulting and the laws in relation to migration and to increase the status and advance the interests of the migration industry in Australia;

(ii) To recruit educate and train a body of members skilled in such knowledge theory practice and understanding of the laws relating to migration;

(iii) To preserve at all times the professional independence of migration consultants and agents in whatever capacity they may be serving;

(iv) To set and administer standards for the conduct of the parties to ensure that the services provided by the parties are professional, of the highest standard and in accordance with government policies. The parties will include the following: -

* The members of the Institute;

* Non-members of the Institute who practice with the members of the Institute in practice entities and have agreed to be bound by the standards of practice (notably The Code of Conduct for Migration Agents) and professional conduct and by the discipline of the Institute;

(v) To prescribe disciplinary procedures and sanctions, to exercise disciplinary powers and to impose sanctions for the better observance of the standards of practice and professional conduct of the Institute by members, by the non-members and the practice entities;

(vi) To foster and provide information to members with a commitment to the introduction into Australia of business enterprises, investment and migrants with the capacity to provide new and improved business technology, the creation of employment within Australia or the stimulation of exports;

(vii) To provide a forum for liaison with government departments;

(viii) To provide for and regulate the training and education of members and students and to set up examinations in theory and practice of migration

work for members and students and all others desirous of being enrolled as members, except organisations eligible to be corporate members;

(ix) To provide a medium by which members can effectively communicate with each other;

(x) To promote in Australia and internationally migration and business into Australia;

(xi) To provide a contact point for industry experts, potential Australian joint venturers interested in business migration and employer and other sponsors of prospective migrants;

(xii) To do all such things as may advance the profession of migration consulting and migration agents and associated industries or in relation to industry, commerce, education, public service or otherwise.

The MIA's website is www.mia.org.au

The MIA in its regulatory role (MARA)

In March 1998, the MIA was appointed by the Minister for Immigration on behalf of the Parliament as the migration advice profession's regulator. The MIA performs this function as the Migration Agents Registration Authority (MARA) pursuant to Parts 3 and 3A of the Migration Act 1958 and operationally under a Deed of Agreement in place since March 1998. The MARA powers include educational issues (Entry Level and Continuing Professional Development) initial registration and repeat registration as well as conduct / professional standards.

This submission is not being put forward in the MIA's regulatory role, but purely in its advocacy role for its members.

The MARA's website is www.themara.com.au

The Migration advice profession

The profession currently numbers 3300 registered migration agents. This number is expected to increase significantly as a result of the Commonwealth Government's stated commitment to introduce legislation into Parliament in 2004 of extraterritorial regulation and registration of those presently unregistered migration agents who operate offshore.

Migration agents do make submissions and representations to the Minister seeking his exercise of his intervention powers. The MIA strongly supports the rights of agents to make these submissions and representations provided they are properly presented and not undertaken for an improper purpose.

Comments on the Terms of Reference

We note the terms of reference do not extend to all intervention powers but are restricted to those that arise from the MRT and RRT. We acknowledge these are the main forms of application to the Minister.

Reference 1 - use made by the Minister for Immigration of the discretionary powers available under sections 351 and 417

The use made by the Minister for Immigration of the discretionary powers available is not surprising, given the backdrop of the ever increasing complexity and volume of change in migration law. We do not wish to comment on individual Minister's performances in their usage of Ministerial decisions however we note that the present Minister appears to have a strong grasp of the portfolio, based on his wide parliamentary experience, including that of Shadow Minister and a member of the Joint Standing Committee on Migration and its predecessors including the Joint Standing Committee on Migration Regulations.

It does mean a steep learning curve for the next Minister for Immigration, regardless of political persuasion, and hence the need for a wider participation in the ministerial intervention process at the decision-making stage. There is a risk, if the Minister devotes so much time to the personal exercise of discretion, that it will be at the expense of being able to discharge the macro roles of developing policy and other accountability requirements, such as community consultation, etc.

MIA considers it unfortunate that recent events have led to some politicisation of intervention requests. This could mean that future ministerial use of these intervention powers may be limited or restricted because of political considerations. We believe this could impact negatively on the fundamental need to retain this power within migration legislation, and damage opportunities for bona-fide, deserving cases to be put to a minister in the public interest.

Reference 2 - appropriateness of these discretionary ministerial powers

We welcome that the Committee has this term of reference to consider the broader migration application, decision-making, and review and appeal processes.

It is absolutely essential that the Minister retain discretion to exercise powers to waive criteria. MIA believes that the power is an entirely appropriate ministerial power which should certainly be retained. The public interest must always remain at the foundations of immigration policy and legislation and to remove ministerial discretion and intervention would be to remove ultimate consideration of the public interest in immigration policy and procedure.

From an historical perspective, wide ranging discretions were available at officer level in DIMIA throughout much of the post war period, until migration eligibility criteria were codified in the late 1980's. While some of these discretions continue to exist today, DIMIA officers no longer have discretion to decide for example to approve a visa application in the public interest where that application would otherwise be one for rejection.

The appropriateness of the discretion is particularly necessary as it is an important safety valve in an otherwise rigid system. There used to be an opportunity to participate in a 2 stage merits review process, proceeding via the Migration Internal Review Office and the Immigration Review Tribunal. This has been replaced with a single merits review process – the Migration Review Tribunal. Whilst there is no criticism of the independence of this Tribunal, the need for a rigorous and independent review of the policy framework and individual circumstances may mean that an alternative means of reviewing and making recommendations should be established, so that all responsibility does not vest with the Minister.

There have been many legislative and regulatory changes to migration law. Whilst the MIA recognises the right of the Minister and of the Parliament to set and review the operation of migration law, the changes are such that it can be difficult for an applicant to submit an application that adequately addresses the current criteria. Furthermore, the changes in regulations are only 1 part of the legislative schemata which also includes legislation, gazette notices, ministerial instructions and policy material.

The changes in regulations alone number nearly 100 sets of statutory rules promulgated since the implementation of the 1994 set of regulations. This is the 3rd consolidation of regulations since codification took place in December 1999, the previous being in 1999 and in 1993. This is represented by the following table :

Table 1 : List of changes to the Migration Regulations, 1994-2003

Year	Statutory Rule No's	Total for year
1994	268, 280, 322, 376 and 452	5
1995	3, 38, 117, 134, 268, 302 and 411	7
1996	12, 75, 76, 108, 121, 135, 198, 211 and 276	9
1997	17, 64, 91, 92, 109, 137, 184, 185, 216, 263, 279, 288, 301 and 354	13
1998	36, 37, 139, 210, 214, 284, 285, 304, 305, 306 and 322	11
1999	8, 58, 64, 68, 76, 81, 82, 132, 155, 198, 220, 243, 259, 260, 321 and 325	16
2000	52, 62, 108, 192, 259, 284 and 335	7
2001	27, 47, 86, 142, 162, 206, 239, 246, 283, 284, 285 and 291	12
2002	10, 86, 121, 129, 213, 230, 299, 323, 347, 348 and 354	11
2003 (to date)	57, 94, 106, 122 and 154	5 (to date)
	TOTAL	**96**

Reference 3 - operation of these discretionary provisions by ministers

The operation of discretionary provisions by ministers, in particular the criteria and other considerations applied where ministers substituted a more favourable decision, is not sufficiently transparent. The introduction of Migration Series Instruction No 225 is a commendable attempt to describe the process and provide some indication of the issues that need to be addressed in order to meet the high threshold of gaining intervention.

From 1988 till 1996, the facility available to a Minister for Immigration to intervene and make a decision on an application in the public interest was little used. Since 1996 it has been used much more extensively.

Nowadays it is a significant part of DIMIA operations employing numbers of specialist staff in Ministerial Intervention Units dealing with several thousand requests for intervention annually. Thus the wider use of intervention has become an integral part of the immigration system operated by DIMIA and accessed and interpreted by registered migration agents including members of the MIA.

We feel that the trend in recent years has been to gradually cause mainstream immigration legislation to become more restrictive, resulting in an increased number of appeals to relevant review tribunals, and subsequent increased approaches by applicants or their registered agents to the Minister seeking his intervention. A useful example of this is the incidence of rejection of migration applications on health grounds. Another factor influencing this more restrictive environment has been the consequences of Section 48 bars on second visa applications.

Thus, in periods where demand for migration and other visas is increasing, and approval criteria are more restrictive, it is not difficult to understand that the volume of requests for ministerial intervention would increase.

There will always be debate as to how the discretion within intervention should be exercised. MIA does not wish to be involved with, or comment on the outcomes of particular intervention cases. However the MIA most strongly believes that the discretion must be retained, and very much so for the community or public interest however that may be regarded by successive Ministers for Immigration over time.

Reference 4 - the ministerial discretionary powers- conditions or criteria to attach to those powers

The MIA does not consider it appropriate that the ministerial discretionary powers continue to exist in their current form, or if so, then conditions should attach to those powers. The MIA proffers several options. The MIA has a preferred course, but it is in the hands of the Parliament to decide which is the most appropriate.

Option 1 Existing Process with more transparent reasons by the Minister

In the event the Committee prefers to retain the existing process, then it ought require the Minister to table not only the decision but more detailed explanation of the facts and circumstances and reasons for the course of action take. This serves to allow greater understanding and to see an emerging jurisprudence in the area, but it would not of its own solve the issue unless sound reasons were given to the unsuccessful applicant.

Option 2 Existing Process with greater Tribunal input

The RRT and MRT are in an ideal position to assess the credibility of an applicant's circumstances, given they have usually taken evidence from the applicant. The process could be developed to allow the Tribunals to make a formal finding on their suitability for ministerial intervention. While in some cases the Tribunal do comment, incorporating *obiter dicta*, more thorough reasoning in a Tribunal member's decisions would allow more persuasive consideration by the Minister.

The Minister could issue a Direction under section 499 to the Tribunal to assist in this process

This option may find favour for reasons including the following :

1. cost – while the Tribunal should perhaps be allowed some funding assistance, it is not an extra process being introduced to the applicant or the Minister
2. doesn't change the existing access regime
3. Bridging Visa conditions do not change
4. Independence and freedom from political interference
5. transparency
6. the Tribunal members have the skills to carry out the task by being the arbiter of facts
7. these decisions, along with MRT decisions generally, are published and available to the community in a public fashion
8. allows the Minister to follow the Tribunal recommendation in an apolitical fashion

Option 3 Existing Process with decision making delegated to a senior Departmental decision maker

One means of de-politicising the use of ministerial intervention while retaining the ultimate use of intervention by immigration ministers, is to enable the delegation of this power to a limited number of senior, executive level officers of DIMIA. Examples of such DIMIA executives who might hold such a delegation would be State Directors of Immigration and First Assistant Secretary level executives in DIMIA Canberra.

This would not be difficult to implement, especially given that numbers of DIMIA officers are already engaged in specific Ministerial Intervention roles. In effect these officers currently consider the submissions against the guidelines set out in Migration Series Instruction (MSI) no. 225, and make their own assessment as to whether to recommend to the Minister that he should decline to intervene or decide positively to grant a visa in the public interest. Our understanding is that the Minister does not in fact sit down and read every single request for his intervention. The Minister relies as is normal practice in relations between that Minister and DIMIA, on the advice of officers of his department.

Thus in reality the delegation to senior level in DIMIA of powers under intervention is not seen by MIA as a major or radical departure from the existing process.

Option 4 Replace existing Process and introduce a committee to review the decisions

The option of a Departmental authorised officer may not be a sufficiently, rigorous independent or transparent process and there may need to be another alternative. Attempts to limit access to judicial review shows that a greater need for a wider role in informed and transparent external consideration is crucial however the process would need to be cost effective as well as maintain public confidence in the integrity of decisionmaking.

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.

MIA recommends that in allowing a more transparent exercise of the discretion may remove some of the political sensitivities that will inevitably arise from time to time no matter who is the government of the day. It would also have the effect of maintaining public confidence in the process.

Option 5 Introduce a new compassionate visa subclass

The main reason for the rise of the request for bona fide interventions are the many circumstances that cannot be contemplated in the regulations, or that it is oppressive or unfair and not in Australia's interests to have someone depart Australia and reapply offshore, etc.

If the Government were to restore flexibility by allowing greater discretion the Department may well argue that judicial driven migration policy may eventuate, or that the program numbers would not be able to be as easily managed as they are at the present time.

There is a precedent of allowing a compassionate visa subclass. This was already undertaken when the regulations were introduced with December 1989 with the introduction of the December 1989 (temporary) entry permit. This is set out in regulation 131A(1)(d)(v) of the *Migration Regulations* 1989. This in short stated :

" There is any other compassionate ground for the grant of an entry permit, to the effect that refusal to grant that entry permit would cause the extreme hardship or irreparable prejudice to an Australian citizen or Australian permanent resident"

While the MIA is not necessarily advocating this precise definition is the panacea, the fact that such an option existed confirms that such a subclass can co-exist within the regulatory framework, and address the need for a flexible opportunity.

There may be a need for this to be able to be submitted as a prescribed visa class, for the bona fide applicants that may be precluded from applying because of a prior refused application. Alternatively, it could become a specified ground for consideration before a Tribunal in addition to the primary reason for seeking review. That is, the subclass may not be available at a primary level but only available at a review level.

Such an option would still allow for the Minister to consider the matter after the review process in the event the particular case did not meet the criteria. In the event the Minister considered the matter appropriate for the exercise of powers,

the Minister might also consider modifying the regulation. It would appear that one of the reasons for the codification and subsequent Ministerial intervention power, was to allow the Minister to substitute a more favourable decision but then to change the regulations to stem the problem for other cases in the future. This is surely what Parliament had intended.

This options has several advantages :

1. retains codified system
2. retains and strengthens the current review pathway
3. allows a build up of case law through reported Tribunal decisions
4. allows the Minister to intervene after the Tribunal process is exhausted
5. may reduce the need for bridging E visas as a result of the clog that occurs
6. introduces greater transparency
7. speed up the visa process by reducing the number of applications going to the Minister by enabling meritorious applications the opportunity of redress at a primary stage