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SENATE

SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

Reference: Ministerial discretion in migration matters

TUESDAY, 23 SEPTEMBER 2003

SYDNEY

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SENATE

SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

Tuesday, 23 September 2003

Members: Senator Ludwig *(Chair)*, Senator Santoro *(Deputy Chair)*, Senators Bartlett, Humphries, Johnston, Sherry and Wong

Senators in attendance: Senators Bartlett, Johnston, Ludwig, Santoro, Sherry and Wong

Terms of reference for the inquiry:

To inquire into and report on:

(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 provisons by ministers, in particular what criteria and other considerations applied where ministers substituted a more favourable decison; 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.

WITNESSES

Committee met at 9.36 a.m.

CHAIR—I declare open this public hearing of the Senate Select Committee on Ministerial Discretion in Migration Matters. 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 use made by the Minister for Immigration and Multicultural and Indigenous Affairs of the discretionary powers available under sections 351 and 417 of the Migration Act 1958.

Submissions were called for, with a deadline of 1 August 2003. The committee has received 33 submissions, 31 of which have now been published. Today's hearing will begin with Amnesty International and A Just Australia. After morning tea, Dr Mary Crock and Ms Jennifer Burn will give evidence. The committee will suspend for lunch and then hear from representatives of the Department of Immigration and Multicultural and Indigenous Affairs.

Evidence given to the committee is protected by parliamentary privilege. This means that witnesses are given broad protection from action arising from what they say and that the Senate has the power to protect them from any action which disadvantages them on account of the evidence given before the committee. I also remind witnesses that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers to conduct its hearings in public. However, if there are any matters which you wish to discuss with the committee in private, we will consider your request.

I also draw to the attention of witnesses the Senate rules concerning adverse comment. Where a committee has reason to believe that evidence about to be given may reflect adversely on a person, the committee shall consider whether to hear that evidence in private session. Where evidence is given which reflects adversely on a person, the committee may consider expunging that evidence from the transcript of evidence. Alternatively, in the event that the evidence is published, the committee shall provide reasonable opportunity for the person to have access to the evidence and to respond to it in writing and by appearing before the committee.

[9.37 a.m.]

GEE, Mr Alistair Patrick Clement, Member, National Refugee Team, Amnesty International

THOM, Dr Graham Stephen, Refugee Coordinator, Amnesty International Australia

CHAIR—I welcome Dr Graham Thom and Mr Alistair Gee from Amnesty International. The committee has received your submission to the inquiry—thank you very much. Are there any alterations or additions that you would like to make to that submission?

Dr Thom—We have today provided a video of a *Lateline* story of October 2000 which deals with the trafficking of women. In that story the minister was questioned about his use of ministerial discretion in looking at the issue of trafficking of women. It is a 10-minute story which we have provided for the interest of the committee.

CHAIR—I take it that you would like that video to be tabled. We will receive that and then I will refer it to the committee in due course, as we have not had the opportunity to have a look at it. We will take it as part of your submission. I now invite you to make an opening statement.

Mr Gee—I thank the committee for this opportunity to make this submission. As the chair has said, we have made a written submission. That submission points out the work that Amnesty International does with regard to refugees and the sorts of human rights violations that cause refugees to flee their home countries. Amnesty's submission was solely in relation to the section 417 ministerial discretion rather than the mainstream migration discretion that the minister has.

Amnesty seeks to ensure that states do not refoule people to a country where they will face serious human rights violations and to ensure that these states operate fair determination systems. Refoulement is a broader concept than that which is contained in the refugee convention. Determination systems should give due regard to these provisions under the other conventions, such as the convention against torture, the Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights. Amnesty's recommendations to this committee are set out on page 1 of the written submission. I note that we recommend that the ministerial discretion should be retained and we make additional recommendations.

The key points in our submission are that Amnesty views that, despite the guidelines, there are insufficient safeguards under the section 417 mechanism to ensure that persons at risk are recognised and protected. The Senate Legal and Constitutional References Committee has already dealt with this issue in a bipartisan report, *A sanctuary under review*, which says, in recommendation 2.2:

> ... Australia's laws could be amended so as to explicitly incorporate the non-refoulement obligations of the CAT and ICCPR in domestic law.

This has not been acted upon to date, and Amnesty respectfully asks that this committee takes on the responsibility of examining how this should be done. I understand that some others have

submitted to this committee that the section 417 discretion is being primarily exercised on grounds other than Australia's international human rights obligations. If this committee finds that this is, or may be, the case, this adds further impetus for the need to explicitly incorporate these other non-refoulement obligations.

It is Amnesty's belief that the international community is moving towards developing systems which have a complementary protection component. The case of Ireland is similar to that of Australia, in that it had a two-track system. It initially did refugee determination and then, after that, had a ministerial discretion to consider humanitarian and other non-refoulement obligations. The UNHCR has clearly advised that country that, instead of having such a two-track discretionary process, applicants should be automatically considered for protection in a complementary way by the staff who process the initial refugee applications.

In Australia there are problems similar to those faced in Ireland. There are lengthy refugee determinations. This is a clogged up process. It is a very expensive process for the public, especially where there are detention costs. It is expensive often for the health and well-being of the applicants. If there were means to make it quicker and have a more logical system, where humanitarian protection is considered at the same time as refugee protection, I believe this would be in everyone's interests.

CHAIR—I just have a couple of questions. You mentioned the Irish system. Do you have little bit more information on that that you could provide to the committee? I know that might stretch your otherwise tight resources, but I do not know whether you included all of that detail in your main submission.

Mr Gee—If I could take that on notice about Ireland in particular, I could certainly provide some articles of what the UNHCR—

CHAIR—Even the references would be helpful.

Mr Gee—I would certainly have some references.

CHAIR—You mentioned *A sanctuary under review* and recommendation 2.2. I understand that was not picked up by the current government. Are you saying that this is a way of implementing recommendation 2.2?

Mr Gee—My point about Ireland is that it is an example of a country that is in our situation and the UNHCR, and indeed the international community, are recommending that the system be changed. The international community has recently agreed on what is called the 'agenda for protection'. Goal 1 of the agenda talks about developing complementary protection systems. There are many complementary protection systems that operate in other parts of Europe. I am not aware of what the UNHCR has said with regard to Australia's system of discretion; I was pointing to what they had said about a similar system over in Ireland.

CHAIR—I guess that is the nub of the issue. You are saying that Ireland is in breach. Is it a technical breach or do they just not agree that it actually meets the two conventions? I am talking about the UNHCR in respect of Ireland.

Mr Gee—In the reports I was reading, the UNHCR were not referring to a breach as such.

CHAIR—They did not go that far?

Mr Gee—They did not make a comment either way. They were saying—

CHAIR—It was not meeting its obligations. I do not want to put words in your mouth; I am trying to ascertain exactly what—

Mr Gee—Perhaps if I could go to—

CHAIR—By all means. I think you can follow the issue I am trying to explore a bit further. If you want to take it on notice for the purposes of time, I am happy for you to do that rather than deal with it now.

Dr Thom—We can take that on notice and provide you with more examples.

CHAIR—It would be helpful to understand how our system compares and then understand what the UNHCR has said in respect of that comparative system and if there are any recommendations in that to change. That links back into what was suggested under *A sanctuary under review* in 2.2. I understand there have been 162 interventions in respect of section 417 by Amnesty International. That is what the department's figures suggest. Do they correspond with your figures?

Dr Thom—No.

CHAIR—I was hoping for a yes.

Dr Thom—Part of the problem is the lack of transparency and what DIMIA considers is a 417 application compared to what we consider is a 417 application. Up until this year, we have directly written on an individual's behalf and said, 'Please grant a 417.' We made roughly 30 submissions—about 10 a year—plus an extra nine 48B submissions.

This year has been slightly different, in that we have written a number of letters following the memorandum of understanding with Iran that the government has signed. We highlighted a group of Iranians who we knew in detention. One group had claims of religious persecution and another group had claims of political persecution. The letters were merely highlighting the new nature of the memorandum of understanding and concerns with sending groups of people back with these sorts of claims. What the department then did was take each individual name and assess it on a 417 basis. Clearly, we never said 417 in our letter and that resulted in about a dozen 417 responses from the minister.

We have also given evidence about Mandaeans to the minister. We know of roughly 40 individuals, I think, who are currently in detention who are Iranian Mandaeans. We have said, 'These cases should also be reviewed, particularly under 48B, given new evidence that has been used by the Federal Court and the RRT.' But we said, 'If you have individual evidence for those individuals, you may also wish to include 417.' Again, that would extend the numbers. It is a

long answer to your question; I am sorry. We are not quite sure how the department came up with 160. It still would not add up to 160 in our experience.

CHAIR—Your experience suggests about 100.

Dr Thom—If you include those, yes, it would take it to about 100.

CHAIR—Have the additional 40 that you said were not intended to be section 417s, having stepped over the 417 line, been rejected or not?

Dr Thom—Those Iranians have been rejected, yes.

CHAIR—That is the first rejection. In the sense of wanting to pursue a 417 in a fulsome way, it would mean that, if they then go to a solicitor, a consultant or an immigration agent and pursue a proper 417 application, they have already stepped over the line and cannot access a bridging visa E. And that was not your intention.

Dr Thom—That was not our intention, no. That is part of the concern with the way the system works and how the minister or the department respond to any letter regarding an individual in detention. We have written a number of other letters, looking at the mental health of someone in detention or issues of moving them closer to other family members or whatever, and we would hope that they have not been considered as 417 applications. We are a little surprised by that figure of 160, because—as you point out—there are ramifications if the department does consider that somebody has had a 417 application made on their behalf. In saying that, the correspondence about this group of Iranians is one of the first times we have actually got a response back from the minister saying, 'This 417 has been rejected.' We have had discussions with the department as well about when they do respond to our letters, because not all the time when Amnesty put in a 417 do we actually get a response. Sometimes they say, 'Yes, we have agreed.' Other times we do not hear back and that letter will instead be sent to the person in detention or wherever. So we are a little unclear about when the department or the minister will respond directly to our request or when they think it is more appropriate to refer to the applicant. Again, the lack of transparency with this system is causing us as much confusion, I think, as everyone else.

CHAIR—It seems a shocking way of dealing with some person who is seeking a particular outcome, when they do not know who is doing what for whom when. And there is no way of tracking that back either. It seems terribly inefficient as well.

Dr Thom—I think that certainly is part of the problem.

CHAIR—How many successful interventions have you had? I call them 'successful interventions' for want of a better name.

Dr Thom—Again, I can only give a rough figure because, as I said, we do not always get a letter back saying, 'This has been successful.' I would say 30 per cent—so maybe three cases a year—are successful. We are more successful with 48B applications than 417 applications. That is the nature of the evidence that Amnesty provides. As I say, only rarely do we get a letter back saying, 'We have chosen to exercise our discretion.' At the same time, we are probably aware

that a church group has also written on behalf of that applicant, and friends may have written on behalf of that applicant. So Amnesty's 417 letter will form part of a broader 417 application. In the last few years, I can only think of two or three cases where we could positively say it was our submission that was the clincher in getting a person recognised.

CHAIR—And that is only in respect of those that you have actually decided to write—in your view—a 417 application for?

Dr Thom—Yes, and not where we have written a broader letter highlighting a particular issue or particular new information on a class of people, saying, 'This could merit a 48B.'

CHAIR—In respect of those, do you make direct representations to the ministerial intervention unit or to the minister's office, or do you rely on your submission?

Dr Thom—Our submission is usually posted to the minister. Then we will often call the ministerial intervention unit to follow it up—to ensure that that letter has arrived and that they are in fact aware that it has been sent.

CHAIR—And the reason you do that is not to assist the file. Is it to ensure that, administratively, it got there?

Dr Thom—Yes.

CHAIR—Because you are not confident?

Dr Thom—In our experience, it is always best to follow these things up.

Senator WONG—In your submission you emphasise the non-refoulement obligations, or principle. You make the point that this committee ought to examine approved section 417 applications, as compared with the applications lodged under section 417, to see whether or not section 417 is actually delivering on Australia's international obligations. It has been interesting through this committee—'sad', I suppose, would be the other way of looking at it—that there is nobody in government, or at any level, that does such an analysis. Obviously, you are not privy to all the section 417 applications, but has Amnesty, in terms of the knowledge you have of section 417 applications, done any comparison between what one would argue is a very strong basis for a claim under some of the non-refugee convention grounds—ICCPR, CAT and CROC—and whether or not section 417 actually delivered on the outcome?

Mr Gee—Certainly we have not done such analysis, and we are not really in a position to do so, as you have mentioned. And, as you have pointed out, we are not aware that anyone else has done one in Australia either. I think it is most important that that be done, particularly considering that there is not monitoring of returnees—so we do not really know, at the end of the process, just how many of them are facing difficulties and, indeed, persecution on return.

I just mention that in the Refugee Council submission they referred to a number of European countries who, on average, approve about twice the number of humanitarian claims as they do refugee claims. Those figures are on page 4 of the Refugee Council submission. That certainly

accords with what we understand to be the case in a number of European countries—that there is a very strong humanitarian component in their systems.

Dr Thom—Just following that up on a specific case basis, one thing we do is look at other forms of persecution not considered within the convention, or that have not been—specific gender forms of persecution, for instance, which is one of the reasons why we have provided that interview regarding trafficking of women. We believe that with certain gender forms of persecution—which have now been included in the convention only through often legal channels—such as female genital mutilation, honour killings, trafficking in certain countries, domestic violence, the problem we have had in Australia is that the minister has quite specifically said that he does not see a need to expand the current definition of the convention and he is not going to take those cases into consideration. So we have seen the Khawar case at the High Court, where domestic violence has been considered now to be falling within the convention. But women, as a particular social group, have historically been problematic not just in Australia but in a number of countries, and only recently in the US too. So, often, Amnesty will find cases like that, where the RRT has also said, 'Yes, this person has been abused. Yes, they will face abuse on return. Sorry, no, you're not a refugee,' and we have taken those cases specifically to the minister to highlight particular issues and also, hopefully, to get that person granted protection.

Senator WONG—Have you been successful?

Dr Thom—More often than not, no. Particularly on gender persecution, we have not been very successful.

Senator WONG—You mentioned honour killings. Have you actually dealt with—

Dr Thom—We have never had cases of honour killings, no. But trafficking, domestic violence we have.

Senator WONG—I go to the issue of forced removal. You made the point in your submission that Australia does not monitor what happens to people when they are returned. You, in your submission, deal with the Colombian national who you assert was reportedly murdered in Bogota after his—I assume it was a he—return. You say that you actually had some discussions with DIMIA about this earlier this year. Did DIMIA concede that he was murdered, or is that still disputed?

Dr Thom—I have not have heard officially that they have conceded. I cannot say one way or the other. They certainly have not come out and conceded that. But UNHCR have also gone and spoken to the department about this particular case, because I think the UNHCR have certainly conceded that, yes, this person was killed. So I think, on that basis, that Amnesty is more than satisfied that he was refouled.

Senator WONG—His claim for asylum was rejected. Were there other grounds that you assert ought to have been taken into account in regard to his case?

Dr Thom—We have used this particular case to highlight problems with effective protection. His case was, like a lot of cases, a complicated one, and so there were credibility grounds which

were also used to reject him, but part of our problem was that he was ultimately rejected on the basis that he should have gone to Argentina, even though he had never passed through Argentina and that there was no guarantee that Argentina would actually process his refugee application. We had evidence that that was also used for a number of other Colombians as well.

We have used this case in the case studies, because ultimately this person has died. Where that has happened in subsequent cases we believe those people are still in Australia, even though they were rejected initially, and so we did not want to harm their further applications in any way by highlighting their cases; but in those other cases their claims were not even really assessed—they were simply rejected on the basis that they should have gone to Argentina.

Senator WONG—You said that until this year you had around 30 section 417 applications that you can identify, and presumably you have some more for the year 2003. How many do you currently have before the minister?

Dr Thom—I would say at least six specific cases, as well as our broader concern with Iranian Mandaeans.

Senator WONG—In your dealings with the 417 applications, are you able to tell the committee whether or not there are certain characteristics which you have found render a person more likely to have a successful application? For example, one of the issues that has been put to us is that if the applicant has family connections in Australia, Australian-born children and those sorts of connections, that that has tended to be elevated by this minister. Does that accord with your view? Or are you in a bit of a difficult position because you have six cases before him at the moment?

Dr Thom—Yes, we are in a difficult position, but realistically, where we have been the soul person writing on behalf of someone—for instance, where they do not have family in Australia who is also writing on their behalf or they are not members of a church et cetera—our success rate is very low. It is better with 48B. Those people are then sent back to the Refugee Review Tribunal, where they have predominantly been successful. When we have been able to provide extra evidence that they would face persecution or that a mistake was made in their initial determination, then the minister, in our experience, has been more likely to grant a 48B and, as I say, they have bee successful at the RRT.

Senator WONG—What is your success rate in 417s?

Dr Thom—It is about 30 per cent. But, again, part of that is the fact that Amnesty will usually be the last port of call for a lot of people who have already had legal and other assistance. There is also the fact that we pick particular cases where we believe there are policy implications—for instance, women who have been trafficked, where clearly there is no credibility issues with them, there are s no arguments being put against the fact that they will face persecution on return, but we believe that they will not be accepted because the minister has stated publicly that he will not grant his discretion in these cases. We believe that is clearly evidence that Australia is not meeting its international obligations, and we want to highlight that point, as well as hopefully get protection for those women.

Senator WONG—Does it concern you that Amnesty, which is a respected human rights organisation, has a success rate of around 30 per cent and Mr Kisrwani has a 50 per cent success rate?

Dr Thom—Amnesty would hope that those people who need protection are getting protected. We do not care if it is us or someone else who is getting protection for people who need it. But, clearly, where we write a section 417 application, we believe that the case has merit and we hope that it would be judged on its merits.

Mr Gee—Can I just add that we are very selective with the section 417 applications that we write. It only happens in a minority of cases that we support and the RRT submissions that we write. I think that the problem is our whole lack of understanding of how this process works. We need a more transparent process, developed through the DIMIA and RRT stages, so that everyone knows where they stand. I think that will ease the congestion in the system and make for a more smoothly-run system.

Senator WONG—You said that you wanted a system where the people who deserve protection are protected. Do you think the current system delivers that outcome?

Dr Thom—We have concerns. Certainly we have had cases where people who have needed protection have received it, but, as I have highlighted, we have had a number of cases where we think people who have needed protection have not received it.

CHAIR—Have you examined cases where people you have dealt with before have apparently got protection and you wonder whether or not they should have got it?

Dr Thom—Not really. Generally, we would not hear about those cases. Amnesty looks at about 200 to maybe 300 cases a year, which is hopefully a representative sample of people in Australia seeking protection. If the minister has exercised his discretion because of compelling family reasons or other public interest reasons, Amnesty does not have anything to say about that or any position on that.

Senator SANTORO—I just wanted to follow up on a few of the answers that have been provided by our witnesses. Dr Thom, you stated that you do not know how successful you are because you do not always get a letter back from the minister. Would part of the explanation for that be that the minister may be getting back to the main advocate? You stated in your evidence that you often adopt a supportive role. If I understand what you are saying, you are often treated as an agency of last resort. Is it that sometimes the minister does not write back to you because he may have gotten back to the main advocate?

Dr Thom—That could definitely be the case, yes.

Senator SANTORO—I just wanted to clarify that. We have heard how hard the minister works and how he makes himself available. I thought we could just try to get a bit of clarification there. You stated that you handle the really difficult cases and that often you are the agency of last resort for a lot of the difficult cases. I just wanted to explore briefly the point about success rate. You mention a 30 per cent success rate and you sounded pretty definite about that. It is a reasonable success rate, I would suggest. But it does not compare to, say, the 50 per

cent plus success rate Ms Chao informed the committee yesterday that she enjoys or, indeed, the 50 per cent plus success rate or the high success rates that are enjoyed by, say, some parliamentarians compared to other parliamentarians or other advocates. Your success rate is 30 per cent. Is that because you are dealing with the really hard cases? Would the fact that you are dealing with those be a factor?

Dr Thom—I do not think so; there are a number of reasons why. As I said, while we may get a large number of cases, there will be those really hard cases where Amnesty will not be able to add anything to the case. We will write to the minister only if we have been able to find specific evidence for an individual. So we are fairly confident when we write to the minister that an individual will face some form of persecution. The problem we have—and this is where I think the evidence from others is important—is that it appears the minister is using the human interest component of his discretion more than the strictly humanitarian, convention based component of his discretion. We do not deal with that.

A lawyer can include the fact that they have three family members here or the fact that they have 1,000 people in the local church who are willing to sign a petition their behalf. Amnesty does not do that. So if it is a case of somebody in detention who, say, does not have any family in Australia or any connections to a local church or whatever, the only thing that Amnesty is writing on their behalf is the fact that it believes that they will face some form of human rights violation. If the minister is not using his discretion in that way then our success rate will obviously fall.

Senator SANTORO—What you are saying is that the grounds of appeal that you are putting forward are, in some cases, limited.

Dr Thom—Yes. They are certainly more limited than others.

Mr Gee—Could I add two things quickly. The first thing is that I would ask the committee to be very cautious when referring to our success rate as 30 per cent and perhaps comparing that with others. As mentioned, it is only three a year, so one less is a drop of 10 per cent. I think it is difficult with statistics in such small figures. The second thing is: you asked if we often get the most complex cases. That can be true, but also solicitors will often give us their clearest cases, where they believe: 'This is certainly one in which Amnesty will have a lot to say'—the classic Afghani situation, for instance.

Senator SANTORO—In terms of when the minister does not get back to you, do you do any follow-up of the individual cases or with other people who are representing them?

Dr Thom—Yes.

Senator SANTORO—When you put in a submission, presumably you would maintain a watching brief or take a continuing interest in the case, wouldn't you?

Dr Thom—Yes, so it does not disappear. We definitely follow up, with a lawyer or family members if they have family or with the individual directly, to find out whether or not they were accepted. If not, we decide what else we can do.

Senator SANTORO—In terms of transparency in matters that are referred to the minister, do you see any merit in the argument that a very complex, multilayered process has gone on before a case has been referred to the minister, that transparency throughout that process has been a fairly strong component of the process and that, at some stage, there has to be a final court of appeal—if I could put it that way—that somewhere the process has to have finality, has to come to an end?

Dr Thom—That is definitely the case, but I would not agree that it is transparent. We do not know why one case will be scheduled or made into a submission, we do not know what that submission says and we do not know why the minister has rejected that submission. For example, in our case studies we have used effective protection, where both DIMIA and the RRT have said that somebody can go back to Syria. Two years later they are still in detention because Syria will not accept them, and subsequent advice from the Department of Foreign Affairs and Trade has said, 'No, Syria won't take them.' Clearly that is evidence that the minister should take into account, and we cannot understand why that evidence would not be taken into account. There is no appeal for that person, who has just spent two years in detention, to say, 'You said I could go back to Syria. I can't; why am I still here?' Their only appeal is to go to the courts, and then we get these complaints from the minister that asylum seekers are clogging up the courts.

You do get habeas corpus cases which have recently occurred where they have been successful. The minister is now challenging those in the High Court as well, without actually coming up with any system that will ensure that these people are not going to be locked up indefinitely. In that sense, there is no transparency and there is no appeal. Yes, there has to be some final point at which somebody who is not genuine can be removed because they are not going to face human rights violations, but somewhere in that system you need to be able to test things like effective protection so that people do not get sent back to Colombia and get shot on the basis that they should have gone to Argentina. That is the point we are trying to make.

Senator SANTORO—Presumably, when the minister is making a decision, he is operating on the basis of detailed information and detailed submissions from not only his own officers but also other departments and other advocates.

Dr Thom—He is, but what he accepts and what he does not is his own business and that is the problem with the discretion. You can have the most well-meaning, well-intentioned and hardworking minister in the world, but if has made a position that women who have been trafficked do not fit within his idea of what he should be protecting, or women who suffer domestic violence, or people who have come from Colombia and should have gone to Argentina, then this is where mistakes can be made. If that assumption cannot be tested and those people are being sent back to face torture or death, then Australia will breach its international obligations.

Senator SANTORO—We heard yesterday that, in perhaps most cases, one of the major reasons why the minister does not put forward reasons or further information into the system—quite apart from the fact that he may expose himself and the case to continuing litigation—is that the release of information may compromise further reputation or safety, as in some of the cases that you are alluding to. In other words, you could put out information that would further compromise either reputation or the safety of people and cause further stress and trauma. Do you think that is a reasonable attitude for the minister to take in some cases?

Dr Thom—Possibly in some cases, but I do not think that is a reason why a ministerial discretion should be non-compellable. I think there should be avenues where people can find out on what basis they have been rejected so they can challenge that basis. For instance, the minister has drawn a line in the sand on trafficked women, or he is not going to countenance a particular decision because it may set a precedent. Quite clearly, if that has occurred—and I think that is something that should be raised with the department when you interview them this afternoon—and that is a reason why he is not going to consider a particular application, then Australia is not meeting its international obligations with regard to that particular person.

Senator BARTLETT—Given the number of cases that you do advocate on behalf of—whether it is specific 417 requests or more broader ones—how much guidance have you got from the department over time about how best to do that? Has the department, either formally or informally, suggested, 'It's better if you do it like this' or 'Don't do it like that' or anything along those lines?

Dr Thom—There hasn't been previously, so one of the things we have done is talk to the Ministerial Intervention Unit. They have agreed to come to speak with Amnesty and a number of NGOs in the next two months, because there have been frustrations felt by not only Amnesty but also a number of NGOs, and perhaps even the Ministerial Intervention Unit in terms of what submissions they have been receiving. So, yes, they have agreed to speak to us and discuss that issue further, because clarification clearly needs to be made.

Senator BARTLETT—Amnesty have been involved with this for a long time but, on a personal level, people in the refugee unit have been involved in it for a fair period of time. Have you sensed any changes in terms of the ministerial discretion area over that time for better or for worse?

Dr Thom—It would be difficult for me to say. I have been involved with Amnesty in some way since 1998, and I have been making submissions since the end of 1998. Clearly from our perspective we have seen more 48B decisions than 417 decisions from the minister—

Senator BARTLETT—Those 48B decisions involve resubmitting?

Dr Thom—yes—but beyond that I would not like to make further comment.

Senator BARTLETT—Given that Amnesty is an international organisation—as its full name would suggest—how much potential is there for you to be able to get accurate information about people that are returned? There was a recent report of a Hazara who was returned to Afghanistan from Nauru and allegedly killed by the Taliban. Have you been able to get any verification about that report, for example?

Dr Thom—No. When we get those reports we do send them to our international secretariat, but obviously in countries like Afghanistan, Iran and Iraq it is almost impossible in a number of cases to verify particular incidents. For instance, we have received and followed up on reports of two Iranians who were granted refugee status in the UK and subsequently went to Saudi Arabia. The Saudi authorities then returned them to Iran where they were arrested. So there are specific cases from other countries where we have been able to follow up people who have been arrested on return, but it is incredibly difficult.

Mr Gee—We obviously also have very limited resources in countries like Afghanistan and Iraq, where these particular conflicts are. Amnesty are currently based in England and a number of other Western countries. In our submission to the Senate Legal and Constitutional References Committee inquiry on the issue of monitoring we suggested that both the Australian government and the International Red Cross were in a far better position to monitor returnees. They looked at that and encouraged the Australian government to develop that further. Nothing has been done to date, but we remain hopeful that something will be done about such an important issue. I think it is in the government's interests to have a greater degree of monitoring so that they can determine how successful their system is.

Dr Thom—Where there are Amnesty sections in other countries and where we have good relationships with other NGOs and human rights bodies it is a lot easier to follow things up, but when collapsed states or states in conflict are involved then that is particularly difficult.

Senator BARTLETT—I have a question about your understanding of international law and the various international conventions. There is a distinction which is often argued about returning people to somewhere that is unsafe. To use the Afghanistan example, the person that was allegedly killed may have been killed because of the Taliban targeting Hazara or because it is Afghanistan and people get killed there—somebody wanted to steal his motorbike, for instance. It obviously does not make any difference to the person that is killed—they are dead either way—but they are the niceties of things that lawyers argue over. If you take the second rationale, is there an issue there about refoulement—sending someone back to a place where lawlessness is a problem and the general scope for meeting that sort of end is fairly high?

Dr Thom—I think there is for a recognised refugee and for a place where UNHCR has not declared a cessation—for instance, somewhere like Iraq, where no cessation has been declared by UNHCR. If a TPV holder from Iraq were to be reprocessed—although they are not being reprocessed yet—and their case rejected because Saddam Hussein is no longer there and they were then sent back to a country despite a cessation not being declared and subsequently killed for whatever reason, I think Amnesty would certainly say that somebody had been refouled and that Australia had breached its international obligations.

But I think that is where complementary protection also comes in, because assessments can be made on the general safety of a particular country—of a collapsed state, whether it be Somalia, Afghanistan or wherever—and a decision can be made: 'Should this young women be sent back? She's not a refugee, but organisations such as Amnesty say that young women are at particular risk in Iraq. Should she be sent back?' Under Australia's current system the answer, by law, is yes she should be sent back, because she has not been granted refugee status. That is why the agenda for protection now looks at complementary protection. There are going to be situations where people are going to face general violence.

Mr Gee—Senator, you have touched on a very important point—that is, are the contemporary reasons that people are fleeing exactly those that established the five categories of the refugee convention 50 years ago? In most European states they are now finding that, because there are now differences in the reasons that people are fleeing, they need a more generalised humanitarian component, and more people are being recognised under that component. By far, most of the refugees that the UNHCR recognises are from generalised civil war and generalised

conflict, rather than perhaps being specifically targeted because of their ethnicity or because of exactly who they are. That really is one of the key issues these days.

Senator BARTLETT—I have a final question, which may even go back to some of the confusion about the number of submissions: do you coordinate at a national level with all your state offices any of those general requests to the minister, or do they put things in themselves?

Dr Thom—They should not; it should all come through me. There are also local Amnesty groups, many of them in touch with people in detention, and they may put in submissions in a private capacity. But all official Amnesty correspondence comes through me or—if it is going to the minister—will be signed by our national director.

Senator SHERRY—Yesterday we heard on a number of occasions from witnesses who talked about what they saw as an emphasis by the current minister on family, particularly on issues involving children, and how that appeared to have an influence on the minister's decisions when he is exercising his discretion. Those references were reasonably frequent yesterday, if you would care to have a look at them. How does that relate to the case study example you gave in your submission of 'AM', the Colombian national who married a Colombian woman in Sydney, had a child and subsequently returned to Colombia, where he was murdered, allegedly, by Colombian paramilitaries? Were you surprised at the outcome of this particular case, given the involvement of a child in Australia?

Dr Thom—Not necessarily, because it is a discretion; the minister has not made any hard and fast decisions. Look at the case which is currently in the media of the Russian woman who is now in Villawood and is facing removal—her child is an Australian citizen, yet the minister has refused to use his discretion there as well. So it is not surprising, because there are a number of cases where he will not. It may be a factor in his determination but, as it is non-compellable, nobody really knows why he is making that determination.

Senator SHERRY—This is a system which is effectively dependent on the interests or, if you like, the bias of the minister of the day. By contrast, I remember reading comments by the former minister, Senator Ray, who was very firm and clear that he was not willing to exercise any sorts of discretion. There can be quite a significant change in approach, depending on the minister of the day.

Dr Thom—I think that is exactly Amnesty's point. That is why we believe that, for Australia to guarantee that it will meet its human rights obligations towards the convention against torture and the International Covenant on Civil and Political Rights, they should be incorporated into the determination procedure. Then, regardless of minister, whether it is a hard-working, conscientious minister or a minister that says, 'I'm never going to use my discretion,' those people will receive protection earlier, rather than later. It will hopefully ensure—as with the other example that we use in our submission—that people who are stateless and who may not be granted refugee status but who subsequently cannot be returned do not end up spending years and years in detention. Other conventions can also be taken into consideration at a much earlier date.

CHAIR—I want to follow up on what Senator Sherry was asking regarding the perception of bias. A number of witnesses have indicated that there seems to be a perception of bias. Do you get any sense in the system that there is a perception of bias or favouritism?

Dr Thom—We certainly have not experienced that. As I said, the number of submissions we make is quite limited. Where we have put forward clear evidence, often—as I say, 30 per cent of the time—that will either be given 417 or a 48B. Otherwise, it may be a particular issue of concern, such as effective protection, gender persecution et cetera, and we are probably somewhat disappointed but not surprised when the minister rejects that application, because we know of his particular standpoint. It is not a biased standpoint; he has interpreted Australia's obligations in a particular way. Subsequently, decisions by the RRT or the Federal Court or the High Court in Australia or internationally may not be the same as those the minister has made. I would not say that is bias but, for us, it clearly shows a failing in the system.

For instance, if there is a case before the minister of domestic violence that is very similar to a High Court case that says that women who cannot receive protection from the state do fall within the convention and should the granted refugee status, we would assume that the minister would revisit the previous decisions he has made. On a number of them he has not. It is the same with other particular issues, such as trafficking, where the RRT has now acknowledged that someone who has been trafficked and who faces persecution on return is a refugee. We cannot understand why the minister then will not revisit some of those decisions, given that clear evidence is acknowledged that someone will face persecution.

CHAIR—What sense do you make of that?

Dr Thom—Again it is a discretion, so we do not know. There are no reasons given, and we will never see any reasons given. As I have highlighted before, that is a failing of the system.

Senator WONG—How many women do you think are in that situation—that is, having been trafficked and facing persecution if they return because, for instance, they have cooperated, or not cooperated, with authorities?

Dr Thom—It is impossible for us to say, because we do not see all those cases. I think that at the time of the interview that you have—October 2000—Amnesty was aware of five cases.

Senator WONG—In Australia?

Dr Thom—In Australia. In at least four of those cases, both DIMIA and the RRT had accepted everything and had accepted that the person would face persecution on return. But the minister subsequently rejected those section 417 applications.

Senator WONG—Do we know what happened to those women?

Dr Thom—No. Amnesty has lost touch with most of them, so we do not know.

Senator WONG—Which countries were they returned to?

Dr Thom—The cases we looked at involved Colombia, Thailand and eastern Europe—a pretty broad spectrum of where women are trafficked from.

Senator WONG—There are five in the video. Are there more now that you are aware of?

Dr Thom—We are aware of a number of women in similar situations, in detention, yes.

Senator WONG—Are we talking about one or two, or many more than that?

Dr Thom—Amnesty would only be aware of two cases at the moment, but there may well be more.

CHAIR—The other issue that was raised in submissions was that there are payments made for assistance to make a section 417 or a section 351, and it was suggested that those payments range from $3,000 to $45,000 or $55,000. Amnesty International would not, I understand, charge, but do you have any experience of that in the system? Have people come to you with tales like that?

Dr Thom—Yes; I could not be specific. But you are right: Amnesty do not charge. We in fact discourage people from giving us money. While we would like as many people as possible to be Amnesty members and contributors, we certainly do not want those who seek our assistance to feel any obligation in that respect. But we do hear tales of people who have been found by, for want of a better word, 'dodgy' migration agents. Then we have a lot of problems, because credibility issues come into the case. To get the minister to use his discretion where there have been credibility issues raised is, in our experience, almost impossible, for one reason or another. So, if somebody has run foul of a dodgy migration agent early on in their submission and been told to say things or not to say things that have subsequently been found out, regardless of whether Amnesty think they are genuine it is incredibly difficult to get the minister to use his discretion.

CHAIR—This is where there is a case that Amnesty might wish to pursue, where Amnesty can see there might be a reason to pursue a section 417, but where, because of earlier work by, in your words, dodgy migration agents, it becomes almost impossible to progress the issue?

Dr Thom—Yes, because it takes so much time and effort to unpack what has been said before and actually provide corroborating evidence to verify parts of their story that they may not have included earlier. Our experience is that, where that has happened, success rates are virtually nil.

CHAIR—Are they referred to MARA or to the department for investigation?

Dr Thom—Amnesty do not do that, but we certainly have raised this issue, both with the minister and with the department, on a number of occasions. We support any efforts to ensure that people only get the best advice, to ensure that only those people who genuinely face persecution receive the protection they need.

CHAIR—Do you have any direct experience of it? You mentioned that you occasionally get them on that. Are you capable of providing any of that to the committee, in camera if necessary?

Dr Thom—No; the evidence that we get is generally anecdotal. We get someone after they have been through the entire system. They may be weeks away from being removed, and then they come to us and explain what has happened. Often they will not provide the names of the people who did it. Sometimes we will see, through their records, who it was. But it is not something that Amnesty would wish to pursue here.

CHAIR—Why does what seems to be secrecy surround this? Are the people concerned to tell you or to make complaints?

Dr Thom—I think so, partly because it is often community based. The people that they have received help from may be well known in that particular ethnic or national community and therefore they do not want to cause any undue concerns in that community or for themselves amongst that community. I think fear would probably play a part in it. I think people are generally just terrified.

CHAIR—Thank you, Dr Thom and Mr Gee.

Proceedings suspended from 10.39 a.m. to 11.18 a.m.

BURN, Ms Jennifer, (Private capacity)

CROCK, Dr Mary Elizabeth, (Private capacity)

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Dr Crock—I am a senior lecturer in the Faculty of Law at the University of Sydney, but I appear in a private capacity.

Ms Burn—I am a lecturer in law at the University of Technology, Sydney. I also appear in a private capacity.

CHAIR—Do either of you wish to make an opening statement?

Ms Burn—Yes. It is my view that in a democratic society like ours it is essential that we have processes in place to ensure the accountability of decision makers and the transparency of decision making. I am confident that these kinds of principles ensure that the community is confident about the way that our government and government departments exercise their important, responsible functions under relevant legislation. I am not sure whether these principles are sufficiently adhered to in the migration jurisdiction. My view is that the flaw in the migration jurisdiction is one that is embedded within the way that the legislation is constructed and that there is a split in the system, which is highly codified and highly prescriptive and, at the same time, is accompanied by two forms of discretionary decision making—decision making by the minister exercising personal discretions under the act and decision making by departmental officers who have the power under the act to exercise delegated decision-making responsibility.

Dr Crock—Senator, you have now had a number of excellent submissions, some of which I have had the benefit of reading, and I think they take you through the changes that have occurred in the migration field in recent years. I know that you would be very familiar with the changes. I am largely in agreement with Ms Burn. The thrust of my submission is that the process we have gone through of distilling, solidifying and articulating all of the criteria for making migration decisions has occurred without sufficient understanding of the broader impact of the changes that have been made. I think we have made incremental changes without realising exactly where we are going and what we have done.

I know from early days that the idea of broad discretions was seen as ultimately leading to potential corruption within the system. It reminds me of an old text of reminiscences made by members of the department, where they used to refer to the officers as angels or arrogant gods—people who were unaccountable but who had enormous powers. In seeking to replace that system we have really lost sight of the multiple meanings of the words ‘policy discretion’, and we have gone towards a monolithic, monolineal way of thinking about discretion that has had the effect of creating a power vortex that focuses all of the power and discretion in one man. It is my submission—and I actually did get around to writing one for you—that this is a very damaging situation to be in, no matter who is in that one position. My submission to you is that

our understanding of notions of democracy and the rule of law must diversify that power and the discretion.

In my submission, I take you through the various ways in which this vortex has been constructed. The obvious one that you have been talking about is the power given to the minister. In teaching migration law I am very conscious of the draining of power from the bureaucracy. Sometimes I think that there really has been a loss of belief in notions that individuals should be able to choose and to exercise balancing functions in a way that is legitimate. 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.

I have spoken to the members of this committee in other contexts. I remember in particular the big inquiry into the whole functioning of the humanitarian and refugee system in Australia in 2000. This issue of discretion came up very forcefully in the context of whether Australia was complying with its international legal obligations under the torture convention and the Convention on the Rights of the Child. It was my submission and that of the Law Council of Australia at that time—and I managed to get a copy of that; I can remind you of the submission that was put before the committee—that the failure to build discretion back into the system places Australia at risk of refouleing or sending people back to places where they face torture.

I also brought for the committee today a copy of a very ancient committee product known as the model migration bill, drafted by the committee known as the CAAIP to advise on Australia's immigration policies in the 1980s. I thought it was of interest. I was involved in that committee all those years ago and we looked at the different understandings of discretion. That committee realised that you cannot conflate the idea of discretion with policy and power. That is what has happened here and it has almost become a mantra. Back in 1998, well before the *Tampa* came into sight, the minister said:

> 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 ... Again, the courts have reinterpreted and rewritten Australian law—ignoring the sovereignty of parliament and the will of the Australian people. Again, this is simply not on.

The implication of that statement—that the government shall determine who shall enter and who shall remain in the country—and of the many that we have seen since, is: 'I am elected; therefore I am the will of the people and I am the rule of law.' It is a very worrying way of thinking in a democracy like ours. The CAAIP recognised the different types of meaning in the word 'discretion' and tried to build a model that allowed for codification—rules—and, at the same time, a penumbra of discretion to give people more flexibility.

Most importantly, though, that discretion was to be given to everyone, not to one person. That is where I think we have gone off the rails and off the track. If you look carefully at the system as it works now, as I said, multiple little steps have been taken to strip decision makers of their power. We have what is known as front-end loading of the system. You may have come across that term. Instead of the immigration department doing all of the functions of the immigration process from go to whoa—the assessment on what skills you have, whether you are healthy, whether you have a police record—all of which used to be done within the immigration department, now, if you are a skilled migrant, you have to get all of your qualifications assessed

before you go anywhere near the department. I think it would be a lot more boring, frankly, to be an immigration officer today.

The upshot, though, is that all of these functions have been stripped from the department and outsourced. It is very clever, because they were the problem areas and, of course, it means that you can control your department much more, because they have no power to 'go behind' the decisions that are being made by the private bodies. Your average punter who is after a visa has recourse only through contract or tort with the private body—they cannot use the tools of administrative law. I think that is probably enough for the moment, but, ultimately, my argument is that we have gone off the rails and we need to diversify the power and build discretion back into the whole system.

CHAIR—In respect of your submission, we will receive that from you as a tabling statement at the moment. Obviously, the committee has not had an opportunity to read that yet, so we will take it on that basis. In respect of the Law Council submission, you can attach that as an exhibit to your tabling statement as well. We can take copies of that if you wanted to make that available to the committee. In respect of the CAAIP report, I can see that you have your cherished version there. If you want to table that, we can get a copy of it from the library, attach it as an exhibit to your submission and make it available to the committee members that way.

Dr Crock—I would like to invite the committee to revisit the whole *Sanctuary under review* report, because the Senate had a lot of interesting things to say. They did not actually engage in—

CHAIR—I can say I have read it a couple of times.

Dr Crock—You have. You wrote it, I believe.

CHAIR—I am told that we are happy to publish your submission. The committee can resolve to publish it and make it public and then we will attach those exhibits to it. The library will be able to obtain a copy of that original report for the benefit of committee members.

Dr Crock—Without wishing to spring it on you, I have also brought with me today—

CHAIR—But you are anyway.

Dr Crock—If you are interested in the extent to which the removal of humanitarian discretion intersects with our international legal obligations, I have also taken the liberty of bringing with me today a young former student of mine who is becoming the definitive expert on what the Europeans call complementary protection. She has written a paper on that that we could make available to the committee, if you would like.

CHAIR—That would be helpful. Some evidence has been provided to the committee about complementary protection. If information is available I think the committee would seek to have that made available. I will confer with my deputy about that as well.

Dr Crock—Thank you. The young woman in question is Ms Jane McAdam.

CHAIR—Thank you very much. If you could get her to contact the secretariat, we can deal with it from there.

Senator BARTLETT—I mostly want to look at the big picture in terms of the expertise that both of you have in law, but I have a couple of questions about your experiences as individuals. I imagine that both of you have been involved at various stages in representations to the minister about particular cases. Obviously, one of the issues surrounding this inquiry is whether or not the minister's exercise of his discretion is somehow unduly influenced by improper factors—or corruption, to be more blunt. Have either of you had any experience or examples that would lead you to believe that there is a significant problem in that area?

Ms Burn—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.

Senator BARTLETT—Thank you for that. I want to move to law more broadly now. You have spoken in your introductory statements about the idea of the rule of law, which is a very noble phrase that is used from time to time. Without necessarily getting into a full-length dissertation about the underpinning principles of it, can either of you talk a bit more about why it is important in this context and particularly in the context of humanitarian obligations? What are the ongoing potential consequences of moving away from or undermining the rule of law? It seems a fairly fundamental principle, but we do not often hear people talk about what the problems are when it is not there or when it is breaking down.

Dr Crock—One of the key problems here is in our understanding of terms like 'discretion' and 'policy'. Standard statements have been made about the rule of law, as you say, that ultimately do not really get to the basis of what our system of democratic governance is. I think back to the old Dycean notion that where rules stop, tyranny begins. That sort of thinking is behind the way that the Migration Act has been constructed, and that is the point I was trying to make before: it is a very simplistic notion of the rule of law that parliament is elected and therefore it must make the rules and its rules must be obeyed. That is okay as far as it goes, but what it does not reveal is the extent to which our notion of the rule of law is based on much less concrete notions of justice and fairness. These go back to prehistoric times. In fact, children know about them. They are part of who we are as human beings. The big dispute is between individuals who say, 'Law is what comes out of the end of a gun'—in other words, law equals force—and people who would argue, 'No, law is something more than that; law has a notion of a universal promise of justice, equality and equity.' That is what we are talking about here, hence the issue where it is said, 'I am the rule of law; I am elected, therefore what I say is law, as is the way I think and the way I want the bodies to interpret the rules that the parliament has made.'

There are numerous examples of that. If you go into the exchanges involving the minister's barrister in a case like S157, which was before the High Court earlier this year, you have Queen's Counsel Bennett actually saying to the Chief Justice of the High Court of Australia that the way the minister wanted the privative clause interpreted was as a sort of a magic dusting powder that would render every decision immune from judicial oversight. You could see the incredulity of the Chief Justice in listening to that submission. That is the problem with this notion that the minister should set the rules—which, of course, the minister does through making

regulations—and that ultimately at the other end the ability to choose the ways those laws are to be exercised should lie with one person also.

In my submission, I refer you to two different legal philosophers on this notion of discretion. Ronald Dworkin said, most famously:

Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction

To me, that is the way the minister sees the migration process here. He says, 'I make the rules and anything that is left over is up to me—I will exercise that power.' Going to another theorist, I cite the example of Professor John Evans, who about De Smith's *Judicial Review of Administrative Action*. He says that you have to think of discretion not just in those terms but also as the process of administration that involves choice between two alternatives. If you take that second approach then you can never say definitively that one or another exercise of discretion is definitively correct or incorrect.

Senator BARTLETT—Ms Burn, you mentioned in your submission that we should look at reviewing the whole legislative decision making framework that that discretionary component flows from. That is obviously a bit beyond our terms of reference at the moment, but it may be a recommendation we adopt at the end—or it may not; I do not know. In saying that, is it a matter of us having the balance wrong between discretion and black letter law or is it that it is too much with the minister and not enough of a more broadly shared power? Is it a lack of transparency in all aspects of the process? Obviously, we are focusing on discretion in this inquiry.

Ms Burn—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 under the terms of reference this committee is examining. One of the problems with making a request to the minister to ask him to exercise his discretion in the public interest is that in terms of the current legislation there has to be a decision of a review tribunal—there must be the trigger from the Migration Review Tribunal, the Refugee Review Tribunal or in some very rare cases the AAT—before the minister can turn his mind to whether there should be the grant of a visa in the public interest because of unique circumstances. That is an example of a problem in the way that the current migration legislation is constructed.

The first problem there is the trigger of the tribunal before there is the possibility of the minister reviewing the facts of a particular case. That is a major problem. That has led to a distortion in the kinds of applications that are made to the minister. People believe that they must enter into a certain course of conduct before they can present their circumstances to the minister. The minister has established a system to deal with these kinds of requests. That system, until recently, was outlined in a migration series instruction which was called *Exercise of discretion in the public interest*. It was MSI 225.

CHAIR—That has now been corrected by the department. Between the time that we received submissions and now we have moved from MSI 225 to MSI 386. I think that was operative from 14 August but I stand to be corrected on that.

Ms Burn—I have seen that MSI but only as an attachment to the immigration department's submissions.

Senator WONG—You are no orphan in that. I do not think a lot of people realised it had changed.

Ms Burn—But as far as most migration cases go I do not think the MSI is available yet. It is certainly not available through the Law Book Company CD-ROM service, which was last issued in July. It is quite possible that most agents are not aware of it. I have seen the new MSI. But the point about that is the minister has developed a process for dealing with these kinds of requests.

There are other problems in the legislation. One would be that where there is a discretion in the legislation frequently no checking is necessarily embedded in the legislation. I have given an example in my submission of a particular kind of discretion that is exercised by members of the immigration department—immigration department delegates. The technical aspects I have mentioned in my submission. The point is that in terms of whether or not there should be a particular waiver to allow a visa application to be lodged in Australia, a decision is made by an immigration department delegate—a person who has authority from the minister—but that decision is not reviewable at the Migration Review Tribunal. There is no checking on that kind of decision within the jurisdiction. That is a problem, too.

Now of course we have only one tier of merits review in the migration jurisdiction but the kinds of decisions that can go to the tribunal are limited. That is a flaw, too. I would agree with Dr Crock in that we need to envisage a system where there may be in fact more discretion within the provisions of the legislation. Then there has to be an ancillary mechanism to check the exercise of that discretion. That would ideally be through a merits review tribunal.

Senator BARTLETT—In terms of the history of this, Dr Crock mentioned that report and the attempts to rewrite the legislation comprehensively back in the eighties. Part of what drove that, as I understand it, and I think you may have mentioned this, was that it was seen to be inadequate codification and that it was predominantly discretionary. So there was that major reform of the Migration Act at the end of the eighties. Obviously a lot more discretion has now been provided to the minister over the 14 years since then in a whole lot of different ways. Are you suggesting that, basically, we have gone too far back towards discretion again and that we should revisit where things were in 1989—although obviously it is not exactly the same because of the issue of the humanitarian component which you spoke about.

Ms Burn—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 discretion is focused in one person. What we need to see happen is the diversification of power again. It would not be that hard to do. I think there is a feeling—certainly amongst the people I have been speaking to over the years in the area of migration—that the system would collapse, that border control would be no more and that we would be flooded with the ruined et cetera, if people were allowed to be compassionate. Hence, since 1989 the migration tribunals were enjoined that they could not grant a permit on compassionate or humanitarian grounds. That is the great shame, as far as I am concerned.

We need to build back into the system the ability to deal with cases that, at the end of the day, I believe, as a matter of international law, we are obliged to deal with humanely. It is not that hard to articulate the criteria for compassionate and humanitarian behaviour in the administration. You have international human rights law for starters—upon which much of our migration system is built anyway. This law covers, for example, the right to marry and found a family, an absolutely fundamental human right; the right to liberty; and the right to be free from torture and trauma. These rights are enshrined in the torture convention and the International Covenant on Civil and Political Rights. We are signatories to these instruments and we like to think of our society as a society that is built on respect for human rights and the rule of law, so I do not actually buy the idea that it is impossible to build discretion back into the system on a more generic basis. You have got specialist tribunals, if you want to start with them. Give the migration tribunal and the refugee tribunal back a little bit of residual discretion. Even that would be better than the system that we have now.

Senator BARTLETT—I have one final question. A lot of the practitioners—in fact most people who have given evidence—have raised the issue of the lack of transparency about the reasons why the minister does or does not use his discretion or does or does not consider whether or not to use his discretion. Firstly, I am interested in any problems you perceive with that from a legal point of view—and I know that exercising discretion has no effect of precedent in a legal sense. Are there any issues there that cause a problem or are there any positives you want to mention? Secondly, as practitioners yourselves or as people who obviously train practitioners in this area, what are the issues that arise from the inability to know why the discretion is used in one case and not in another?

Ms Burn—I believe that it is desirable that reasons for the excise or nonexercise of the discretion are made available to the person who is asking for the discretion. I have also suggested in my submission that there be fuller information provided by the minister when, as is required under these particular sections, he tables in parliament the reason why the discretion was exercised. Despite the guidelines, including the new guidelines, there are issues I think in transparency. It is not always clear that the minister is aware of all the circumstances behind particular cases. The immigration department officer who prepares the schedules for review by the minister selects the facts and matches those facts against the guidelines. While in both versions of the MSI there is the statement that the guidelines are not meant to curtail the exercise of the minister's discretion—that would be an error of law, of course—it is hard to see that the actual processes that are embedded within the guidelines allow for the minister to be given all the information. So there are recommendations made to the minister against the guidelines and departmental officers must consider, in the new version of the MSI, countervailing factors, but there is a poverty of information in the MSI about what those factors should be. So the actual product that the minister gets is a summary, but it may not be a complete analysis of all the relevant information.

I would suggest, from my very brief reading of the new MSI—I did that this morning—that there may be a remedy there. If the MSI were expanded at the point the departmental delegate concludes the assessment of the facts after reviewing all the information on the file, it would seem sensible for that information then to be given to the person who has made the request to the minister to ask for their response and there could be a certificate to that effect. The minister, who would read the response from the applicant for discretion as well as the immigration department assessment of the facts, then more likely would be aware of any particular factors that at least the

person requesting discretion thinks important. That would provide a process for expanding the scope of the MSI to allow the person who is requesting the discretion to identify any countervailing factors.

Senator JOHNSTON—Dr Crock, I was very interested in your submission. Is there no role for the minister and the sort of discretion he now has as a final destination of 351 and 417 applications?

Dr Crock—As long as our ministers for immigration continue to take the sort of hands-on approach that we have seen for the last 30-odd years, it will be very hard to get them to agree to the relinquishment of that sort of power. Ultimately I do not have a concern with a minister having a power to intervene. What I do have a concern with is the minister being the only person with a power to intervene in circumstances as of late—and I may come back and speak to the committee again in another context. One of the problems with the system as it operates now is that, in spite of the marvellous MSIs, it is not what you know, it is who you know. If you do not have direct access to the minister so that you know your piece of paper will get through what sometimes appears to be an utterly impenetrable barrier, you will not been able to exercise your discretion—and that is wrong. That is why I am saying I really think you need to diversify the powers so that you build back some discretion into the system.

Senator JOHNSTON—How would you do that?

Dr Crock—I suggested earlier that you could start by giving the two tribunals—the Refugee Review Tribunal and the Migration Review Tribunal—based on our basic fundamental human rights obligations, many of the discretions that are being exercised by the minister; they could be exercised equally at that level. Looking at the statistics, those who are being allowed through are people who have close family here but who have somehow failed to meet the balance of family test for one reason or another. Those are the sorts of cases that succeed at a ministerial level, and they should not be up there; they should be dealt with back at the tribunal level.

Senator JOHNSTON—Would those amendments in the previous tier, if you like, be to the exclusion of the minister or as an addition?

Dr Crock—As an addition.

Senator JOHNSTON—How do you determine what is an adequate level of things like compassion, justice, fairness and even health issues? How would you set the benchmarks for those thresholds in terms of who you would and would not allow in?

Dr Crock—This is where I think we have lost any belief that people can judge. What I find most worrying about this system is that you have one man who says, 'I can be judge and I am the only legitimate judge because I am elected.' Why is one person's sense of compassion—and this is not personal—somehow more legitimate than somebody else's? You can think of a dozen reasons why it would not be. There is compassion fatigue—

Senator JOHNSTON—But what about the difference between judges? You might have one judge who is more compassionate—you would always want to go and take an application to him—than other judges. Isn't that just a replication of the same problem?

Dr Crock—At the moment what is wrong with this system is that there is a kind of giant vortex that gives all the power back to one person. The thinking behind that is, because he is elected, he is the only person who can legitimately make this ultimate decision on a question of discretion. I am saying that the system is corrupt and it certainly makes itself very open to corruption because of the obvious limitations in—

Senator JOHNSTON—The perception.

Dr Crock—Not just perception; actuality as well. People are human. You develop compassion fatigue and cynicism. That is why judicial review is so important. That is why it is so important to have an accountability mechanism that takes you out of yourself so that you are not stuck in your single mind-set—so that you are not dependent on: 'This information is coming from so-and-so; I know that person, therefore I am going to trust it.' That system has built into it its own corruptions.

Senator JOHNSTON—And judges do not suffer from compassion fatigue and things of that nature?

Dr Crock—Of course they do, but there is more than one of them and there is an appeal process, isn't there? Of course, we are human; that is what I am trying to say.

Senator JOHNSTON—So the whole process should always be open to judicial review at any point.

Dr Crock—I am saying that if you are going to have a discretionary system the discretion should be diversified. I am trying to say very forcefully that any system that puts all the power in one person is going to be corrupted, and it is going to be perceived as being corrupted.

Senator JOHNSTON—Let us go back a step. Suppose all of the judicial processes have been exhausted and the applicant is bound to leave; is there no role for the minister in those circumstances?

Dr Crock—Sure.

Senator JOHNSTON—It is interesting that you say that. So you always want to come back to having the minister having a discretion. There seems to be a loop where you just seem to keep going around and around here.

Dr Crock—I do not think you follow my point, or perhaps you do.

Senator JOHNSTON—No, I do not.

Dr Crock—I said to you before that, with the way successive ministers of immigration have thought about their own powers and the migration process—and perhaps with the way the Australian people think about it too—the politicians are deeply involved in it. Canada has gone a totally different route. Its politicians tend to take a much more backseat approach, which I think ultimately is healthier. The biggest problem we have here is not that this man has a discretion at the end; the problem I am trying to put across to you is that he is the only person with discretion.

It is not just that he alone has discretion but that everybody else has been drained of their powers so that you have this giant vortex that goes down to one person.

Senator JOHNSTON—But let us suppose that we put a tribunal of merit between MRT and RRT that looked at issues of compassion and issues that might not fit within the code and then made a transparent decision, which was judicially reviewed. You seem to indicate that, if all that fails, you would still like the minister to have the final say.

Dr Crock—Senator, I can see that you like playing with words.

Senator JOHNSTON—I am not playing with words.

Dr Crock—My submission before was that I would like to see discretion reintroduced—I would actually like to see it reintroduced at every level. I would like to see people starting to believe again that the officers in the department can make discretionary rulings about issues of compassion and humanity. I think you would find that the system then would be a whole lot less fraught. It used to be a whole lot less fraught. I think we have a sense today that how we are now is inevitable—that it has always been like that, it will always be like that and there is nothing we can do to get out of it. But it was not like that years ago.

Senator JOHNSTON—I just want to clarify this one aspect. After having built in discretion all the way through the chain and exhausting all the judicial and discretionary administrative remedies, do you still want the minister to have the final say?

Dr Crock—What do you mean by 'the final say'?

Senator JOHNSTON—Do you want him to have a discretion to say yes or no?

Dr Crock—If he wants it.

Senator WONG—I have some general questions, but I want first to ask both of you some questions about gender persecution. That was raised this morning by Amnesty and we have not covered very much on that. Dr Crock, you rather forcefully assert that, personalities aside, a system which vests so much discretion in one person is corruptible. I think you said in answer to Senator Johnston that such a system will be corrupted and will be perceived as being corrupted.

Dr Crock—Yes.

Senator WONG—Do you think that is the case with the current system?

Dr Crock—I do.

Senator WONG—DIMIA's position is that the tabling statements are the process of accountability. Do you think they are an adequate process of accountability? I know Ms Burn had something to say about that.

Dr Crock—No.

Senator WONG—Why not?

Dr Crock—I have a pile of them here; they do not tell you anything. You no doubt have seen them.

Senator WONG—Yes. Dr Crock, you also said that the people who are succeeding are those with family ties. Have you actually done an analysis of successful 417 applications in order to make that assertion?

Dr Crock—There have been analyses made. I have read and you have had submitted to you the excellent article by Ms Johanna Stratton.

Senator WONG—Yes, who seems to be the only person who has looked at all the tabling statements that I can find so far.

Dr Crock—Yes. The Refugee Advice and Casework Service over the years has done a bit of an analysis, which it has sent me from time to time. This is dated 10 February 2000. If you look at that, back in 2000, 50 per cent of the section 417 grants were protection grants; one per cent was aged parent; 11 per cent were family permanent stay; three per cent were medical treatment; one per cent was spouse; three per cent were business long stay; and 31 per cent were spouse temporary. That suggests that family grounds are way up there with refugee grounds in terms of the grant of protection.

Senator WONG—Given that 417 is essentially our only answer to our obligations under a number of international agreements—CAT, ICCPR and CROC being the obvious ones—does it concern you that the types of visas being granted under this minister appear to have shifted considerably, in terms of the proportion that are protection visas and the higher incidence of other classes of visas?

Dr Crock—I have not done a close enough analysis of recent visa grants to be able to answer that sensibly.

Senator WONG—Ms Burn, do you have anything to add?

Ms Burn—No, although I could look at it and respond later.

Senator WONG—Yes. Perhaps you could take that on notice; thank you. Turning now to gender persecution, with the article provided as part of your submission, I think Dr Crock made the point that the refugee convention does not list gender as one of its grounds. Was it you, Dr Crock?

Dr Crock—I do not think so.

Senator WONG—I am sorry. We have included what I think is called *Future seekers: refugees and the law in Australia*.

Dr Crock—Yes.

Senator WONG—Weren't you aware that we had that?

Dr Crock—That is very much in the public domain.

Senator WONG—You make the point that the refugee convention lists certain grounds. You also make the point in your submission that the codification of the convention in Australian law is arguably narrower than perhaps it is in other jurisdictions and that the absence of gender as a specified ground in the convention has caused some difficulties for women around the world seeking protection. What is the situation in Australia when it comes to women who do not satisfy the refugee convention grounds and who assert that they will be persecuted on the basis of their gender if they return?

Dr Crock—Basically it is that they are left in the same situation as other people who do not make the definition of 'refugee'. My most recent research looks at the position of unaccompanied children in the refugee determination process. The law in Australia with regard to women has improved quite dramatically with the High Court's decision in the case of Khawar against the minister. We have not got that far. Jurisprudence generally on children and refugee law is probably where gender persecution was about 10 years ago. Again these are the types of cases that highlight the problems with the ministerial discretion. These are people who—certainly in the case of unaccompanied children—are quintessential examples of the voiceless and the powerless. If those people do not have backers who are able to penetrate through to the minister personally, there is a very great danger under our present system that they will be sent back to situations where they will face persecution.

Senator WONG—Khawar's case dealt with a victim of domestic violence, did it not? We had evidence from Amnesty earlier today that they considered there was insufficient protection—I am paraphrasing what they said—for women who would suffer domestic violence or other forms of abuse on return. What was the effect of Khawar's case? Is it still the case that women who argue these sorts of grounds would be reliant on ministerial discretion, or is there a capacity for their claims to be ventilated through the tribunals?

Dr Crock—Their claims would go through the tribunals; there is no question about that.

Senator WONG—It would be a matter of going through the process, as everybody does.

Dr Crock—Yes. There have been changes to the legislation that make it harder for women to gain protection as refugees. I think the most notable change was made in the wake of the *Tampa* affair, with the introduction into the legislation of section 91R of the Migration Act, which makes it considerably harder for a woman who is separated from her family to gain refugee status by dint of the fact that she is no longer able to counter any harm or fears that the rest of the family from whom she is separated might have articulated in refugee claims. Hence we have a situation where there are men in the Australian community who have been recognised as refugees when their spouses and children are in detention, having had their refugee claims rejected. That comes about in part because we have abolished the notion of derivative refugee status in Australia.

Senator WONG—In other words, if your husband has a claim under a convention ground—that he is going to be persecuted for his political beliefs—even if the reality is that the

government on your return would persecute you because of what he has done, we do not recognise that.

Dr Crock—That is right. The classic problem in refugee law for women is that their subversive activities tend to be very private. In many traditional societies they 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.'

Senator WONG—What about sex trafficking? There was some discussion this morning about that. Amnesty International have provided a video which we have not yet seen, but they indicated to us that it dealt with a number of women who had been, I think, returned after being brought to Australia for sex trafficking purposes.

Dr Crock—Again, I think what we are seeing here—and the relevance of that as I see it—is that we have a system that is so strictly codified that there is no scope for targeting the people who should be targeted in those circumstances. We are imposing more penalties on essentially the victims—the women who have been trafficked—instead of dealing with the issue of trafficking and going after the perpetrators of what I regard as a quite serious crime. We are targeting the fact that these women do not have appropriate documentation—they do not hold a visa—and we just send them back. The refugee law does not operate to help those people and, once again, we are left with one person to deal with this. These are all examples of the reduction, the draining away, of broad discretions in different areas. These examples also highlight the problems with focussing discretions in one person.

Senator WONG—Finally, in the article that I was referring to, you made reference to the fact that the European Parliament in 1984 included women as a particular social group in terms of the convention grounds. So it would seem that we are almost 20 years behind.

Dr Crock—Yes. Australia is behind a lot of other countries in our behaviour, but we do not seem to have a sense of that.

Senator SANTORO—Dr Crock, I have been interested in listening to your evidence, and I have some questions that go to the heart of some of the broad statements that you have made. I would like to explore with you the concept of mandated democracy. You have talked a bit about democracy today and you have made statements—and correct me if I paraphrase you wrongly—that, because the minister is elected, he is the only one who is legitimate to make the decisions. Have I paraphrased you correctly?

Dr Crock—I said that in the context of the quotation that I read out from Mr Ruddock.

Senator SANTORO—I will come back to the issue of the separation of powers in a minute. I want to explore with you the concept of a mandate. If the minister receives a mandate via the democratic process—and you seem to be upholding the democratic process today, and I compliment you on that—and the views of ordinary people are expressed via a democratic

election process and a mandate is gained by the government, what do you make of that? Is the will of people expressed via a mandate not the ultimate court?

Dr Crock—Without getting into questions of how representative our elections are, because that is another issue—

Senator SANTORO—We will not get into it, but you would have to assume—

Dr Crock—The point is that, if you take a monolithic, simplistic view of 'I am elected; therefore what I say is true,' you are just sweeping aside all the subtleties of our system and conflating the notion of a decision in an individual case with the legitimate power of an elected government to set policy. You are saying that the word 'policy' means everything from the grand vision of cabinet in closed session down to the decision made in this particular case. Can you not see that it is a huge leap? The point I was trying to make is that words like 'policy' and 'discretion' have colour and a whole range of meanings and by using this monolithic, simplistic language, we are losing sight of that. You can get your throwaway two-second lines that say, 'I am elected; therefore I am the rule of law.'

Senator SANTORO—Would you agree with me that when it comes to broad and specific policy areas such as—I will throw in another one just for comparison—immigration policy and, say, the GST that the public is really very much aware of what they are voting for, including the existence of ultimate discretionary power?

CHAIR—Including the likes of the GST.

Senator SANTORO—We have heard some very sensible side comments over the last day or so about the GST from your party, which I compliment you on. But the point that I make is that I am using the GST and the immigration examples as two issues—

CHAIR—That is fine. I am happy for you to ask that question.

Senator SANTORO—It is very clear to Australians that the minister is sitting at the top of the appeal tree.

Dr Crock—I do not think anybody disputes that an elected government absolutely has the power to set policy to introduce legislation into parliament.

Senator SANTORO—We are talking about a system here.

Dr Crock—A system—sure.

Senator SANTORO—Not just policy.

Dr Crock—I am trying say that the words 'policy' and 'discretion' do not have single meanings. You cannot just say, 'I am elected. I set policy; therefore I should be the only one to determine this particular case.'

Senator SANTORO—In this particular case, meaning and definition are provided by practice. This whole inquiry is about practice, about deciding whether there is a discretionary power that ultimately says that there is going to be a stop to the process because of privacy, defamatory, safety and compassionate reasons. There has to be a stop. The minister and the government get elected and then you say, 'But that is not legitimate; that is not a mandate.' I am asking you: do you acknowledge the validity that in this particular case—and I mentioned two issues: immigration policy and GST—people are very aware that in the end the minister has discretionary power as we have been discussing? It is pretty clear to the Australian people that in the end it is the government that says, 'This is our immigration policy. You can vote for it or vote for something else.' It is very defined because there has been a lot of debate about this issue and other Senate inquiries have touched very significantly on this issue.

Dr Crock—I think I answered your question before, Senator.

Senator SANTORO—In terms of the separation of power, you commented that the minister expressed views on judicial interpretation. Judges are increasingly commenting on and sometimes even attacking government policy, including in this fairly sensitive area. Do you wish to comment on the increasing trend of judges commenting on and sometimes attacking government policy and commenting on political issues? How do you see the separation of power there? Are you equally critical of judges who attack government policy?

Dr Crock—My personal view is that they are tending to act in self-defence. The attacks on the judiciary in recent years have reached the point where we have seen the traditional defence role of the Attorney-General disappear almost completely. We have seen the rules of what is proper and improper for politicians to say about judges being rewritten as we go. I have got to say I find it hugely distressing, as a lawyer, that more respect is not shown to the judicial process.

Senator SANTORO—Like you, I support the separation of power concept in practice. I am not accepting your implied suggestion that judges are responding to an attack when they attack the government. Do you support the separation of powers in this instance?

Dr Crock—Yes. I would like to see some examples of judges attacking government policy, as you say. I have not seen that in evidence; I have seen the opposite in evidence, however.

Senator SANTORO—In terms of what the minister said, you see that as not acceptable but judges commenting on what ministers say is more acceptable?

Dr Crock—I am sorry?

Senator SANTORO—You have attacked Mr Ruddock in your submission, which we have published, for making comment on a legal outcome, on a court decision. I am asking you: are you equally critical of judges when they attack ministers or are you just using the chicken and egg theory?

Dr Crock—I have not seen such flagrant examples of judges standing up and saying—

Senator SANTORO—Attacking laws?

Dr Crock—Judges make comments in the course of—you would have to give me some examples.

Senator SANTORO—My colleague to the right, Senator Johnston, has just reminded me of Judge Nicholson attacking family law.

CHAIR—Or the system; I suspect he was not attacking family law per se.

Senator SANTORO—Yes, or the system of law under which—

Dr Crock—Senator, I cannot see the relevance of this question.

Senator SANTORO—The relevance that I am trying to establish is, in fact, in your comments where you attack the concept of the national interest being pursued by a government that is democratically elected. You made some very broad statements about democratic process and outcomes based on democratic process. I have sought to finetune it by suggesting to you—and asking you to agree with me, although you are obviously disagreeing—that in the area of immigration policy there is a very specific mandate provided by the Australian people.

Dr Crock—Sure. I do not disagree with you at all that the government has a very strong mandate here. What I am suggesting to you is that the problem with the system, and why we are here today, is that we have seen a conflation, a shrinking together, of notions of policy, power and discretion so that the subtleties of those concepts are no longer recognised. What I am trying to say to you is that you might have a mandate to set a general policy direction, but it is another thing to then give one person and one person alone the power to make the ultimate choices at the end of the day with no other person having any power to make similar decisions.

Senator SANTORO—I understand the point that you make—that is, that discretion is focused on one person. What about the issue of consistency? What would happen if you spread discretionary power to, say, the junior minister, a group of ministers or a group of people?

Dr Crock—If the present system gave you consistency then I would agree with you, but it does not. I have been involved at a very personal level in this area for a really long time, and I can tell you now that I am a lot less concerned with the people who are granted visas than I am with the people who are not. If there was real consistency then I would not be concerned.

Senator SANTORO—Do you believe that ministerial discretion is an integral part of a coherent, regulated immigration system here in Australia?

Dr Crock—A part of, yes. But it should not be the only thing—that is the essence of my submission. I do not have a problem with discretion, but I do have a problem with this image of the funnel down to one person.

Senator SANTORO—The issue was raised of the different visa classes that were being used to grant people residence in Australia. What would you say to the suggestion that the minister is in fact availing himself of those classes of visas so that he does not erode the number of visas that are available to him in terms of genuine refugee cases? We have heard some criticisms here today.

Dr Crock—If you had two days, I could talk to you about that.

Senator SANTORO—We do not have that much time, so could you give us a quick answer?

Dr Crock—I have major concerns with the whole way that the issue of onshore-offshore visa places is being played with. The accounting for and the filling of visa classes in that area has been a matter of major concern to me, frankly, over the years because they take places out of the program when they grant temporary permits. There seems to be all sorts of double accounting going on.

Senator SANTORO—We are talking about preserving the refugee quota.

Dr Crock—Yes; it is playing games with numbers.

Senator SANTORO—Preserving the available places for the minister to grant genuine refugee visas is playing with numbers?

Dr Crock—I am sure you do not want to get into the whole dispute over who is or is not a genuine refugee. As a matter of international law, genuine refugees are people determined to be refugees—right? The issue of places within the program is a matter of this government's policy. They have decided to do things in particular ways, but I have major concerns with the way that they play with the figures and the numbers within the system we have at the moment. I think it is opening a can of worms to start talking about that at this late hour.

Senator SANTORO—Have you researched and written in that area?

Dr Crock—Yes, I have done a little.

Senator SANTORO—I am not worried about opening a can of worms and I would welcome any information that you could provide to the committee on that area. You may want to supply that to the committee formally in writing.

CHAIR—I am aware of a number of your publications and journal articles. The secretariat will get together a list and provide it to committee members. I am sure that, if there are any additional matters that you could refer us to, we could source them from the Parliamentary Library.

Dr Crock—I am very grateful, Chair.

Senator SANTORO—I am grateful to you too, Chair.

Senator SHERRY—From your experience, Dr Crock, can you think of any other area of public policy where a minister has such significant powers of discretion in decision making?

Dr Crock—I cannot think of another area where the discretionary powers are constructed as they are in the migration area. As I have said now on a number of occasions, my concern is not with the presence of a discretion, rather it is with the concentration of the discretion in one person. Offhand, I cannot think of another area that replicates that situation.

Senator SHERRY—Okay. You say in your submission:

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.

Yesterday we heard from a number of witnesses about some migration agents, and some non-migration agents, giving misleading advice, in some cases, to their clients and receiving substantial payments, in some cases, in cash form—in some cases up to $50,000. Isn't that a form of corruption?

Dr Crock—I would have to agree with you. I think it is.

Senator SHERRY—What about where some of those people, at least, are asking a minister to exercise discretionary power and make political donations of money in some form, either directly to the minister or to the political party. Isn't that a form of corruption?

Dr Crock—This is what I think you are really getting at here. In the first example that you gave me, it is corrupt in the sense that individuals are taking money other than for direct labour or work that they have done—

Senator SHERRY—And misleading advice.

Dr Crock—And misleading advice; exactly. I think what has happened, though, is that this is occurring because of the structure of the system that we have at the moment.

Senator SHERRY—I am not arguing about that. I am just asking you your view. You have said a system 'will become corrupt'.

Dr Crock—I think the point here is that you may have politicians at the other end who are as pure as driven snow. I would have to say that, over the years, Minister Ruddock has struck me as a very upright man, a very principled man. It is the system as a whole, though, that really encourages this sort of behaviour going on behind the scene.

Senator SHERRY—Let us go back one step. Where you have such significant individual discretion exercised in a minister—no matter who the minister is—doesn't it allow a system of financial inducement where you have such significant levels of discretion available?

Dr Crock—I think it does. Again, I think the problem is the concentration of power. If there was a diversification of this discretion at different levels then the attraction of offering inducements would dissipate, certainly.

Senator SHERRY—Let me go back. We have had the evidence of at least some migration agents and non-migration agents, and at least some of them argue that they have privileged access: receiving substantial sums of money—sometimes the payments are in cash form—and giving misleading advice. Isn't it a form of corruption where one or more of those individuals gives political donations—either individually to the minister's campaign or to the political party that the minister belongs to? Is that a form of corruption?

Dr Crock—I think you enter into a grey area here. The whole system becomes predicated on establishing personal relationships. Again, one of the problems here is that the system certainly develops the appearance of corruption, because those close friends then transform themselves into supporters of the political parties. I suspect that, in most cases, the more astute agents would be even-handed in their donations so as to cover their backs when it comes to perceived favouritism. So you will probably find that, for every agent who has made donations to the Liberal Party, there are equal and opposite donations being made to the Labor Party.

Senator SHERRY—We do not know that. We will be interested to find it out—if we have access to someone like Mr Kisrwani, for example. So you would argue that the system is at least open to corruption in that respect?

Dr Crock—Open to corruption and certainly open to the perception of corruption.

Senator SHERRY—But do you say that the system is acting corruptibly at the moment?

Dr Crock—I would have to make the point that I am not a migration agent—I have applied, but I do not think I have a certificate right now. I am primarily an academic, so I am not working in this area.

Senator SHERRY—I understand that, but you have opened yourself up to questioning on this issue. You have made some observations about a system perhaps becoming corrupt. That is a very strong criticism and concern about the system. I referred earlier to the evidence we received yesterday from a number of witnesses at two levels—migration agents and non-migration agents. You accepted earlier that that is corrupt.

Dr Crock—I have said it is corruptible.

Senator SHERRY—I do not think the *Hansard* will show that.

Dr Crock—Perhaps I should make it very clear that I do not have enough immediate, hands-on experience to say, 'The system is corrupt.' I should make that plain. However, I do believe very strongly that the system is corruptible and that it is one that is inherently fraught.

Senator SHERRY—Let me go back to my second question. Where a migration agent or a non-migration agent gives misleading advice—and we have evidence to that effect—or receives cash in hand payments, are you saying that that is not corrupt? I put it to you earlier that that is corrupt, and you said it was.

Dr Crock—I saw the question in an abstract sense. If a person were to behave like that, I personally would regard that as being corrupt.

Senator SHERRY—So, if that is occurring, that is a form of corruption?

Dr Crock—Yes; I think I would agree with that.

CHAIR—You mention in your submission:

The criteria for the exercise of such powers can be articulated without opening the floodgates and losing precious control of the migration process.

You might need to take this on notice—I do not want to drain your time—but you mentioned that it can be articulated without opening the floodgates. Do you have specific examples of that that you could provide to the committee in terms of the structure you are referring to? You obviously have something in mind about how the process could work without doing that.

Dr Crock—I suppose I could take that on notice.

CHAIR—Thank you; it would be good if you could turn your mind to it.

Ms Burn—I would like to add something.

CHAIR—I am sorry that the senators have concentrated on Dr Mary Crock.

Ms Burn—I have not had the benefit of reading her submission, but it was obviously very significant.

CHAIR—Your submission was in fact quite excellent.

Ms Burn—Thank you so much. I want to speak to Senator Johnston about an earlier question which related to the mechanics of introducing fairness or compassion into various tiers of the migration system. While I cannot give a detailed exposition of how that could occur now, I think it would be possible to look at ways of incorporating an assessment of humanitarian or compassionate factors or other relevant factors into the operation of the migration jurisdiction at all levels. Dr Crock referred to an earlier report that suggested some of those elements be introduced. For those reasons, I have suggested that the committee might like to consider establishing a committee to look at general decision making within the migration jurisdiction. There is distortion in the system we have now. People are going to the minister for a particular reason. It may be more sensible to try to identify any special circumstances before that final step.

Senator WONG—Dr Crock, when you get back to the chair on this issue, you might want to consider Amnesty's proposed amendments to the Migration Act to cover international treaties and complementary protection proposals.

Dr Crock—Thank you, Senator; I am very grateful to you.

CHAIR—Thank you, Dr Crock and Ms Burn. We do appreciate the evidence you have given before the committee today.

Proceedings suspended from 12.35 p.m. to 1.49 p.m.

GODWIN, Ms Philippa Margaret, Deputy Secretary, Department of Immigration and Multicultural and Indigenous Affairs

ILLINGWORTH, Mr Robert Laurence Mark, Assistant Secretary, Onshore Protection Branch, Department of Immigration and Multicultural and Indigenous Affairs

LINDSAY, Ms Louise, New South Wales Manager, Onshore Protection, Department of Immigration and Multicultural and Indigenous Affairs

NICHOLLS, Mr Nick, State Director, New South Wales Office, Department of Immigration and Multicultural and Indigenous Affairs

WALKER, Mr Douglas James, Assistant Secretary, Visa Framework Branch, Department of Immigration and Multicultural and Indigenous Affairs

CHAIR—Welcome. The committee has received your submission. There is some correspondence that you have made available to the secretariat, and I think the secretariat is in the process of making it available to committee members. When that is available I will move to have that published. I now invite you to make an opening statement.

Ms Godwin—I do not have an opening statement as such, but I would like to make a couple of comments. We have supplied some additional information today. I apologise that it is not immediately before you. We sent it to the secretariat but we were not aware that there was not an email exchange available. We have provided a hard copy and I think it is in the process of being photocopied. That is the additional statistical information which, at the last hearing, we said that we would try to provide. It is in relation to the non-parliamentarian community and individuals. This is the first time that Ms Lindsay has appeared before any Senate inquiry or any other parliamentary inquiry.

Senator SANTORO—Do you want us to listen to her in silence?

Ms Godwin—No, I was going to suggest that Ms Lindsay explain where she fits into the operations in New South Wales, because I think it may assist the committee to understand her role a little bit—if that would be all right with you.

CHAIR—That would be fine.

Ms Lindsay—I manage the Onshore Protection Branch in New South Wales. This is made up of a number of teams that address the PV process, from when a case comes into the New South Wales office until it is finalised. Part of my role is to ensure that cases are tracked properly right through that process; to look at work flows; to ensure that time frames and service standards are met; to ensure that any issues or trends that arising are identified; and to address training issues. I regularly meet with team leaders and we discuss any complex cases that come up. Part of the Onshore Protection Branch is the Ministerial Interventions Unit—which you are particularly interested in.

CHAIR—I will lead off with a couple of issues. We had one list from you in correspondence. It was colloquially called the 'Top 10 list' and then that was corrected. Could you explain to the committee how it came about that we ended up with, in some parts, quite divergent information that was presented after the original information was presented? Of course, some of the information was similar, but it makes the committee—or at least me—wonder how that information was collated and put before us, and whether the final material you have put before us is as accurate as it can be.

Ms Godwin—The first thing I should say is that the list we provided—I think in correspondence on 4 September—was headed 'Top 10' but that in fact was where the error was. The heading of the table was the correct one. We had left the reference to 'Top 10' in there, but it should have come out and it should have been footnoted.

The background to this, as you know, is that a request was made to the department to provide what information we could prior to the hearing on 5 September. As we described in some detail at the last hearing, there are considerable difficulties in collating that information. In order to assist the committee, we had intended to explain that the list provided was not in fact the top 10 but simply a snapshot, and I will explain how that snapshot was arrived at. I guess that, when the correspondence was put together, that part of the process was inadvertently left off and the reference to a top 10 was left in, and hence the confusion arose. At the last hearing we explained in some detail, in relation to some of the material provided—and I think we are probably going to explain it again—some of the difficulties in collating this material. We do not have a database designed for this purpose. We are in fact using databases that were designed for completely different purposes and trying to retrospectively pull information out of them that may assist the committee.

At some point in the process, we took a snapshot and simply asked ourselves what the system would tell us about the people that we knew were reasonably regularly in contact with us. That is where the list came from. It was, as I said, a snapshot of people who happened to be regularly in contact with us or were significantly involved in issues to do with cases, post the RRT. That is where Mr Clisby's name came from; we knew he was involved in a large number of cases and we simply asked the question of whether he was involved in the intervention correspondence as well.

As I said, the list we provided on 4 September was really a snapshot of people whom we knew were in reasonably regularly contact with us. It was inadvertently given the wrong heading of 'Top 10'. When that came to my attention, we sought to correct the record in correspondence which we sent about a week later. In that correspondence, we have tried to explain the differences in the list. I would like to turn to what that means about how we got that information and how accurate it is. I know I am repeating myself, but I think it might be worth while to try to clarify this in the interests of avoiding any further confusion.

CHAIR—Absolutely.

Ms Godwin—The basic information comes from a system that we call the PCMS—the parliamentary correspondence management system—which is designed specifically to track correspondence. It is not designed to manage or monitor interventions per se; it is designed to track correspondence. When correspondence comes in, it is logged into that system and flagged

in a number of ways. We enter the name of the person who signed the letter. There are some variations on that. If there is more than one signatory we usually only include one person and refer to cosignatories. Sometimes the person entering this simply enters the first person's name; sometimes they put more than one name—one in the signatory box and one in the commentary box. There are variations, and it depends a lot on which individual logs the item. But the key field is the signatory to the letter, because that is the person who is going to get the reply.

The letter is also given a priority which is assigned according to various categories. Two of the categories assigned are 'intervention parliamentarian' and 'intervention other'. Working backwards through PCMS you can get it to report on the pieces of correspondence that are flagged in that way. What comes out of that is a ginormous list of pieces of correspondence, with the names of the signatories. We then have to put that through another process to try to group them in some way—by individual or by organisation, such as Amnesty International or whatever. That involves looking at both the signatory field and the text commentary to see whether any organisation is referred to.

CHAIR—Do you need another system?

Ms Godwin—We do not need another system for managing ministerial correspondence, because that is what it was designed to do. What we are trying to do is make that system retrospectively answer questions such as this, which it was not designed to do. This is not a system for managing intervention; it is a system for managing and tracking correspondence and for making sure that we answer the correspondence et cetera. When this inquiry arose and questions started to be asked, because we do not have a system that is simply a ministerial intervention system, we were looking for ways in which we could find information that would be helpful or indicative, but it is not perfect, because it comes from a different source. You can see from the explanation I have given that there are various things that could lead to inaccuracies.

CHAIR—Yes, I understand that. Does that beg the question of why you do not have a system that tracks the use of ministerial discretion for probity and accountability reasons?

Ms Godwin—I guess I would put it another way. Most of the systems in the department are built to manage what happens to individual clients. The system which has been built over a period of time from the late 1990s is called ICSE—the integrated client service environment. Because in effect the stock in trade of the department is dealing with individual clients and cases, the purpose of the core system—ISCE—is to work from the individual. So you can see by looking at individual records exactly what steps have occurred regarding an individual according to the things that have to be flagged in ISCE. Of course, ISCE does not record every single transaction or every single piece of correspondence; it records key milestones: applications received, decisions made, visas granted and those sorts of things.

That is the core system and in any individual case you can inquire into it. Our difficulty with ministerial intervention is that we do not know all of the individual cases. We know those where there has been an intervention—you can work backwards into those client records—but at other times the committee has asked us if we could inquire into the 27½ thousand requests that we have received, and the fundamental answer to that is, 'No, because we do not track them in that way.'

CHAIR—At that juncture, and as there is no objection, I will authorise this letter of 23 September from the Department of Immigration and Multicultural and Indigenous Affairs, signed by Andrew Endrey, Director, Parliamentary Coordination, to be published so that it becomes available for use. I will now put it to good use. I asked Amnesty International whether or not they could agree or disagree with the 162 pieces of intervention correspondence and the number of requests made. I think it is 126 requests on this and, although I did not put that to them, I did mention the 162. They said that their records did not quite match those figures. They could not quite identify what their records were, though, to be fair to them, but it seemed that there was a significant difference between what they thought they had done and what you say they have done. I think that is a fair way of putting it.

Ms Godwin—Yes.

CHAIR—They mentioned that there were 40 cases of Iranians that they had written to. What we were concerned about and one question I asked them was whether they mentioned specifically a section 417 intervention or whether the department took their correspondence to be a section 417 even though they did not state that. Of course, that has implications as to whether it becomes a first request and whether or not the person is then subsequently unaware that a request under 417 has been made. They might subsequently go to a migration agent or a solicitor seeking a bridging visa E whilst they make a section 417 application.

Of course, unbeknownst to them, it might have already been accepted that Amnesty International unwittingly made one. Then they do not get a bridging visa E. So it is important that people understand when they do and do not make a section 417 application, as I understand it. I think I have got that right, but I am happy to be corrected.

Ms Godwin—Yes, I think you have got that right. Some of the points they are making, which you are alluding to, are potentially possible. I will start with the figure of 162. I will tell you how we derived that and what the potential sources of difference are between what they think and what we think, and I will then maybe try and pick up on some of the other points you have made. I described how we check the system. What we did to get the Amnesty International figures was to go through and interrogate the system by signatory and then see whether any of those signatories had indicated—and whether it had been flagged in the system—that they were from Amnesty International. I think essentially that gave the figure of 162. There are multiple signatories involved, but all of them—

CHAIR—So there could be one piece of correspondence with four signatures which then counts as four pieces?

Ms Godwin—Sorry, I may not completely understand the point you are making. It includes correspondence not just from Amnesty International's central office but also from Amnesty International branches around Australia. It clearly includes pieces of correspondence that related to the same case because that is what the third column shows.

CHAIR—Yes, section 120.

Ms Godwin—There are 162 pieces of correspondence, of which we have flagged 126 as being specifically about sections 417 or 351, which related to 68 cases. That is what that document is telling you.

CHAIR—So that is probably getting closer to the number?

Ms Godwin—Yes. The reason we did it that way was that one of the questions you asked last time was whether we could give you any indication about how many cases were embedded in the pieces of correspondence. You will see that there is a very significant difference. In some cases there are reasonably close correlations between the number of pieces of correspondence and the number of cases but in other cases there are wide discrepancies—for example, there could be 36 letters about what appears to be one case or 28 pieces of correspondence about 21 cases. It was just an attempt to try to give you a sense of the answer to the question that you had asked. Essentially, the answer shows that there is a wide discrepancy. In relation to Amnesty International, we have assessed—with all of the caveats I have alluded to in describing the process we go through—that they have made 126 requests in relation to 68 individuals.

CHAIR—If we look at, say, the case of Karim Kisrwani, where there have been 56 pieces of correspondence that you have identified—55 requests in respect of 55 cases—this document shows that there were 17 interventions, 19 cases of non-intervention and 19 'other' cases. That seems to suggest that there is one piece of correspondence per intervention. Would that relate to the number of files attached to this? What I wanted to do was have a look at the files that surround those sorts of issues. I am trying to find out about a couple of areas: one would be about migration agents and another would be about non-migration agents. I think Kisrwani is the only non-migration agent on that list; Marion Le is a migration agent—although I stand to be corrected on that; and Amnesty International are a community based organisation. Do you collate those into a file or a system? If so, could the committee have a look at what the correspondence is and how the process works? Some of the questions today will go through—with Ms Lindsay, I suspect—how the ministerial intervention unit operates.

Maybe this is an admission but, unless you take me through it, unless I can see exactly what happens in the process—sometimes it is a bit oblique—I lose sight of it. We may then end up with—and this is what I was referring to—a couple of issues: privacy issues, section 417 issues. The courts do not use people's names, so in terms of the public record there may be a difficulty. Before we hit that, could you explain to me—if the committee are going to refer to specific issues or questions—how we might deal with those matters. In the *A sanctuary under review* inquiry—Senator McKiernan was the chair at that time—we took a number of matters in camera. I just remind you that that is available if you want to deal with it that way. You would have to ask the committee for that, and the committee would then confer and make a determination on it, before you provided the information. I think it is helpful to understand that process first and what files can be made available to the committee.

The other area involves some cases. I am trying to narrow it down—we cannot look at 27,000 pieces of correspondence but the 1,900-odd intervention cases also seem to be quite a lot to look at from the committee's perspective, let alone the work that you would need to do to put that together. I guess those cases involve three categories. There are those that did not appear on any schedule or list to begin with that the minister has requested. In other words, correspondence has come in to the minister and there has been a first knock-back, if I can put it that way. It was

denied at that point where the department exercised their MSI 386, as I understand it, and they did not make it. So they were rejected at that stage—is that the phrase you would use?

Ms Godwin—Not quite, Senator; but go on.

CHAIR—Bear with me, please. So there are those in that category. The second category is where they have been assessed as either having a public interest or meeting the 386 ministerial—

Ms Godwin—Falling within the guidelines.

CHAIR—Yes. It then did not get on the schedule or list that was then put on the minister's table, so it did not form one of the orange files. It passed; it is on the list but not fully explored. Do you call that 'on the schedule'? The minister has then requested that file to be put into the orange folder. Do you understand?

Ms Godwin—I think so. But we might need to tease out some of the elements. Can we just go backwards a little way to talk about the files. The files are the other client's file. It is their whole file. As I said before, our stock in trade is the individual client. There is no separate intervention file or anything like that; it is just the client file.

CHAIR—That is what I got to understand last time when you talked about the files. Are they the orange files?

Ms Godwin—They are the briefing folders that go to the minister. They are not the full client file. The full client file—just to take the Amnesty figure of 68 cases—might be 68 files or it might be more. The files only get to be a certain size, then they are broken up and become two parts, three parts or however many parts. There may be associated files for compliance related action, litigation or any of those sorts of things. There could be a multiplicity of files that come out of a number called 68. So to say to you that any given number of cases would result in a specific number of files is the first thing we would have to check. I do not know the answer to that. It would vary with all of the cases.

Secondly, as I say, the files themselves are not constructed just for the purpose of managing the intervention. So you would have to go through the file, as we did in that earlier inquiry that you mentioned, to look at things that are within the scope of this inquiry, outside the scope of this inquiry, things that go to other people who are not necessarily the main subject of the file and raise privacy considerations, and questions of other public interest immunity. Examining the files is itself a reasonably intensive sort of process.

CHAIR—Yes, I can understand that. That is why I was trying to reduce the number or at least pick on a finite area. In the evidence to date, witnesses have talked about a perception of bias. Some have talked about—forgive me if I get this wrong—a vortex that leads to a direct exercise by a minister of a particular power, which also has the suggestion that the power, not the minister, might be corruptible in that sense. I think that is the gist of what was put, although I can be stood corrected on that. I want to have a look at how that power is then exercised, because Amnesty International loosely talked about the nontransparency of it, whereas you talked about the transparency of it when you were last before us. So there seems to be a discord between what some groups are explaining to us and what the department is saying to us. It seems

that the issues might be more lucid within the files themselves—or at least become clearer to us anyway.

Ms Godwin—The files will show what happened to an individual. Part of the difficulty of this goes back to one of the points we were making before—and I do not know whether this is the source of some of the comments by others. In the end, a decision that the minister makes is a weighing up of all of the factors that go to the question of public interest, in his assessment. Taking any two files and trying to compare them is not necessarily going to resolve the issue that may be being put to you. Two files that may superficially look like very similar cases may in fact raise quite different public interest issues in the mind of the minister and will therefore result in different outcomes. It is the notion of comparison between individual cases which is difficult in this sort of context.

CHAIR—It is not only a comparison; it is also the process of where the file goes and how it gets to the minister's table. People seem to have suggested that—rightly or wrongly—if it can get to the table, they have a better chance.

Ms Godwin—Yes—

CHAIR—Would you agree that if it gets to the table, the person would have a better chance?

Ms Godwin—No. Sorry, I was agreeing that that was a point that people are making. As we described last time, all of the requests that are regarded as first time requests get to the minister one way or another. They get there either on a schedule or as a submission. If they are on a schedule, it is because an assessment has been made departmentally that they do not fall within the ambit of the guidelines. But the reason for giving the minister the schedule is to say: 'We've had a look. We don't think it falls within the ambit of the guidelines, but if there are any here that you want to lift up out of that group, please tell us and we'll send you a submission.'

Others that are regarded as falling within the ambit of the guidelines from the beginning are the subject of a submission. The fact that they are the subject of a submission does not mean that they will or will not be intervened in; it just simply means that they have been assessed by us as falling within the ambit of the guidelines. It is then for the minister to weigh up all of the information. So the notion that people do not get to the minister's table, I think, is the one that I am sort of not—

CHAIR—You might just have to—

Ms Godwin—The fact is that they all go to the minister one way or another and, going back to our discussion last time, those are the orange folders. There is a folder with the schedules and there is a folder with the submissions. So all of those go onto his table and he looks at them.

CHAIR—I have outlined what I would like. Can you take that on notice and get back to us on what we can and cannot do?

Ms Godwin—Sure.

CHAIR—I do not want to exhaust the department completely.

Ms Godwin—Just almost.

CHAIR—I am happy to partly exhaust the department in terms of providing information that we can have a look at. It seems that there is a gap between what some of the submissions suggest and what I understand, so I am just trying to close that gap a little. If it includes the orange folders, then those too, I guess. We could take Kisrwani, as the non-migration agent, and Marion Le, as the migration agent, as two individuals.

Ms Godwin—You asked if we could take it on notice, and I would appreciate it if we could do that.

CHAIR—It is also a question of how we deal with it.

Ms Godwin—Sure. I really need to sift through with my colleagues what exactly would be involved in trying to find something manageable that responds to the points you are making.

CHAIR—If you want to reflect on some of the submissions that have already been made and the evidence that has been given to the committee, you may gain an appreciation of some of the points that have been made and understand the request I am now making in respect of those files.

Ms Godwin—Okay. As I said, we will take it on notice. It may be helpful in that process for us to further consult with the secretariat.

CHAIR—If you need to ask questions, put them to the secretariat and then the committee can meet and consider them.

Ms Godwin—Okay.

Senator WONG—On this issue, F4 in your correspondence of 19 September refers to my question regarding the number of times that the minister or the minister's office has asked for a full submission in relation to a case that has been assessed as being outside the guidelines and therefore on the schedules. Do you have any response to that yet?

Ms Godwin—We do not, because, again, it is one of those things we do not keep a running tally of. We have to go backwards through quite a lot of material to try to get that. We are still in the process of seeing what we can sensibly get that will assist you.

Senator WONG—On the same issue, just so that I understand, does attachment 2 to your original submission contain administrative guidelines?

Ms Godwin—I think that is right, yes.

Senator WONG—Are they distinct from the current ministerial guidelines, which are in attachments 8 and 9?

Ms Godwin—Yes.

Senator WONG—Do the attachment 2 guidelines still subsist?

Ms Godwin—Yes. The two current relevant documents are 2 and 9 and their companion documents, if I can put it that way.

Senator WONG—Yes, I understand. So they are your administrative guidelines to your departmental officers in terms of the actual process of the system.

Ms Godwin—Yes.

Senator WONG—On the issue of what Senator Ludwig is asking for, I note that 4.3.3 of the departmental guidelines says:

Where necessary, the DLO coordinates with the relevant MIU or policy area on urgent cases.

Is that 'urgent' as determined by the minister?

Ms Godwin—From time to time, it may well be by the minister, but it would not necessarily be. I am aware of cases that the department has regarded as urgent and has raised with the MIU directly—or that the DLOs have raised with the department—because somebody has made further representations or something has come to light about the changing circumstances of the case. Mr Nicholls is saying to me that health factors would be one thing that might make something urgent.

Senator WONG—I am just asking who defines whether a case is urgent. You are saying it can be either the department or the minister and/or his office.

Ms Godwin—Yes.

Senator WONG—In 'Priorities', which is part 6.1 of the administrative guidelines, you set out what I assume are your instructions to departmental officers on the work priorities they ought to have. At the top of the table is 'cases where the minister has sought early advice'. I presume that is where the minister, through his office, directly contacts the department in respect of particular cases, possibly before they have even been assessed against the ministerial guidelines?

Ms Godwin—A variety of things could lead to that. It could be the sort of situation we were talking about before, where something has been on the schedule and the minister has asked for a submission. That would then be regarded as becoming a priority.

Senator WONG—A repeat request?

Ms Godwin—No—

Senator WONG—Sorry.

Ms Godwin—If it were on a schedule and the minister had asked for more information about it, I am saying that would then become a priority because that would be an indication that the minister wanted further information. I am just saying that it could arise in a variety of ways.

Senator WONG—Do you keep, and you may need to take this on notice, records of cases which the minister has sought early advice as per 6.1.1—the first dot point? Would the answer to that be different to the answer to the question that I outlined previously in F4? I presume it may be.

Ms Godwin—It could be. But the short answer is that we would not necessarily keep a record of it in that way, because if the minister has asked for information about a particular case then our focus is on processing the case; we do not keep a tally of all of the things that he would ask for, such as 'Can I have a submission on this?' or 'Can I have a submission on that?'

Senator WONG—Perhaps you could take it on notice. I am interested in cases which have been processed in accordance with 6.1.1—that is, where the minister has sought early advice—and/or urgent cases as per 4.3.3. Perhaps you can let me know whether or not you can interrogate your data management system to give us any answers about that.

Ms Godwin—Certainly.

Senator WONG—Senator Ludwig has indicated to you that there has been a reasonable amount of evidence today that is critical of the system as being corruptible. This is certainly not an assertion that any particular person in it is but that a system which vests such discretion in a single person, with limited accountability, is corruptible. I understand that your assertion is the tabling statements are the accountability mechanism; I would have to say that the weight of the evidence is that they are an insufficient accountability mechanism. The weight of the evidence is that there is a concern that this sort of system is corruptible and perceived as being such. Do you agree with that?

Ms Godwin—I am nodding in the sense that I know that that is an assertion that has been made in the context of this inquiry.

Senator WONG—One of the witnesses this morning, Dr Crock, made the point quite forcefully, both in her written submission and orally, that this is a system which gives benefit on the basis of who you know and not on the merits of the case. Do you agree with that?

Ms Godwin—If that is Dr Crock's opinion, it is Dr Crock's opinion.

Senator WONG—We have gone through a bit of evidence with the department about the process of how the matter actually gets before the minister. I do not want to traverse all that, but clearly the first step to a successful section 417 application is to try and ensure that your case is put before the minister in a full submission, as opposed to being on the schedule. That is the first hurdle in many ways. Would you agree that that is the case?

Ms Godwin—The fact is that there is no application; it is simply a power that exists in the act which is available to the minister, and the way in which the circumstances might be drawn to the minister's attention are various, as we have talked about. The schedules and the submissions are a way of ensuring that, at least at first instance, all of the people who have raised this as a possibility are made known.

Senator WONG—Sure.

Ms Godwin—But it is not correct to say that there is some sort of hurdle involved—whether you are on a schedule or whether you are on a submission. It is simply a process of assessing whether, in light of the overall circumstances of the case, they look as though they are circumstances that are more likely to fall within the guidelines or more likely not to.

Senator WONG—The reality is that, if there is going to be active consideration of a section 417 application, what you would want before the minister is the full submission. If you are on the schedule, there is not a full submission in respect of that, although, clearly, you are hoping that the minister might ask for one. You are on the schedule because you are assessed as being outside of the guidelines. So, in that sense, you have not made the first step. That is the whole point of the guidelines, isn't it?

Ms Godwin—That the circumstances of your case do not fall within the guidelines—as a simple statement, yes, that is true.

Senator WONG—So the first important hurdle for most applicants is to try and get a full submission before the minister. We agree that an analysis is done by the department. If the department assesses you as being within the guidelines, your case is a full submission before the minister. If you are assessed as being outside the guidelines, you are on a schedule. Generally, if the minister were to consider you on the schedule, he would then have to request a further submission. Is that correct?

Ms Godwin—Yes, as a general proposition.

Senator WONG—So you are better off not being on the schedule—you are obviously better off being subject of a full submission. That is obvious in terms of the process.

Ms Godwin—I know you want me to agree with that as a proposition, but I do not necessarily agree with it because the underlying assumption appears to be that this is in effect a third tier of review—a formal process that people go through. It is simply intended as a safety net after all of the formal processes have concluded, and where a primary review and often court consideration have determined that the person is not entitled to the visa that they have sought.

Senator WONG—I am not disagreeing with that.

Ms Godwin—I know, but I guess I am having difficulty with the question, because, as I said, it seems to imply that there is a formal determination process which somehow mirrors what happens in a visa application.

Senator WONG—I have not said that.

Ms Godwin—I know you have not said that, but that seems to be an element underlying some of the comments, not necessarily just this one.

Senator WONG—I agree that this is a non-compellable, non-reviewable discretion. The guidelines are there as guidelines only. You have caveats all over the document indicating that fact. But the reality of the process is that, if you are assessed as being outside of the guidelines,

you are therefore on the schedule and you are not the subject of a full submission to the minister. That is the first step that section 417 applicants have to face. Is that correct?

Ms Godwin—As a statement of fact it is true that, if you are on a schedule, you are not the subject of a full submission. Yes, that is correct.

Senator WONG—And the decision to put you on the schedule or not is a decision made by departmental officers?

Ms Godwin—It is an assessment made in the department, yes.

Senator WONG—Given that there are some benefits and disadvantages which accrue as a result of that assessment, from the perspective of the applicants a fair bit of power accrues to departmental officers in making the assessment. Does the department have in place a code of conduct or rules in relation to the behaviour or conduct of departmental officers in terms of their relationship with outsiders when making these sorts of assessments?

Ms Godwin—The department has a code of conduct that deals with the conduct of all officers.

Senator WONG—Does that pertain to one's relationship with third parties, such as community representatives or other lobbyists advocating on behalf of particular applicants?

Ms Godwin—It deals with a whole variety of circumstances, but it does include people's behaviour as decision makers and issues of potential conflict of interest, yes.

Senator WONG—Do you see any limitations on the sort of contact departmental people ought to have with third parties?

Ms Godwin—Clearly people need to be very careful in their dealings with third parties, but this is a department that deals extensively with the public—with representatives of individual applicants, with community organisations, with representatives of those organisations, with people employed in organisations that are run by community groups and all sorts of people. We could not conduct our business effectively without that full range of contacts, which range from information to applicants, through to discussions with community organisations about policy matters and business matters to do with the administration of grants and so forth. It is inevitable that officers will have a lot of contact with people outside the department and, as I say, it seems to me that we could not conduct our business without that. Clearly that means that people need to be careful in their dealings to ensure that they avoid conflicts of interest or perceived conflicts of interest, and the code of conduct deals with those matters.

Senator WONG—I come back again to Dr Crock's evidence. She says that the nature of the system is one where it is perceived that what is important is who you know, not what you know. That may operate at a number of levels. Certainly, I would have thought it is a factor in terms of the department's dealings that, if the community perceives a certain person as having influence with someone in the department, they may consider that inappropriate—or appropriate if they are from that particular community group that might be seen as being advantaged by that.

Ms Godwin—Perceptions are always a complex thing, and I cannot speak for the perceptions that other people have. What I can say is that I think we have within the department a system of training, of supervision, of quality control processes and of alerting individual officers to their responsibilities as officers of the department which mean that they are not swayed in making decisions about cases by the sorts of perceptions that you are referring to.

Senator WONG—Is it appropriate, do you think, for members of the department to attend political fundraising events?

Ms Godwin—It would depend a lot on what the nature of the event was. Often officers are asked to attend community functions and there is a proper purpose in attending it. The community function may have more than one purpose in the minds of the organisers conducting the function. It may well be that the officers of the department are there for a proper purpose concerning departmental activities regardless of what other activities are taking place at the same function.

Senator WONG—In his interview with SBS on 28 August, Mr Kisrwani suggested that a Mr Greg Kelly, director of immigration at Parramatta—I do not know if that is correct; you can perhaps tell me who Mr Kelly is—picked him up and took him to a luncheon of 'Friends of Ruddock', which I think has been identified as a political fundraising group, amongst other things. Is that something that is appropriate, in your view?

Ms Godwin—I would need to find out the circumstances that were being referred to. I know who Mr Kelly is—

Senator WONG—Who is Mr Kelly?

Ms Godwin—Mr Kelly is a departmental officer who worked in Sydney, has worked in Central Office and is now on an overseas posting. I do not know the circumstances that pertain to the comments Mr Kisrwani made, so I am not in a position to comment at all.

Senator WONG—When Mr Kelly was working in Sydney, in what capacity was he working? Was he working in the MIU or in the Onshore Protection Branch?

Mr Nicholls—At the time, Mr Kelly was the manager of our Parramatta office. He had no involvement in the onshore protection part of the department, nor did he have any involvement in the MIU activities of the Onshore Protection Branch.

Senator WONG—Are you suggesting that there is no discussion between officers of the department in relation to any 417 application? I thought that when we were in Canberra you made it clear that staff at the MIU who were making the assessment of a 417 application as against the guidelines might discuss that matter with you or other departmental officers in the Onshore Protection Branch or perhaps in other areas of the department. Is that not the case?

Mr Nicholls—Mr Kelly was not part of that process. There is discussion amongst departmental officers about the intervention matters, but without knowing the full details of his entire history and his entire dealings I cannot conceive of a situation where Mr Kelly would have needed to involve himself in the kinds of assessments that we are talking about today. His focus

was very much on dealing with community multicultural and settlement issues. While, from time to time, a large range of people from the community may have sought to raise particular cases with Mr Kelly, or indeed with any other manager at the Parramatta office, the practice and process is such that Mr Kelly would not have been in a position to make any decisions relating to those cases that are before us.

Senator WONG—That may not have been something the community would have been aware of, though.

Mr Nicholls—The interventions process in New South Wales has overwhelmingly been a process that has been managed out of the city office of the department. I do not have the exact years, but for the time that he was in New South Wales Mr Kelly's focus was very much on operations at the Parramatta office—and I include in that the community relations functions of that office—and, prior to that, at the Bankstown office of the department, which closed some years ago.

Senator WONG—Would 'community relations' also include Mr Kisrwani organising a function for Mr Kelly upon his promotion to director within the Parramatta branch?

Mr Nicholls—Again, I cannot quite recall the instance that you are referring to.

Senator WONG—That fact was reported earlier this year. Has the department not investigated or considered that at all? On 31 January the *Sydney Morning Herald* asserted that Mr Kisrwani organised a function for Mr Kelly and that Mr Ruddock was present at that function.

Ms Godwin—We would have to take that on notice. I am not aware of it, and I am certainly not aware of any background to it.

Senator WONG—I find it interesting, Ms Godwin, and I appreciate that you have a lot to do, but these sorts of allegations—and they may be completely without basis—do paint a picture of a very close relationship between Mr Kisrwani and certain members of the department; and these allegations have been around for some time. The one I read to you just then was from January 2001, and the SBS *Insight* interview was four or five weeks ago. Has the department not taken any steps to investigate whether or not there is any truth in them? Or do you simply think it is not something you need to turn your mind to?

Ms Godwin—The January 2001 comments I am not at all aware of. They have not been raised with me before, and I am not aware that they have ever been raised with the department before or that any consideration has been given to them. I will have to take that on notice. We are aware of the *Insight* program that appeared a few weeks ago, as a general thing, but I am not aware of a specific allegation of the sort that you are referring to.

Senator WONG—Could I quote from the transcript.

Ms Godwin—Sure.

Senator WONG—Karim Kisrwani said, 'Greg Kelly was the director of Immigration at Parramatta, and he picked me up and we went to the luncheon.' The luncheon is identified earlier in the transcript as being a group called the 'Friends of Ruddock'. It is pretty clear—

Ms Godwin—As I said before, I have no information on that. I would have to take it on notice.

Senator WONG—If it is true, is that something you would have a concern about, or is it not something that concerns you?

Ms Godwin—I would want to know a lot more about the circumstances, about the function—I already made the point that the function may have had a proper purpose from a departmental point of view—

Senator SHERRY—Why haven't you checked?

Ms Godwin—Senator, I am telling you I have not checked—

Senator SHERRY—Why?

Ms Godwin—Because it has not been particularly brought to my attention in the way that it is now being brought to my attention.

Senator SHERRY—There are serious allegations about a departmental officer on national TV and you have not bothered to check? I would have thought you would have asked. Serious allegations—whether they are true or not we do not know—have been made and a departmental officer has been named in this way, and you have not bothered to initiate some sort of investigation. Why not?

Ms Godwin—All I have been saying to you is that I did not see the program and it has not been personally brought to my attention prior to this.

Senator SHERRY—Okay, you did not see the program. Has anyone discussed the contents of this program with you at all?

Ms Godwin—I am certainly aware of the program. I am aware of some of the issues that arose in the program. The particular point you are referring to is not one that I had previously been aware of.

Senator SHERRY—Okay. You are obviously aware of the program and some of the allegations, or all of the allegations. I am just very puzzled why you would not ask someone in the department to check whether these allegations are correct or not.

Ms Godwin—I am making the point, Senator: I have not asked because I was not aware of that specific allegation.

Senator SHERRY—You were aware of the general allegations; you have just submitted that.

Ms Godwin—I am aware that, as a general point, Senator Wong was saying that there is a question about whether the officers of the department have close working relationships with members of the community and with community groups. I have already agreed that, for a whole variety of purposes, we do work closely with community organisations, community groups and individuals within those communities.

Senator SHERRY—But you are aware of the SBS program, you are aware of the general allegations made. Is that not correct?

Ms Godwin—I said I was aware of some aspects of the program.

Senator SHERRY—What are you aware of?

Ms Godwin—I am aware that there was a program, I am aware that Mr Kisrwani appeared on it, I am aware that there were discussions within that program about matters to do with ministerial intervention. I have not read a transcript of the program, and I was not specifically aware of the mention of Mr Kelly in that program.

Senator SHERRY—So you have not initiated any check at all in relation to the allegations made on the program—none at all.

Ms Godwin—Not in respect of—

Senator SHERRY—About Mr Kelly, for example?

Ms Godwin—No.

Senator SHERRY—An officer of the department?

Ms Godwin—No, I have already said that I was not aware of it until you just raised it.

CHAIR—More broadly, do you have an internal investigations unit or an ethics investigative unit that would investigate these matters? I must say that there is a lot in the papers dealing with ministerial discretion that goes to that issue. I must be careful in the words I use, but there is sufficient out there, and I think Senator Sherry has hit the nail on the head in asking about some of those matters. Is there an internal investigations unit that would investigate these matters? If so, can you provide information on which ones they are investigating, how the process is enlivened, what they do and what the results of those investigations are, or whether they are pending?

Ms Godwin—I would need to have that question clarified, but yes there is an internal investigations unit in the department and it has responsibility for conducting investigations into the conduct of officers where allegations are made of instances of fraud, corruption and those sorts of things, Without wishing in any way to comment on the specific point that has been raised by Senator Sherry and Senator Wong, knowing that an officer of the department had accompanied a member of a community to a community function would not necessarily give rise to a view that an officer had acted inappropriately. As I say, that is not commenting on the specific point that has been raised but, as a general matter, there are many times when officers of

this department attend community functions and accompany members of the community to community functions for perfectly proper reasons.

CHAIR—Yes, but I think we are talking about specific instances where there is a question mark.

Ms Godwin—I have said that I am not commenting on the specific allegation because—

CHAIR—I understand that that can happen elsewhere.

Ms Godwin—I was not specifically aware of it until it came up today. The sorts of things that the internal investigations unit would investigate go to a whole variety of circumstances. I am not aware of an investigation currently being conducted by them in this area, but that is partly because I am also not aware of—

CHAIR—Perhaps you could take that on notice.

Ms Godwin—I will take it on notice.

Senator SHERRY—I am quite shocked that, as deputy secretary of the department you could not be bothered to get a copy of a transcript involving a figure of some major public interest and controversy about which some serious allegations have been made—that is, Mr Kisrwani—in which he raises the name of a departmental officer. I am shocked that you have not done that already. Frankly, I struggle to believe it. Accepting that what you have said to this point in time is true, could I ask you to read a copy of the transcript, determine whether or not the claims made are correct and report back to this committee?

Ms Godwin—I sort of assumed that the question Senator Ludwig raised went to the same point.

Senator SHERRY—Yes, it partly covered it.

Ms Godwin—I will certainly examine the transcript and report back to the committee on the issues you have raised.

Senator SANTORO—Ms Godwin, just to clarify some of what has been said, I have here a copy of the transcript which has been quoted and I want to ask you a question about Greg Kelly. The only reference I can see to Greg Kelly in this transcript—I have quickly looked at it, and I had it on file—is where Karim Kisrwani says:

> Greg Kelly was the director of immigration at Parramatta and he picked me up and we went to the luncheon.

Other senators may care to correct me, but, to the best of my knowledge, that is the only reference to Greg Kelly in the transcript. Ms Godwin, you may not want to answer this question, but I am asking rhetorically whether you think that mention represents an allegation. I have heard here today that allegations have been made about Greg Kelly. But, for your information, that is the only reference to him. My question is: do you think that reference represents an allegation or allegations?

Ms Godwin—As you read it out, I would have to say that I do not. However, given that the issue has now been raised, I will certainly inquire into the circumstances of that, if I can. As I have said, I will report back to the committee.

Senator SANTORO—A lot of country cabinet meetings are held around Australia. For a brief period of time I was a minister within a cabinet in state parliament. I recall going out into the country and functions would be hosted by community groups. Those community groups would also have a lot of political types of people in attendance, particularly in small country towns. At those country cabinet meetings—and this is still the case under the current state government in Queensland—departmental officials, departmental heads and others would accompanying the ministers and obviously attend meetings in order to assist the ministers at formal community consultation processes and subsequently in the more informal situations. Would you regard that situation involving a departmental officer, whether it was a director-general or a deputy secretary of a department, as unduly unethical or against the code of conduct that governs the operations of your department and your officers?

Ms Godwin—I guess I would want to make part of the same point I was making before—it would depend a lot on the nature of the function. But it would certainly not surprise me if, in the proper conduct of departmental business, there were consultations with ministers. As you know, the Minister for Immigration and Multicultural and Indigenous Affairs and the Minister for Citizenship and Multicultural Affairs regularly conduct consultations and meetings with community organisations. It would be very common. In fact, I would not be aware of any circumstance in the discharge of portfolio functions where a minister would not be accompanied by officials of the department. It is obviously true that sometimes those functions include a social element as well—an afternoon tea or a dinner or a lunch or something. So, as a general proposition, it would not surprise me. I would want to know the circumstances of the specific event, of course, but, as a general proposition, I think it would be perfectly within the ambit of normal departmental operations.

Senator SANTORO—Obviously, some of the questions this afternoon to you were pointing to contact between departmental people and members of the community. Are members of parliament regularly in contact with departmental staff in relation to some of the issues that we are discussing today?

Ms Godwin—I might invite Mr Nicholls or Ms Lindsay to comment, but I think we talked last time about the fact that often not necessarily members of parliament but members of their office staff would be quite regularly in contact with the department. As you are probably aware, parliamentarians' officers are often points of contact for people who have issues or concerns about immigration matters. Inevitably, that leads to a degree of communication between those officers and departmental officers.

Senator SANTORO—Whether it is with the member of parliament or with somebody that he or she has delegated to, there is contact between departmental officers and a political office.

Ms Godwin—Yes, and certainly from time to time that would include the member. I have personally had contact with members of parliament during my working life in the department over individual cases or policy issues.

Senator SANTORO—So you would not regard it as unusual if somebody in my position, say, rang you up to discuss a particular issue or matter relating—

Ms Godwin—I would not regard it as unusual. As I say, it would again depend on the nature of the subject matter.

Senator SANTORO—Similarly, contact between somebody like Greg Kelly and a member of the community like Karim Kisrwani again would depend on the circumstances and the context that it is in.

Ms Godwin—As a general proposition, no. As I have already said, our department deals a lot in communication with people outside the department—individuals, community groups, representatives and grant organisations—

Senator SANTORO—who are very socially inclined.

Ms Godwin—Many of the community functions include, as I say, a social element. Under our multicultural affairs responsibilities it would be quite common for departmental officers to be invited to attend things like national days and celebrations of various sorts. We have an extensive program of attendance at those sorts of functions.

Mr Nicholls—On the first part of your question, relating to members of parliament and their officers: there are in Sydney specific sections that deal with both formal and informal representations from electorate offices and assist generally to provide information and, in some instances, guidance as to possible options. That is quite an extensive program. Informally, as Ms Godwin said, the varied aspects of the work in this portfolio—in particular, the multicultural and the settlement aspects—would bring us into regular contact with a wide spectrum of people from various communities. Contact also occurs with non-government organisations and specific-issue interest groups—for example, refugee interest groups. Again, the contact at both the individual and the collective level with those kinds of organisations outside of the office is quite extensive.

Senator SANTORO—Would you please inform the committee about some of the contents of the code of conduct? You may not have it in front of you, but would you just paraphrase your understanding of it?

Ms Godwin—I might prefer to take some of this on notice. It is a document that sets out what are regarded broadly speaking as the responsibilities of officers across the department in a whole variety of areas. It is the subject of extensive training within the department. We have a regular program of training for both induction of new staff and training of staff within the department already. It goes to some of the things we have touched on here: conflicts of interest, dealing with members of the public. Obviously—and this is a point I think Senator Wong referred to—there are always the difficult issues of perceptions of the way in which departmental officers conduct themselves and of whether matters other than the facts of a case have been brought to bear. The code of conduct is obviously designed to ensure that people are focused on their responsibilities, on their statutory obligations as decision makers and on avoiding issues of conflict of interest.

Senator SANTORO—Although I prefaced my question with my view that no allegations have been made in relation to Greg Kelly, obviously as a senior departmental officer he would be very much aware of the code of conduct.

Ms Godwin—He would, yes.

Senator JOHNSTON—You mentioned the internal investigation unit. Do you know what is required in order to activate that unit on a matter within the department?

Ms Godwin—It is usually a specific allegation. Members of the public may call the department or write to the department and say something about an officer. Sometimes those allegations are vague. They might relate to an office, as opposed to an officer.

Senator JOHNSTON—Would you normally, in the course of your duties, be aware of a complaint?

Ms Godwin—I am certainly aware of the internal investigations function within the department but, obviously in terms of individual complaints, there are issues to do with the appropriate management of those investigations. They are not widely disseminated within the department. The unit itself has a process for recording, conducting and reporting on those investigations and I am certainly very familiar with that process. So, yes, I am aware of a complaint, but I would not necessarily know at the point that the initial allegation is received.

Senator JOHNSTON—So you require a complaint from an individual or an organisation, being a specific, credible allegation of some sort. I presume you require that that be backed up by some sort of objective corroboration or evidence given the nature of the work of the department?

Ms Godwin—Certainly. I will just make one proviso. From time to time there will be questions raised which are of themselves vague but there may be a number of questions about a particular office, post or whatever. In that context it may well be that we will, for example, conduct an audit, investigation or something like that because if a number of questions have been raised, even though each one individually may not have much substantiation, there is a question of whether you need to dig further. From time to time that happens.

Senator JOHNSTON—You and some of your officers that are here today did appear before the committee previously in Canberra. Just for the record and to correct my memory, were there any allegations or credible complaints about internal wrongdoing or matters arising from the *Insight* program ever put you at that previous hearing?

Ms Godwin—Certainly not at the previous hearing.

Senator JOHNSTON—Have any specific allegations been put to you since the hearing? Have you received any complaints since the hearing that would enact your concern such that you would proceed further with them?

Ms Godwin—As I have said, nothing has been drawn to my attention.

Senator JOHNSTON—You have received no information today that would cause you to activate any inquiry?

Ms Godwin—I have this proviso: I have undertaken, in response to the other questions, to look at the transcript and to see whether or not there is an issue that ought to be pursued. I have said I will look at it. I do not know whether that will result in a view that there is something that needs to be investigated.

Senator JOHNSTON—The point is that apparently there is so much concern about the issues contained within the program that no-one has bothered to complain. Is that correct? At this particular point in time, that is where we are at.

Ms Godwin—Certainly in the sense that it has not be brought to my attention; no.

Senator BARTLETT—As I understand it, DIMIA holds training sessions occasionally with parliamentary staff to give some instruction in issues to do with migration. At those sessions do you specifically outline this ministerial discretion power and how best to engage with that part of the act?

Mr Nicholls—I cannot specifically recall any recent occasion in Sydney when that issue may have been raised. Generally, the quite regular sessions with electorate staff focus on new legislative provisions or any new processes that we may have introduced. On occasion there are refresher sessions on older existing processes, but I specifically cannot recall any in Sydney recently that may have focused on the ministerial intervention power.

Senator BARTLETT—One of the things that have come up a couple of times—more so yesterday than today, but it came up a little bit this morning with Amnesty—is the issue of the adequacy of the representations people make when they are seeking ministerial intervention. It can actually be a problem if the first request for an intervention is made by somebody who does not really know what they are doing and just sends in a page without much detail, because that will count as a first request, which can have ramifications for the person. Given the number of representations you get from parliamentarians, from the data we have seen, would it make your life—or the minister's life—easier to have those requests done in a more thorough way before you have to consider them?

Mr Nicholls—The focus in our educative dealings with the electorate officers has been on visa application issues and on what could be called compliance issues. In a sense, this process is seen as somewhat different, in that we are not dealing with an application that has criteria set out in the act and that, therefore, requires some information and education about how you might satisfy those criteria. Essentially, what we are dealing with here is a power that is the minister's power. Other than explaining to people the processes that go towards getting cases before the minister, I am not quite sure that there is anything further that we can do in explaining the minister's exercise of this particular power.

Senator BARTLETT—My understanding, from evidence Amnesty gave this morning, is that the ministerial intervention unit here has agreed to have a meeting with them and some other NGOs in a month or two's time to talk about ministerial discretion—they suggested, anyway, that it would in part be to do with that. Is that right?

Ms Lindsay—The supervisor of the MIU has agreed to speak at the Asylum Seekers Interagency, which Amnesty facilitates, and she has agreed to speak about the 417 process.

Senator BARTLETT—Amnesty were suggesting that, from their point of view, this would be a helpful thing for them and for other NGOs, because they would have more of an idea of what sorts of things you are looking for, what is useful for you and what is going to be a waste of time. Surely that sort of thing would be helpful for parliamentary staff as well, given that you get more submissions from parliamentary staff than you do from Amnesty.

Ms Godwin—One of the things we are always careful about when we talk to people about the 417 process is that, when you say what would be helpful and what would be a waste of time, we need to be careful that we do not discourage people from putting whatever they believe they ought to put before the minister because, in the end, it is the minister who has to weigh up the information. It is not a question of whether we think the information is helpful or unhelpful, it is a question of what does the individual want to put before the minister about their case—bearing in mind that essentially what they are saying is: 'Look, I've had an application refused. I've been to review and I still haven't got up, but I think there's something about me or my situation that means that I would like you to look at me again under your powers.' It becomes very much a matter of what the person thinks is relevant to put before the minister and what the minister makes of that information. We try to avoid prescribing or describing in anyway what people think is likely to be more or less helpful.

We can clearly talk about the guidelines—those are all public—and we do; we can clearly talk about the process—that is public and we do talk about that process. But as I said, in the end, because it is a matter for the minister, it is important that we do not try to constrain what the individual wants to draw to the minister's attention. In the schedule process, because there has been some discussion of that, while that is clearly a summary, the summary specifically makes reference to the issues that the individual has indicated they would like to draw to the minister's attention.

Senator BARTLETT—When you go through all these different requests in the ministerial intervention unit, surely you would have some requests that are more effective than others in terms of the information they provide. I can understand you do not necessarily want to be completely prescriptive but given you have those guidelines and other things, I understand it does potentially have an impact for somebody whether or not it is an initial request, a 417 request, or a second or third one in terms of bridging visas and the like.

Ms Godwin—I will get Mr Nicholls or Ms Lindsay to comment in a moment but essentially, whether someone has put in an extensive submission or whether they have put in a one-page note, the thing that we are looking for in making an assessment is whether or not, when you put all of that together with what is already known about the case—and bear in mind we know about cases coming back from the RRT because they have already had a thorough examination of the refugee related claims—all of that brings them within the ambit of the guidelines. I will get Mr Nicholls and Ms Lindsay to comment, but from my personal experience of this process—which goes back over some years—a one-page letter may be as effective as a lengthy submission. In the 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 already have been known to the department.

The issue of repeat requests goes to the question of whether there is new information that has not previously been brought to attention. So the focus in relation to repeat requests is to look at the request, whether it is a short or a long piece of correspondence, and to then weigh it up against what is already known about the case and whether there is something new. There are certainly circumstances where there is new information, and if it is new information it goes back again to the minister.

Mr Nicholls—Again, I draw on my earlier comments in making the distinction between this process and a visa application process. You are quite correct in saying that in visa application processes the understanding and the strength of the way that the case is presented do have an impact on what the outcome may or may not be. If there are clear criteria about what will satisfy a decision maker, the nature of the evidence and how it can be put together does have an impact on the outcome. But this process does not have those elements; this process does not have criteria against which we can say to people, whether they be electorate secretaries or anybody else, 'This is how you might want to go about building the evidence to satisfy a decision maker.' In these processes the best that we can aim to do is really just talk about the guidelines, but we would not be in a position to go further than that as we regularly do at the electorate seminars that you mentioned earlier in relation to visa applications.

Senator BARTLETT—Can you indicate to me what mechanism you use to determine whether or not something is a 417 request or not? We had evidence from Amnesty this morning that they had examples of sending in letters about particular groups of people and generally expressing concern about their situation and that that had then transformed into individual 417 requests that they got individual letters about when that wasn't their specific intent. That is a group that obviously has some understanding of what 417 is. Is there some particular thing you look at that obviously does not just rely on the person writing under section 417? How do people that are putting things in know that that is what they are doing?

Mr Nicholls—That is correct: you do not need to use any magic words, magic formula or any particular reference. If a letter comes in and it is something that is worthy of consideration as to whether it may or may not meet the minister's guidelines then an assessment is made. So I quite accept that there would be situations where the person sending the letter may not have had a 417 request in mind. But it may indeed end up being assessed to see whether it does fall within ministerial guidelines. I would like to think that as far as possible our officers are being very careful about making that kind of assessment.

Senator BARTLETT—When you are providing a minute or an assessment to the minister about a ministerial intervention proposal, is there a pro-forma format that you use?

Mr Nicholls—I will defer to Ms Lindsay for some of the detail. For those cases that are assessed as falling outside the guidelines and which go up as a schedule there is a format that would be followed. The format needs to be tailored to the individual circumstances, but generally in a schedule there is some background information and a statement flowing from that information that the matter falls outside the guidelines. For those matters that are assessed as falling within the guidelines, a submission is prepared, and again there is a format that is followed. There is a background and a statement of the case that the person has put forward or that someone has put forward on their behalf and any countervailing issues that we may be aware of. Then, if the minister was minded to intervene, there is some canvassing of what visa

options might be available. Generally, that is the format that is used, but each case may require some deviation or amendment to that general approach.

Senator BARTLETT—Those submissions do not specifically make a recommendation?

Mr Nicholls—No, they do not.

Senator BARTLETT—They can mention things like who representation has been received from?

Mr Nicholls—Yes, there would be some recording in the submission of where representations have been made by a variety of people.

Senator BARTLETT—How would that be relevant in terms of the decision that the minister has got to make—which people had made representation?

Mr Nicholls—Quite often the case, if I can call it that, on behalf of the person who is the subject of the request is actually made out by the person who is making representation. Most often it is the letter that is sent in—whether it is a member of parliament or somebody else—that is the source of the applicant's case that they want to put forward. So it is relevant in identifying the source of who was putting forward the matters on behalf of the person seeking the intervention.

Senator BARTLETT—When the minister makes a decision to intervene or to exercise his discretion, does that have any form of establishing a precedent?

Mr Nicholls—No. Each case is quite separate and, if I am understanding your question, does that bind us in the department to putting forward things in a particular way—

Senator BARTLETT—If the minister decides to intervene for somebody in a particular set of circumstances, does that have any flow-on effects for other people that are in similar circumstances?

Mr Nicholls—Not from the departmental perspective. What may be in the minister's mind I obviously cannot comment, but, from the departmental perspective, we approach these cases as being strictly on a case-by-case basis.

Senator BARTLETT—So it would not be an issue then to draw to the minister's attention that if you grant a visa in a particular case it might be seen as establishing a precedent.

Mr Nicholls—I cannot recall a situation where we would have used words similar to the ones that you have just suggested. In addition, it would be contrary to the case-by-case approach that we tend to take.

Senator BARTLETT—Looking at precedent from the other way around in terms of legal precedent by court decisions: when a court particularly a High Court makes a judgment—and there was one referred to this morning and I cannot remember the name of the case earlier this year to do with women and domestic violence, for example—do you then look back through

other cases and other files with that sort of circumstance and have to reassess them in terms of ministerial intervention given that they cannot be reassessed by the tribunal?

Mr Walker—No, Senator. It is important to remember also that the decisions of individual decision makers are unique to the circumstances both at primary and also at merits review. Unlike the court, where the court is interpreting and giving guidance on the application of the law, that is certainly precedential and taken into account within our decision-making process to ensure that lawful decisions are made.

The case you were referring to is, I think, Khawar. It was about social groups in the protection visa decision-making context of what is a social group, and it provides guidance. That is certainly fed back to our decision makers. It would most certainly be also fed back to tribunal members. It would be a precedent in the context of protection visa decision-making. Anything the court may provide by way of guidance in its examination of the 417 and 351 processes would most certainly be taken into account in the way that we are involved within that process. However, there has not been anything that the courts have said specifically about those processes.

Senator BARTLETT—A case or a decision like that does not trigger a reassessment of either ministerial intervention requests or—

Mr Walker—As we mentioned at the first hearing, the circumstances that give rise to the minister intervening, the factors before the minister, are also important. While the department does provide information there may well be other factors or other information that the minister obtains that we may be unaware of. It deals with the specific circumstances of the particular case.

Senator BARTLETT—In terms of issues that should be put to the minister in relation to intervention submissions from the unit, is the issue of how long somebody would likely remain in detention if there was not a visa granted part of what is taken into account?

Mr Nicholls—We give priority to the processing of cases of persons who are in detention. Those cases would be taken out of the stream and dealt with as expeditiously as possible. Generally, there would be a reference in the submission to the fact that the person is in detention. It also goes to the minister in a different coloured folder so it is immediately recognised as a detention case.

Senator BARTLETT—Would part of the information to be provided be that if there is no visa granted the person would be required to remain in detention indefinitely? That would be something that you would inform the minister about?

Mr Nicholls—We canvass all possible visa options.

Senator BARTLETT—Including the no visa option?

Ms Godwin—In the end, it is a matter for the minister as to whether he intervenes or not. The submission attempts to say, ‘If you are minded to intervene, here are the sorts of things you might be able to do by way of a visa. If you are not minded to intervene, the person’s status

remains unchanged,' that is, if they are in detention at the 417 stage it is because they have already been determined not to be a refugee, et cetera, and are in effect available for removal. That person remains in detention available for removal. Whether that period of detention is further prolonged would depend on issues to do with their removal.

Senator BARTLETT—We have had court cases in recent times where it has been found that people are there indefinitely—they are not available for removal even if they have requested to go, in certain circumstances. If it is a circumstance like that, which can exist, where a person is not available for removal then they would remain in detention indefinitely.

Ms Godwin—If you are asking whether the submission would draw attention to potential removal issues then, yes, it would often do that if we thought there may be issues around that potential removal—the person did not have documentation or whatever. That may well be drawn to the minister's attention. So the answer is yes, as a general proposition, but it would depend very much on the circumstances of the case. I should make the point, and I am sure you are aware, that we are bound by the judgments of the court but also those judgments have been appealed.

Proceedings suspended from 3.35 p.m. to 3.48 p.m.

Senator SHERRY—Does the department use a media reporting service?

Ms Godwin—Yes, we receive media clips each day.

Senator SHERRY—Is that privately contracted? Does it come into the department or is it done internally within the department?

Ms Godwin—It is not done internally; it comes in to us.

Senator SHERRY—Do you receive copies of that? If you do not, who does?

Ms Godwin—I do, although not all of the clips. We have a process of sorting the clips. The key ones are drawn to attention. We check them each morning. It is a standard process. I need to draw a distinction between actual clips from newspapers and brief references to electronic things. There is a set of things that report on items in radio and television, but they are usually just two or three lines.

Senator SHERRY—I can understand that. That is why I asked about a media reporting service. I was not just referring to newspaper clips. Obviously, where there is a reference to issues relating to the department in some form or another, it is drawn to the department's attention but not in any detail beyond a line or two. You may then ask for further detail.

Ms Godwin—Indeed.

Senator SHERRY—I just wanted to clarify the position of politicians. It is my understanding that a member of parliament can make a representation.

Ms Godwin—Yes.

Senator SHERRY—Therefore, they are exempt; they do not have the same requirements as migration agents, for example. They can give advice—is that correct?

Mr Walker—Yes, that is correct. Members of parliament are permitted to give what it is called immigration assistance.

Senator BARTLETT—And their staff, I hope.

Mr Walker—Yes, I think it also covers the staff.

Senator SHERRY—I was not going to go down that road, although I am not on the list at all.

Ms Godwin—We will take that one on notice!

CHAIR—I might be vicariously liable.

Senator SHERRY—I am not on the list at all so my staff and I can sleep easy. Is it also correct that members of parliament are forbidden to receive payments for assistance they may render? It is all right; I have not checked the act but I have seen reference to this.

Mr Walker—I do not believe it is covered by the Migration Act but I understand you are correct. I could not tell you precisely where that division comes about.

Senator SHERRY—Could you take that on notice for me? I have seen reference to it in quite a few reports but have never been able to identify the exact terms of that prohibition. Let us assume that that is correct. Effectively, members of parliament take up requests on behalf of individual constituents, community groups or whatever. That is part of their function as a member of parliament, isn't it?

Mr Walker—Yes.

Senator SHERRY—And they or their staff are expected to do that within the remuneration of a politician's salary, as part of their responsibility of holding office, aren't they?

Mr Walker—That is my understanding.

Senator SHERRY—Yesterday we heard a number of comments from witnesses. I do not know whether you have had an opportunity to look at yesterday's transcript. There has been some media reporting; you might have had a look at the clips.

Ms Godwin—I was a bit busy getting organised for this hearing—

Senator SHERRY—Okay; I accept that.

Ms Godwin—but, if your point is whether we are aware of some of the evidence in some broad terms, the answer is yes.

Senator SHERRY—A number of witnesses referred to reports they had received concerning some migration agents and some non-migration agents giving misleading advice to applicants and, in some cases at least, asking for or receiving cash payments. Are any of you before the committee aware of those allegations—

Ms Godwin—Can I say a couple of general things?

Senator SHERRY—in terms of people contacting officers in the department?

Ms Godwin—I will make a couple of comments and then perhaps ask Mr Nicholls or Mr Walker to comment. The reason I say that is twofold. Clearly this issue of migration agents is a matter of importance. As you are aware, there is a process of registration. If people who are not registered are giving immigration assistance, that is an offence, put shortly. However, there is some question around the issue of what immigration assistance is. Particularly in this area, it seems clear at the moment, in any event, that assistance to individuals in respect of processes past the decision point—that is, in terms of ministerial intervention, for example—is not, at the moment, clearly part of immigration assistance. The other point I wanted to make is that if allegations are made which go to registered migration agents—

CHAIR—That is extraordinary. Are you saying that people can charge anything they like because it is not part of the migration assistance issue, and then, in terms of assisting someone on a 417 or a 351, post a decision.

Ms Godwin—I am not commenting on the payment issue.

CHAIR—Some of the evidence was exactly that. It seems extraordinary to me. If you know about this, why haven't you sought to fix it so that it encapsulates part of that?

Ms Godwin—I will ask Mr Walker to come to that point. I was not commenting on the payment per se. I was simply making the point that in the act there are certain things that are proscribed. At the moment, there is a question regarding advice post the point of a decision. The terminology in the act is 'finally determined'. A case is considered to be finally determined once there has been a decision of the Refugee Review Tribunal or the Migration Review Tribunal. However, there is work afoot on precisely this issue. I will ask Mr Walker to comment on that.

CHAIR—Have cases been brought to your attention? You may want to take that on notice. If cases have been brought to your attention of migration agents or non-migration agents who are doing this, and who have caused this gap in the legislative framework, could you provide some of that information to us?

Mr Walker—At the moment, there is a requirement for a person to be registered to provide immigration assistance where they provide that assistance for profit. It refers to a person who uses, or purports to use, knowledge of, or experience in, migration procedure to assist a visa applicant or cancellation review applicant by preparing or helping to prepare the visa application or cancellation of the review application. It is very much cast in terms of the visa application. The 417 intervention is not a visa application. It is certainly a deficiency and it is one that the government is moving to rectify—

CHAIR—The 417 has been around for a long time, though.

Mr Walker—The 417 has been around for a long time.

CHAIR—And 351.

Mr Walker—Yes; that's correct.

CHAIR—Why has it taken you so long, then?

Ms Godwin—This is a portfolio where there has been a pretty active program of legislation, as you would be aware.

CHAIR—Well, you have been active everywhere else.

Ms Godwin—We have been active in a variety of areas, including this one. This has been the subject of a review and, coming out of that review, recommendations were made about amendments to the act. That process has now reached the point, I think, of a bill in parliament.

CHAIR—Can you make the findings of the review available to the committee?

Mr Walker—Certainly.

CHAIR—When did the review start?

Mr Walker—The review was undertaken in the context of, I think, the 2001-02 review of the migration agents registration scheme.

CHAIR—So the anecdotal evidence of what we heard today was available back in 2001.

Mr Walker—I am not aware—

CHAIR—Can you have a look at that because something must have sparked your interest to close the gap. I assume it was the anecdotal evidence or hard evidence that this issue was occurring. Now it has taken you three years to close it, but in that intervening period people have been able to charge what they like. Correct me if I am wrong, but that seems to be what you are suggesting.

Mr Walker—I am not aware of whether people have or haven't. I am aware of the allegations, certainly.

CHAIR—We haven't finished Senator Sherry's question yet, but I think Senator Sherry went to that issue and I am sure he is keen on an answer at some point.

Ms Godwin—As I said, we will come back to the question Senator Sherry asked. I will make a couple of points. It is not three years; the Migration Agents Registration Scheme has been the subject of review a couple of times, most recently in 2001-02. We are in 2003 now. Arising out

of that review and those recommendations, this matter has found its way into proposed amendments to the legislation, subject to the views of parliament. The second point is that we will take on notice your question about what prompted it, but without examining and checking it I do not know that we can agree that it was prompted by the allegations you said were being made.

CHAIR—I am asking you to find out for me.

Ms Godwin—Sure, and we will.

CHAIR—I do not know what else could have prompted it.

Ms Godwin—It could simply be, as is often the case with the Migration Act now—I think it is second only to the tax act in its size and complexity—

Senator SHERRY—Superannuation law would come pretty close as well.

Ms Godwin—We might have to count the pages. In any event, in some instances what provokes these amendments is a desire to establish clarity in areas where there has not been clarity, not necessarily a specific complaint, problem or allegation. This is an area where there has been a lack of clarity. Seeking clarity is a common theme in amendments to legislation—particularly in the Migration Act, which is now very heavily prescribed and set out in legislation. Having said that, we will take on notice the question about whether there was something in particular which provoked the amendments. Nonetheless, there are amendments now being considered by parliament.

CHAIR—And the review and the MARA paper too, I suspect.

Senator SHERRY—Just to come back to the review that you have outlined, the proposed legislative change relates to the definition of who can give advice or the stages of advice. Let us put that issue aside. What about misleading advice? Is anything proposed?

Mr Walker—Within the framework of the act there are provisions regarding misleading advice and the complaint mechanisms for MARA in relation to registered agencies.

Senator SHERRY—I understand that, but in these latest proposals there is nothing about tightening up, for example, the definition of misleading advice that is currently contained within the act.

Mr Walker—I do not know whether there is a specific provision that says what misleading advice is. That is very much a matter of judgment, and it is very difficult to define it.

Senator SHERRY—We define it in the Financial Services Reform Act, for example. I do not have a copy of the definition here in front of me, but I think it is a pretty solid definition. So, there is no change in the area of misleading advice.

Mr Walker—There are proposed changes in terms of the actions of agents relating to frivolous or vexatious applications and the capacity for MARA to take action against agents who

have a record of frivolous or vexatious actions. Certainly those changes were proposed in the raft of changes that were introduced last week.

Senator SHERRY—In my initial question, Ms Godwin, I asked about departmental officers' knowledge of complaints of misleading advice. We received evidence yesterday from a number of people who reported that some issues with at least some of their clients are inappropriate charges and in, some cases, cash payments. Is there any information that the department has about that collection of issues?

Ms Godwin—I would want to take on notice the specific question of misleading advice, if I can put it that way. On the more general point, it is certainly true that departmental officers are able to, and do, make complaints to MARA when they become aware of agents that they believe are acting inappropriately—what specifically has given rise to an individual officer making a complaint of that sort. As I say, we would need to take that question on notice, because I do not know whether it is about misleading advice as such or what else might have provoked it.

Senator SHERRY—It could be misleading and/or inappropriate financial and/or cash payments—for obvious reasons, the cash payment has been made—a collection of issues, whether they are individual or a group. If you could take it on notice, I would appreciate it.

Ms Godwin—It could be a variety of things. The other point to make is that, if the person is not registered, we would alert the investigations area of the department, because MARA, as you know, investigates registered agents. Unregistered agents are a matter for the department.

Senator SHERRY—So the department is aware of that as a set of issues?

Ms Godwin—We are certainly aware that those allegations are made and, as I say, officers themselves may have those concerns as well from time to time.

Senator SHERRY—If it is an issue around a cash payment, do you report it to the tax office, or does the set of issues go only to MARA?

Ms Godwin—I would certainly need to take that on notice. As I say, I am not aware that it would necessarily be about a cash payment. If such a concern were raised, I would need to check what precisely was done with it.

Senator SHERRY—Okay. If it involved a cash payment, it would seem to me, prima facie, that there could be an issue of taxation related to it. If you could take it notice, that would be fine.

Senator SANTORO—This morning during evidence a case was mentioned of a Colombian refugee who was refused a visa. It was put to the committee that he met an untimely death after he arrived back in Colombia. Are you able to inform the committee as to how the particular person met his untimely death?

Ms Godwin—We are certainly aware of the case and we have made some inquiries in relation to it, but I will ask Mr Illingworth to comment.

Mr Illingworth—We are aware of the case, and there has been some extensive effort to look into this over an extensive period of time since these claims first came forward. The person was not a refugee. The person was an applicant for a protection visa who was found not to be owed protection obligations and was refused a protection visa. They sought a review of that before the Refugee Review Tribunal, which affirmed the original decision. It also found the person was not owed protection. The person subsequently left, of their own volition, at a time, to a destination and by means of their own choosing. There was no compliance contact with this individual, and he did not make a request for a section 417 intervention, although it was assessed under our normal procedures against the guidelines and was not referred.

Some 3½ months after his return to Colombia, he died—and we have satisfied ourselves that that occurred—reportedly in a gun fight. There have been a number of assertions that have been raised in relation to this case which relate, firstly, to claims that he had attempted to seek protection from a country en route to Colombia, had that denied, was held there for some time and was then returned by that country to Colombia. Other claims have been made around this case that assert that the fate of this person casts some question on the reliability of the decision that the Australian authorities made.

Our inquiries have brought to light quite a bit of information about this case, none of which supports the assertions about mistreatment in the country en route. All of the evidence we have identified substantiates his travel as planned and arrival as planned in Bogota. On the second issue, about the motivation of the people who might have killed him, there is no information which substantiates a connection with a convention ground. There have been assertions made, but the evidence that we have obtained does not support that. For example, the Colombian authorities have identified by name an individual who is the suspect in this case and are pursuing him.

Senator SANTORO—Thank you for that answer. Ms Godwin, in the attachment to your correspondence to us today is a note referring to a table, which says:

Case count and status reconciled manually with list provided by Ms Gillard MP.

What does that refer to? What does that mean?

Ms Godwin—In relation to Mr Kisrwani—and nobody else, I point out—a list of case names was provided to the minister. We do not know the source of that list. We have not been able to generate such a list ourselves. We do not know how it was compiled or with reference to which documents or data.

Nonetheless, a list was provided to the minister and, because of that, we checked the requests and the cases that are, in a sense, marked against Mr Kisrwani not only through our own systems but against that list. In other words, we have been able to do a check in relation to those cases additional to what we have been able to do in relation to anybody else, because we wanted to make sure we had reconciled all the cases. In a couple of instances, it has identified cases additional to those which came through the PCMS process that I described, probably at excruciating length, earlier today. There has been a reconciliation process against him which we have not been able to do with others. As I said, it has meant that a small number of additional cases have been included.

If we were able to so the same thing for everybody else on the list, it may well be that we would similarly find additional cases that they have been interested in or made representations on. It goes back, I guess, to my point about PCMS having been constructed for a different purpose. It is accurate insofar as it is a reflection of what we can find by the methods that we have used in PCMS. To give you an example, one of the cases that is included is in fact in PCMS but the correspondence was signed by two people and, as I mentioned before, you put one name in the system. The name that went in the system was the other name, but, when you check back from the case name to PCMS, you find it. So that is why it has been included. In a sense, as I say, it means that we have applied a process to those cases additional to that which we have been able to apply to anybody else on the list.

Senator JOHNSTON—Chair, can I ask a question pertinent to this? Ms Gillard has a list of Mr Kisrwani's cases that has been presented to your department?

Ms Godwin—The list, as I understand it, was not tabled; it was handed to the minister. That is why I am being a bit circumspect about names and so forth. The names were not tabled; the list was handed to the minister, as I understand it. Therefore, that list exists. The list listed a whole lot of names, and it was indicated that it was believed they were cases that Mr Kisrwani had been involved in. We could not necessarily link all of the names on that list to Mr Kisrwani.

Senator JOHNSTON—How many names were on the list?

Senator WONG—Eighteen.

Ms Godwin—I think the initial list had 18.

CHAIR—Can we obtain the list? Would it be of assistance if we could obtain the list? If we need to take the hearing in camera, if it is being tabled, and there are some relevant issues, you might want to make that case.

Ms Godwin—That is my point.

CHAIR—That is where I thought we were going, Senator Johnston.

Ms Godwin—It has not been tabled in parliament and it has not been tabled in this committee. I am not sure if it was handed by Ms Gillard. It was handed to the minister. It was a list that had been compiled, as I understand it, by Ms Gillard. I would take the issue on notice. Given that the list arose in parliamentary discussion, I am not sure of the reason it was not actually tabled in parliament. I guess I am trying to allude to that.

CHAIR—Can you have a look at the list and, if it can be tabled here and if it is in your possession, then table it? If there are issues of privacy or section 417 concerns that might surround the names on the list then you might make a case for it to be handed to us in private.

Senator SANTORO—There must be a good reason why Ms Gillard would not have tabled it.

CHAIR—Sorry. We were actually with Senator Johnston, and I intervened to try to short-circuit the process a little bit.

Senator JOHNSTON—I will be very brief. There were 18 names?

Ms Godwin—There were 18 names, as I understand it, on an initial list and then I think a further group of about six names came forward.

Senator JOHNSTON—So there were 24 names?

Ms Godwin—In total, I think there were 24. I would need to confirm that.

Senator JOHNSTON—The names are alleged to be Kisrwani matters, if we can call them that.

Ms Godwin—I think it was put to the minister that they were cases in which he had been involved, yes.

Senator JOHNSTON—Of the 24, how many were incorrect?

Ms Godwin—Again, I would need to take that on notice for absolute accuracy, but I think we were able to identify 17 or 18 of the names. That was the list that we then crossmatched, if you like, with this list.

Senator JOHNSTON—Were you surprised about the existence of the list?

Ms Godwin—I guess surprised is not the word. It is just that it is a list and we do not know what the basis of the list is, if you know what I mean. We cannot generate such a list.

Senator JOHNSTON—Is it 60 or 70 per cent correct?

Ms Godwin—Yes, it is about that.

Senator JOHNSTON—It is a parliamentarian with a list of referrals—

CHAIR—To be correct, Ms Godwin has not identified whether it was a parliamentarian with the list. Someone handed it to the minister.

Ms Godwin—It was handed to the minister in parliament. What I am saying is that I do not know how the list was compiled.

Senator JOHNSTON—So somebody has possession of a list—and our most recent point of contact is the member, Ms Gillard—of the individual references to the minister seeking exercise of his discretion, under the heading of Kisrwani cases. I asked you whether you were surprised. You said you were not surprised about that. Is it normal that what matters are going before the minister would be out in the public domain?

Ms Godwin—No, it is not. If I could just clarify: I did not say I was not surprised; I just said I was not sure that I could say I was surprised. I can tell you that it is not a list of which we know the source. We do not know how it was compiled, what access to data—

Senator JOHNSTON—But it is pretty accurate.

Ms Godwin—It purported to be a list of cases where Mr Kisrwani was involved, and certainly with a number of names on the list Mr Kisrwani was involved. But, equally, some of those—

Senator JOHNSTON—Seventeen out of 24.

Ms Godwin—Yes, 17 or 18. As I say, I would need to take the specific question on notice. The vast majority of them also came up through the PCMS process. But the reason we footnoted it is that we have applied to Mr Kisrwani, and Mr Kisrwani alone, a process that is not a process we have been able to apply to anybody else on the list, and we wanted to footnote it for accuracy and completeness. But, as I say, we do not know how the list arose.

Senator JOHNSTON—Are you interested to know? Does it concern you?

Ms Godwin—It is of concern to the extent that certainly—I am trying to pick my words carefully here—there is a variety of ways that lists can be compiled. Those lists could be compiled in ways that are perfectly proper. If, however, they were compiled as a result of access to databases that ought not to have been accessed in that way then that would give me concern. But, as I say, I do not know that. I am just saying it is one of the possibilities, and if it were that end of the spectrum, rather than the other end of the spectrum, that would concern me.

Senator JOHNSTON—Save for the person being put in possession of the cases by the advocate, if we can call him that, in what circumstances would a person be in possession of 17 names that have in common that they were put in by the one person? How would anybody, other than the advocate, know of those names?

CHAIR—I am not trying to stop your question; I am not sure whether Ms Godwin can answer it, if she is not the person. I am happy for Ms Godwin to attempt to answer it.

Senator JOHNSTON—Are they published in any shape or form? Am I missing something here?

Ms Godwin—No, they are not published in that way. We have already talked about the tabling statements, which specifically do not publish the names. Clearly, the individuals themselves get correspondence that says, 'The minister's intervened,' and people who are their representatives are also advised. My difficulty is that, beyond that, it becomes speculative. I can speculate that representatives might have shared information amongst themselves and said, 'Look at this.' I honestly do not know how the list was compiled, and any comment about how it was compiled would be speculative. I am just saying there is a variety of speculations and some of them are more problematic than others.

Senator JOHNSTON—Were any of the 17 successful?

Ms Godwin—I do not have that precise information, although, given that in a number of cases raised by Mr Kisrwani the minister has intervened, it is possible. I would have to check the list.

Senator JOHNSTON—So we could possibly rule out that they were a group of disgruntled applicants?

Ms Godwin—Without further examination of names on the list, I honestly cannot comment. I am not trying to be difficult.

Senator WONG—On that issue, I understand there was a question in the House on 5 June and there was a subsequent question which added to the 18 names. You may recall, and I do want to come back to this, that I asked some questions last time on the letter that the minister wrote back to Ms Gillard outlining what had occurred in relation to the 18 names. It would be useful when you consider your list for you to indicate what happened in accordance with the 16 June letter. The 16 June letter sets out X number of cases where there was an intervention, X number of cases that the minister's office requested a submission after a contact from Mr Kisrwani, in four cases no indication of involvement with Mr Kisrwani, and so forth. That might be useful for us.

Ms Godwin—Can I clarify that? I have to say I am not completely clear on what you are asking. Are you asking us to look at the correspondence again?

Senator WONG—You have already done this analysis, because the minister wrote back to Ms Gillard on 16 June. So you have already done the analysis in relation to the list. I understand the chair has asked you to take on notice the provision of the list and I am asking, when you are considering that, if you could also consider the provision of the information in relation to those files, as referred to in the minister's letter dated 16 June. The 16 June letter goes through the list and says: of these, there are X number in which I intervened, there are X number in which my office asked for a submission after contact from Mr Kisrwani, there are four which show no indication of involvement et cetera.

Ms Godwin—Yes, I understood that was the point you were making before. I do not have that correspondence before me.

Senator WONG—Presumably your department provided the information for the letter, though. How else would the minister have got it? It refers to 'preliminary analysis of the department's electronic records', so presumably—

Ms Godwin—I am not sure whether that was done by the department or in the minister's office. Nonetheless, quite clearly we will be able to check it, and we will attempt to assist.

Senator WONG—Thank you. I feel we should be asking some questions of Ms Lindsay and I have quite a number of questions about New South Wales. The first issue is to understand the structure of the New South Wales DIMIA offices. Ms Lindsay, you are with the Onshore Protection Branch and that is located in the CBD?

Ms Lindsay—That is right.

Senator WONG—And the MIU is also located in your offices?

Ms Lindsay—The MIU is part of the Onshore Protection Branch.

Senator WONG—So the officers of the MIU report to you?

Ms Lindsay—Yes.

Senator WONG—And the Parramatta office is a DIMIA office but contains no onshore protection officers?

Ms Lindsay—That is correct.

Senator WONG—Would it be part of the process of decision making for there to be contact between the MIU or the onshore protection unit and the Parramatta office when considering 417 or 351 applications?

Ms Lindsay—There may be. For example, if there are issues to do with residence bona fides or compliance bona fides we may ask them to check up on that. If, for example, in a submission an applicant claims to have married an Australian citizen, we may ask Compliance to do a home visit to check that that is actually the case, that they are actually living together and so forth. We may ask our compliance team in Parramatta to follow that up. If they lived in the city or in the area covered by the compliance team in the CBD office, we would approach them to follow it up.

Senator WONG—What about community representations? If a community leader or representative makes a representation to a departmental person at Parramatta, would the normal process be that they would simply forward that to you and the MIU?

Ms Lindsay—I would expect so. That would generally be the case.

Senator WONG—And would that be done on occasion by telephone—that is, orally—as opposed to in writing?

Ms Lindsay—I am not aware that they would pass something on orally. I think generally we prefer to have things in writing, so generally we would ask to have it in writing. Obviously it does not always occur that way, but that is generally what we would ask.

Senator WONG—There is assessment against the guidelines and reference to a case officer—I think that is the term used in your guidelines. Is that to an MIU person, to a non-MIU onshore protection person or to both?

Ms Lindsay—Are you talking about when a case comes back from the RRT? Is that what you mean?

Senator WONG—Yes. In a 417 application where there has been an end to the tribunal route, what then occurs, as I understand it, is that an assessment is made by a departmental officer against the guidelines—

Ms Lindsay—Yes, that is right.

Senator WONG—the administrative and the ministerial guidelines—

Ms Lindsay—That is right.

Senator WONG—and the assessment then results in that case being put either on the schedule or in the full submission?

Ms Lindsay—You are missing a step there, with respect, Senator. Essentially what happens when a file comes back from the RRT is that the case goes back to one of the case officer teams—the team that made the initial PV decision, because we allocate cases by country. As you would understand, officers develop particular country expertise, and so it would go back to one of those officers.

Senator WONG—In the onshore protection team?

Ms Lindsay—Yes, in the onshore protection team.

Senator WONG—Not MIU?

Ms Lindsay—In the first instance.

Senator WONG—So in the first instance it does not go to the MIU?

Ms Lindsay—Yes. So the case officer would do an assessment against the public interest guidelines, against the ministerial guidelines. It may or may not have been flagged by an RRT member as possibly having humanitarian grounds for a 417 intervention. The case officer would look at that and make an assessment about whether—given all the information on file, the PV decision record and the RRT decision—the case falls within the ambit of the guidelines or not. If according to their assessment it did, it would be referred to the MIU. They may discuss it with the MIU assessment team and/or the MIU supervisor to ensure that they have got it right.

Senator WONG—So it is a case officer?

Ms Lindsay—Yes, it is a case officer.

Senator WONG—And that case officer would be located in Sydney, not Parramatta or anywhere else?

Ms Lindsay—Yes.

Senator WONG—So that case officer makes the first assessment in terms of the guidelines, usually on the basis of their country expertise.

Ms Lindsay—That is right.

Senator WONG—And then it goes to the MIU where it is quality checked. Is that how it works?

Ms Lindsay—Yes, we have an assessments team. Any 417 request would come into the assessment team anyway, whether it is from somebody else or from the applicant themselves. So that is another avenue by which the 417 request would come into the MIU assessment team. They, as a team, with the team leader, would again assess whether it comes within the ambit of the guidelines.

Senator WONG—Sorry, I was distracted momentarily—what was the other way in which it can be presented to—

Ms Lindsay—A 417 request comes in through the minister's office, goes to PARMS and then comes into the New South Wales office.

Senator WONG—What is PARMS?

Ms Lindsay—The Parliamentary and Ministerial Services Section in Canberra. It is the area that logs the correspondence into the PCMS that we talked about before.

Senator WONG—I would like to go to the correspondence of 19 September. I am looking at question C3 on page 29. The requests received by each MIU are broken down there. I presume that the ACT requests would be disproportionately high because you have centralised the 351 requests—is that right, Ms Godwin?

Ms Godwin—Yes.

Senator WONG—Ms Lindsay, your branch—I suppose it is Mr Nicholls's branch—deals with three times the number of requests dealt with by Victoria, and even more than that in relation to WA. That is correct, isn't it?

Ms Lindsay—I can tell you what New South Wales dealt with in 2002-03.

Senator WONG—The figure here is 3,333. Is that right?

Ms Lindsay—Yes.

Senator WONG—There were 278 requests per month for the financial year just gone as compared with Victoria's 86. That does seem to be a very large difference. I accept that Sydney has more migrants and therefore more refugees.

Ms Lindsay—I think if you look at the pool, you would see that Sydney has 80 per cent of the pool of PV applicants, so we do approximately 80 per cent of the processing of the primary applications. Therefore our pool is much larger to start with anyway. So you would expect that we would do 80 per cent, roughly, of the intervention requests about 12 to 18 months later because of the time they spend at the review tribunal.

Senator WONG—I would like to clarify some earlier evidence because I am conscious that we should be closing soon.

CHAIR—If there are a number of questions, we can always put them on notice. If there are a couple of issues that you want to explore, we still have some time.

Senator WONG—We are seeing the department again, aren't we?

Ms Godwin—It is up to you to say, Senator.

Senator WONG—I am sure you wait with bated breath, Ms Godwin!

CHAIR—I am sure, Ms Godwin, you could add a range of inflections to that.

Senator WONG—She had her head in her hands when she was saying that! Can we just go back to clarify something that you gave evidence about earlier, Ms Godwin. I may have misunderstood your answer to Senators Sherry and Ludwig, but are you saying that there is no prohibition in the act as it currently stands against migration non-agents charging for advice or assistance in relation to an immigration matter?

Mr Walker—Basically the MARA scheme, the sanctions and criminal offences that are in the act relate to the provision of immigration assistance. Immigration assistance at the moment does not include anything related to requests for the minister's intervention under 417 or 351. That is something that is in fact specifically picked up to be included as immigration assistance in the bill that Minister Hardgrave introduced last week.

Senator WONG—Yes, I understood that. So there is nothing to stop community leaders charging for making representations to the minister at the moment.

Mr Walker—There is nothing specifically there, Senator. There are a couple of offences that I found subsequently—I knew they were hiding in the act somewhere—in sections 334 and 335, which relate to offences in relation to false or misleading statements regarding the making of decisions. I will not read them out, but their effect is basically that, if someone makes a representation, they can get—

Senator WONG—You would have to establish a misrepresentation there, presumably, in terms of that offence.

Mr Walker—Yes. But if they make a representation that they will get a particular outcome for an individual, it is an offence under one or other of the provisions.

CHAIR—But if they say, 'I'll do my best'—

Mr Walker—No, that is not an offence. But if they say, for example, 'I guarantee that I will get you a visa,' then that is an offence.

Senator WONG—Exactly. That makes the point that, with the law relating to misrepresentation, you would have to be pretty unequivocal in the statements you had made. If people say, 'I've got a special relationship with the minister or with someone in the department, and I will write a letter for you and give them a call if you give me 10 grand,' there is nothing in the act currently that would prevent them from doing that.

Mr Walker—Not if they have not specified that they will get a particular outcome.

Senator WONG—That is right.

CHAIR—Do you have any prosecutions or investigations in respect of misrepresentation under the section you referred to?

Mr Walker—I am afraid it is not my area.

CHAIR—Perhaps you could take that on notice anyway.

Senator SANTORO—My question is extremely brief and it includes an on-notice component. We have heard a lot during this inquiry about the success rates of various people, including Karim Kisrwani. I am indebted to you, as I am sure all the members of the committee are, for providing us some very useful tables which were up to date as of when we received these letters. I hope that, obviously, the figures are accurate, and I have worked out that Mr Kisrwani is sitting on a success rate of just under 31 per cent. This compares with the Sisters of Charity Advocacy Network with 100 per cent. They have obviously got something—although it is just one case—

Ms Godwin—It is quite a small basis.

Senator SANTORO—It still suggests possibly divine intervention there. Mr Kisrwani compares to one of the members of this committee—and I am sorry he has gone, but I compliment him on his 32.57 per cent—Senator Andrew Bartlett. My very good friend, Con Sciacca, has 29 per cent. Laurie Ferguson has 23 per cent. We have been hearing all sorts of figures bandied around. I wonder whether—and this is the on-notice component of the question—you would be able to put together a table for the committee that gives us success rates as a percentage.

Senator WONG—For all parliamentarians?

Senator SANTORO—The top 10 individuals and the top 10 parliamentarians. I think a misconception has been created in people's minds because of the figures that have been bandied around so frequently. If the department could give us an up-to-date figure, that would be great.

CHAIR—Perhaps you could also combine it and we could then rephrase it as showing not a successful intervention but an intervention. I think that is the terminology you use.

Ms Godwin—That is right: there is either an intervention or there is not. What do you mean by combine it?

CHAIR—Senator Santoro was asking for information in respect of parliamentarians and non-parliamentarians. I am also asking for a total list.

Ms Godwin—Okay. This is where I need to launch into an explanation again. We have not done that degree of analysis below the top 10 of each of the two lists. We could do what Senator Santoro is asking in respect of the two top 10s.

Senator SANTORO—That is the reason I am limiting it to them.

Ms Godwin—As you know, we have had a couple of false starts on this, and this is the only analysis we have done to this level of detail. In taking Senator Santoro's question, I would be able to agree to list the top 10, but I could not list everybody. If you look at the total number of interventions compared to the total available pool, which is something we also discussed at length last time, that gives you an overall outcome for everybody—parliamentarians and non-parliamentarians—of about five per cent. If you like, that is the total benchmark. So we have that.

CHAIR—Perhaps we could have that as well.

Ms Godwin—Could I just make one other point? The question of so-called success rates depends a bit on what you are comparing. I would have to say that in our view the most accurate point of comparison is simply a snapshot in time of the intervened cases compared to the total number of cases.

Senator SANTORO—Do you mean as opposed to the number of requests?

Ms Godwin—Certainly as opposed to the number of requests and also as opposed to not intervened or other. A case that is in the not intervened group, as we have seen, could potentially ultimately become an intervened case at some later point. Similarly, cases in the other group might include cases that are still in process, so to speak. So it is a shifting picture unless you stick to a point in time and compare intervened cases to cases. We could do that.

CHAIR—We will take that. Thank you.

Ms Godwin—Okay. Good.

Senator WONG—To clarify that temporal issue, perhaps we could identify when you could give us the dates on the successful interventions. Can I just say, Senator Santoro, if we are going to have the top 10, given that eight out of the top 10 requests are from us, perhaps we could add in a couple of extra coalition members.

Senator SANTORO—I think you know the point that I am trying to make, without having to spell it out. A lot of political points have been made about individuals on this list—or at least one individual. What I am trying to draw from the department—and I would like to have the authority of the department's calculation, which would obviously be graced with integrity—is that the minister is exercising his discretion in a very dispassionate manner. It does not matter who they are: Liberal, Labor, Democrats, Kisrwani or Callithumpians. That is not your business, Ms Godwin, but I have just spelled out the point that I am trying to make. I think that the table showing a snapshot in time is a reasonable starting point.

Ms Godwin—We can certainly do that for the two tables that are currently analysed to this level.

Senator WONG—To ensure that we have a reasonable balance, I suggest that we add a couple of other MPs. I am happy to suggest a couple of them, or perhaps Senator Santoro might like to suggest more. Perhaps we can add the member for Parramatta and the member for Sturt.

Senator SANTORO—I would have no objections to other members being added if the department could handle it. But the point that I make is that—

CHAIR—We might leave it at that number before we start a bidding war.

Ms Godwin—For the two that have now been mentioned, the first thing we have to do is the analysis, which is not an inconsiderable task.

CHAIR—I know it creates additional work for you. Thank you very much for taking that on notice.

Senator SANTORO—We all agree. We have all been talking about the same basket of apples: the top 10. As you say, Chair, we do not want to get ourselves into a—

CHAIR—Bidding war on this, no. The only other issue is that in the list of intervened countries Lebanon is top in respect of the non-parliamentarians. The Philippines, I think, is top in respect of parliamentarians. Is there an explanation for that?

Ms Godwin—Let us be clear, Senator, it is the nationality of the cases involved in requests.

CHAIR—I see.

Ms Godwin—It does not correlate necessarily with the intervened cases, which we provided in our submission. But I do not think it is disaggregated, and I think one of the questions on notice was whether we could disaggregate it.

CHAIR—Yes.

Ms Godwin—I need to clarify that we have tried, so that there would be complete consistency, to ensure that the 243 cases on the nationality list correspond with the total number of cases in table 2; that is, it is the number of cases which are the subject of requests, not successful interventions.

CHAIR—That is helpful. Perhaps you could also take on notice the explanation of how we get there and why we have that many from Lebanon, and perhaps you could disaggregate it. If it shows up another country, please provide the explanation for that as well.

Ms Godwin—Do you mean in terms of outcomes?

CHAIR—Interventions, yes.

Ms Godwin—Okay. We will take that one on notice if we can.

CHAIR—Thank you. Having got to the end of a long day and a long afternoon for the department, I thank Ms Godwin and Mr Walker, as well as Mr Nicholls—and we have not talked to you much today, unfortunately. Thank you Ms Louise Lindsay and Mr Illingworth for your first appearances today. I hope it has been helpful to your understanding of how these things work. On behalf of the committee I thank all the witnesses who have given evidence today. I also thank Hansard, Broadcasting, the secretariat and my colleagues.

Committee adjourned at 4.47 p.m.