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SENATE

SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

Reference: Ministerial discretion in migration matters

TUESDAY, 21 OCTOBER 2003

SYDNEY

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SENATE

SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

Tuesday, 21 October 2003

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

Senators in attendance: Senators Bartlett, Johnston, Ludwig, 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 1.03 p.m.

MITCHELL, Mr Grant Edward, Project Coordinator, Asylum Seeker Project, Hotham Mission, UnitingJustice Australia

POULOS, Reverend Elenie, National Director, UnitingJustice Australia

CHAIR—Welcome. This is the fourth hearing of the Senate Select Committee on Ministerial Discretion in Migration Matters. The Senate established this select committee on 19 June 2003 to inquire into and report on the use, operation and appropriateness of the ministerial discretion powers described under sections 351 and 417 of the Migration Act 1958. The committee has received 36 submissions for this inquiry, 34 of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes that they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat.

Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolution, witnesses have the right to request to be heard in private. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. I also ask witnesses to remain behind for a few moments at the conclusion of their evidence in case the Hansard staff need to clarify any terms they refer to or references that they make.

CHAIR—I understand you have lodged submission No. 19 with the committee.

Rev. Poulos—Yes, that is right.

CHAIR—Do you have any amendments or alterations to the submission that you have lodged here today?

Rev. Poulos—Grant has tabled three additional documents, one of which we would like to be received in camera.

CHAIR—Perhaps we can identify that. There are three documents. One is *Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E, research and evaluation, April 2003*.

Mr Mitchell—That is public, yes.

CHAIR—That is a public document and you are tendering that today to be included as, say, 19A, as a supplementary submission.

Mr Mitchell—Yes.

CHAIR—There is a letter dated 28 May 2002 from the Hon. Philip Ruddock MP. That is the second document you wish to tender?

Mr Mitchell—That is right. That is public.

CHAIR—That is a public document. I will call that 19B. There is a third document headed 'Asylum Seeker Project, Hotham Mission'. I do not think it has a signature. The title of it is *Ineligible asylum seekers at the 417 stage.*

Mr Mitchell—Could that be in camera because it has a number of case studies?

CHAIR—And the reason for the case studies—

Mr Mitchell—They may be identifiable.

CHAIR—So what you are asking for is that that document be receipted in camera as it may identify individuals through the case studies that are identified within the document. Is that right?

Mr Mitchell—That is right.

CHAIR—That would be a reasonable request. We can accede to that. We will make that an in camera document. We will call that 19C. I now invite you to make a short opening statement, at the conclusion of which committee members may have questions that they wish to ask of you. Reverend Poulos, are you going to start?

Rev. Poulos—Yes, thank you.

CHAIR—Thank you very much.

Rev. Poulos—We would like to thank you very much for the opportunity to present evidence today. Our submission relates only to section 417 of the Migration Act. Hotham Mission is one of the key Uniting Church agencies delivering services to asylum seekers in the community. Grant is in a unique position to offer this committee concerns raised by asylum seekers about the minister's 417 powers and associated legal and welfare issues. UnitingJustice is the national justice agency of the Uniting Church, primarily responsible for policy, advice and advocacy. It is the experiences of Hotham Mission, together with the grassroots work of other agencies, groups and church members, which informs the lobbying and advocacy work undertaken by UnitingJustice.

The Uniting Church has a longstanding interest in the status and welfare of people seeking our country's protection and has been engaged in advocacy and the provision of services to this vulnerable group of people since the beginnings of the church. Our church believes that the world is a community in which all members are responsible for each other and the strongest have a special responsibility to care for the vulnerable. We are genuinely concerned that Australia is failing to meet its international human rights obligations under the current policies, legislation and procedures relating to those who seek our protection.

Section 417 is inadequate as a process for assessing humanitarian claims relating to Australia's obligation under international treaties. Australia needs a system that effectively assesses both refugee and non-refugee protection needs. Asylum seekers in Australia are in a vulnerable

position. The concerns they raise with the Uniting Church include their experiences of inadequate legal and interpreting assistance, the lack of work rights, Medicare and welfare assistance, uncertainty about how the process operates, and a lack of understanding of their rights. Asylum seekers also talk of the distress caused by the long delays in the review process, and the impact of not receiving an explanation of the decision. We believe that the problems with the exercise of the section 417 discretionary powers of the Minister for Immigration and Multicultural and Indigenous Affairs stem from the failure of our onshore protection program—both the lack of avenue for assessing non-refugee claims prior to ministerial intervention and the well-documented inadequacies in refugee determination. In our submission we have outlined what we regard as the major failings as they relate to the section 417 powers.

It is significant that Australia has made a commitment to implement the UNHCR's agenda for protection. Paragraph 3 of the first goal of the agenda is the provision of complementary forms of protection. The Uniting Church in Australia attended a recent meeting of the UNHCR Executive Committee and participated in the pre-executive committee meeting. It was disappointing but not surprising that the Australian government's report to the UNHCR Executive Committee in Geneva last month failed to mention its progress with this aspect of the agenda for protection, or even any consideration of such a system of complementary protection.

During these meetings both the Director of the Department of International Protection and the high commissioner himself expressed grave concern at the tendency of states to apply increasingly narrow interpretations of the refugee convention and of their responsibilities under other treaties. Such approaches are contrary to the spirit of the convention and ignore the reality of the protection needs of displaced people. This leads to breaches of states' human rights obligations. UnitingJustice Australia and Hotham Mission are calling for a fairer, more reliable and transparent determination system which takes our international human rights obligation seriously. Thank you.

CHAIR—Thank you, Reverend Poulos. Do you wish to make a short statement, Mr Mitchell?

Mr Mitchell—No, thank you.

CHAIR—There may be senators who have questions in respect of the three documents. The third document may pose a problem in the sense that it may relate to in camera issues. Therefore, if the senators do have any such questions, I would ask the witnesses to take those on notice and provide an answer at a later stage. That course of action would give the senators an opportunity to look at documents A, B and C and decide whether they have any questions. If you could undertake to do that, it would be helpful.

Senator JOHNSTON—Reverend, does this submission speak on behalf of the Uniting Church?

Rev. Poulos—It does in the areas which are consistent with our national policy. I actually believe that the submission is generally consistent with our national policy on refugees, asylum seekers and humanitarian entrants.

Senator JOHNSTON—Does the church have a view with respect to whether immigration to Australia should be the subject of parliamentary oversight and/or a legal framework?

Rev. Poulos—The church's opinion is that Australia must meet its human rights obligations in relation to people arriving on our shores seeking protection and that the processes by which we do that should be transparent and accountable. So, yes, there should be legislation in place which reflects both our international human rights obligations and our moral responsibility as a wealthy country.

Senator JOHNSTON—You are aware of the three tribunals or adjudicating jurisdictions—that is, the RRT, the AAT and the courts—that deal with applications prior to the minister exercising his discretion. I am taking the RRT and the MRT—the Migration Review Tribunal—to be in the same vein. In order to get to the minister's discretion you have to go through those three processes. I note that you seem to be suggesting that the RRT is derogated by injustice. Why do you say that?

Rev. Poulos—It is the experience of refugees and asylum seekers which members and groups in the Uniting Church deal with that the processes in the RRT are not transparent and not accountable. They are inconsistent; so that refugee determinations based on a set of case circumstances which one day are given a positive response and the next day, in front of a different tribunal member, may be given a negative response. There is, in our experience, inconsistency in the decisions being handed down.

Senator JOHNSTON—So the doctrine of precedent is not tangibly applicable to the decisions of the RRT?

Rev. Poulos—The doctrine of?

Senator JOHNSTON—Precedent—that is, the decisions are consistently made in line with principles handed down over a long period of time.

Rev. Poulos—Yes. It does not seem that there is a system of precedent operating. It actually seems to be rather ad hoc and dependent on who is hearing the case. The church has also expressed concern numerous times about the independence of the tribunal and at least the perception of a lack of independence.

Senator JOHNSTON—Which tribunal—the RRT?

Rev. Poulos—Yes, the RRT.

Senator JOHNSTON—When you say 'independence', what do you mean?

Rev. Poulos—I mean that the appointments to the RRT have the appearance of sometimes being political and that the RRT is driven by a political agenda rather than necessarily a humanitarian and human rights agenda. I am saying this is the appearance that we see and that is expressed to us by both refugees and asylum seekers who have had both positive and negative outcomes in the Refugee Review Tribunal.

Senator JOHNSTON—Would you say that of the Federal Court also?

Rev. Poulos—The Federal Court has a very limited capacity to deal with these cases. They cannot judge the cases on the merits. We have been calling for the judicial review to be expanded to include consideration of the merits of the case.

Senator JOHNSTON—So you say the determination based on merit is a factual determination that is not capable of judicial review?

Rev. Poulos—No, we would see that it is capable of judicial review and we would like to see judicial review being based on the merits of the case in process.

Senator JOHNSTON—But you are saying that is not happening now?

Rev. Poulos—No.

Senator JOHNSTON—Do you see a role for the ultimate arbiter of the application of our humanitarian obligations being reposed with the minister?

Rev. Poulos—No, I think we see that it is a problem that the minister, under these powers, is regarded as the final arbiter. We believe that these powers are there to address extraordinary and obscure cases and they should not be regarded as the final arbiter on someone's refugee status. We are also proposing that the minister not be regarded as the final arbiter on the humanitarian status of people.

Senator JOHNSTON—So what would you propose?

Rev. Poulos—We would propose a system, for example, that allows for people to apply for a humanitarian visa from the outset. One of the things that we see happening over and over again is that the RRT process gets clogged up with people who have humanitarian claims rather than refugee claims but who have no option other than to enter the refugee determination process. Also, people's cases are being reviewed when other options are available. It is very clear what Australia's international human rights obligations are. I do not believe that it is difficult to articulate those in a clear way, develop guidelines that suggest how those cases are determined, and then do it, with accountability and transparency.

Senator JOHNSTON—My last question, with the indulgence of the chair, relates to the figures on page 15 of a document that you have given to us with respect to the research findings. I am careful to note that I am not going to talk about any case studies. The figures seem to suggest to me that very few people would want to apply for a humanitarian type visa from the outset. If you look at the 203 cases, you can see, for instance, that, of plane arrivals, approximately 33 per cent of 90 per cent are problem illegal arrivals—false passport, no passport, no visa. But about 80 per cent of plane arrivals come in on tourist visas, visitor visas and student visas. Is it the case with these compassionate applications, if we can call them that, that the people come into the country under a totally different umbrella to what they are ultimately telling the tribunal and the minister?

Mr Mitchell—If you look at the issue with plane arrivals and look at circumstances of people such as the East Timorese and the Sri Lankans, in many cases individuals are using other visa categories to enter the country. That is true. If you look at the 20 per cent of our clients who are

students, a large majority of those have had a change of circumstances in their country of origin. They may have been here five or six years and there has been such a change that they have had to lodge—

Senator JOHNSTON—But isn't that out of kilter with our everyday understanding of what an asylum seeker really is? Are they a person who lands onshore, who is a student for a number of years, who flies in on a plane, who has a tourist visa or who has a business visa? Almost five per cent of these plane arrivals who ultimately want humanitarian compassion shown by the minister are here on a business visa. These statistics here seem to undermine the proposition that there is a need for a separate category of visa.

Mr Mitchell—The issue with asylum seekers is that each needs to be looked at case by case. Each case is unique unto itself, which is why, obviously, there is the need for administrative and judicial review.

Senator JOHNSTON—Thank you.

Senator BARTLETT—Just to reaffirm, the majority of the people you deal with through the Asylum Seeker Project are people who arrive on valid visas and then seek protection?

Mr Mitchell—About 10 per cent are unlawful and 90 per cent are lawful arrivals.

Senator BARTLETT—So the unlawful or unauthorised arrivals are ones that have been in detention and then have been released?

Mr Mitchell—Yes.

Senator BARTLETT—Are they ones who have been—I think you used the phrase in your report—released on psychological and medical grounds?

Mr Mitchell—Some but not all. Of the 60 cases we have worked with who have been released from detention, 19 of those cases were for psychological or medical. Of the remaining ones, two were Federal Court orders and the rest were individuals who had breached a bridging visa and then put up a bond.

Senator BARTLETT—So that last group would not necessarily have been unauthorised arrivals.

Mr Mitchell—Yes.

Senator BARTLETT—Have the ones who were released on psychological medical grounds—this might seem a little bit tangential—been released into your care specifically? Do you have responsibility for them?

Mr Mitchell—We have responsibility for them. They are released on two grounds: either into an alternative place of detention, which is very infrequent, or on a bridging visa E, which is a precarious situation. They are released on their own undertaking, but they are not entitled to any work rights, Medicare or welfare payments, so the Hotham Mission takes on that responsibility.

Senator BARTLETT—If they were in what you called alternative detention, would they still be in the same situation where they would have no entitlement to work or anything like that?

Mr Mitchell—That is right.

Senator BARTLETT—What is the difference? Is it that they have to report more regularly or something like that?

Mr Mitchell—There is a Migration Series Instruction specifically on that issue. It is the responsibility of the Hotham Mission to follow those guidelines in terms of the restrictions on those individuals under community care arrangements.

Senator BARTLETT—For those people to be released on psychological and medical grounds—I know it is not 417 or 351—is it purely up to ministerial discretion? Is that another area where it is purely the minister's discretion as to whether they are released?

Mr Mitchell—That is up to ministerial discretion, to my knowledge. I am not an expert in that particular area of discretion.

Senator BARTLETT—Would they be people who you have advocated be released or are they just ones that are being released and you get a phone call saying, 'Hi there; here's some people'?

Mr Mitchell—It is a mix. In some cases we have advocated because they have come to our attention, perhaps through the Uniting Church chaplaincy work in the centres. Other times, Immigration have contacted us. Other times, the people have already been in the community with no support. It is varied.

Senator BARTLETT—You actually advocate or make representations for 417s as well?

Mr Mitchell—Yes, we are not migration agents so we do not write the application—although we have on two occasions. We use the services of pro bono migration agents and lawyers.

Senator BARTLETT—Would you do that—or be involved in or aware of that—reasonably regularly?

Mr Mitchell—This last year we have had about 20 cases. Similarly to Amnesty International, we look closely at which cases we choose to take on board, because at any one time Hotham Mission is working with 100 or so cases which may be approaching the minister. We will not choose to support every one of those cases.

Senator BARTLETT—So why do you not support some of them? Is it because you do not think they are as strong?

Mr Mitchell—Yes. We pick the cases where we feel there is clear merit. It is a hard position for a welfare agency to be put in, but obviously we cannot respond to or support every application.

Senator BARTLETT—But you might still be providing other assistance for those other 80?

Mr Mitchell—Yes, welfare support definitely. We make no distinction in terms of merits; we provide housing support and emergency relief regardless of their claim.

Senator BARTLETT—I guess you would also communicate with other people in the field, if you like, who do similar sorts of things. One of things this inquiry is looking at is whether there is irregularity of outcomes either for certain ethnic groups, for certain types of cases or for people who had certain people backing them as opposed to others. Have you perceived any sort of pattern in relation to that?

Mr Mitchell—If you look at a situation like that of the East Timorese, you see that there has been clear support in the community, pressure has been applied and the minister's discretion has been very appreciated—although obviously it is not a situation that the 417 category was set up to deal with, being such a large number of people. Thirty per cent of our clients are Sri Lankan nationals from the four major different ethnic groups. They have spent a very similar length of time in Australia, in many cases. Some of them have similar circumstances, in terms of children born in Australia, amount of time spent here, perceived fear of return and so on. We are certainly not seeing the level of response to that group that we are seeing for the East Timorese.

Senator BARTLETT—Do you think that is due to public pressure and public support for the East Timorese?

Mr Mitchell—It could be due to public pressure. This is just something that we have noticed and that we are very concerned about. The issue of the Sri Lankan group is an area that Hotham Mission and many other advocates will be focusing on in the coming months as the class actions that some of them are involved in slowly dissolve.

Senator BARTLETT—I understand the point you are making about the apparent differentiation between the East Timorese and the Sri Lankans. Are there any other aspects you would like to comment on? One of the threads—it is not the only thread—of this inquiry is whether there has been inappropriate influence, inappropriate favouritism or that sort of thing. Do you get any sense of that?

Mr Mitchell—I do not have any examples of misuse of the minister's discretion. We have raised cases where we believe the minister should have intervened. We felt that those cases did meet the criteria and it is unclear to us why there was no intervention—if, in fact, they did reach the minister. So they are cases of concern that we have. We do not have any cases where we feel that the minister has misused his powers.

Senator BARTLETT—You mentioned the Swedish arrangement with humanitarian visas. I might be wrong, but I think you are probably more responsible than most for the phrase 'the Swedish alternative' entering the lexicon, at least in a tiny subgroup of the community. One aspect of that is in terms of an alternative arrangement to detention; the other is in terms of a compassionate or humanitarian type of visa. My understanding was, a few years back, that there was at least a tiny twinge of interest from the department about the Swedish model, so to speak. That was just in terms of detention, it was not in terms of humanitarian visas.

Mr Mitchell—In some ways that could be seen as the introduction of the Woomera housing trial, but not for any other aspects of the so-called Swedish model.

Rev. Poulos—I have just come back from Geneva, having been in an environment where there are lots of government representatives from all over the world talking about their different systems and procedures. The case is now that, rather than Australia looking at what is in place elsewhere and taking the good parts of that on board to further develop our procedures, the Australian government are trying to sell their systems elsewhere.

Senator BARTLETT—I have noticed certain election results from the land of Switzerland over the weekend. Geneva is in Switzerland, isn't it?

Rev. Poulos—Yes.

Mr Mitchell—I would like to raise one thing about the Swedish system, because I was employed by the Swedish immigration department for three years until 2000 and I actually had a job which was to give the final decision to asylum seekers in the detention centre there. If you look at the Swedish figure for what is a government objective—return—it is very high. Part of the reason that was found in various research—and that could be forwarded to the committee as well—is that there is a very clear incorporation of refugee and humanitarian issues into the primary and secondary decisions, with full legal representation in those first two levels. The only case where it would be forwarded, not to the Swedish minister but to the Swedish government, would be if there is absolute new information or an extreme change of circumstances. What we found is that there was a very clear finite final decision in Sweden. It was far easier for the immigration department to work with refused asylum seekers who had a very clear definition and explanation of why they were refused. They felt more confident and had a greater understanding of whether or not they in fact had protection needs. This is something that I have found lacking here in Australia and certainly lacking in my work with refused asylum seekers. There is simply no explanation, and it is very difficult to work with someone at that point to make them feel that they in fact do not have any fear and can return. So it is something that we have been quite concerned about: that that does not exist here.

Senator BARTLETT—I have some more questions on the Swedish scenario. My understanding is that, in terms of an EU wide approach to asylum seekers, if they seem to have gone through another country in Europe where they could have claimed asylum and then get to Sweden, for example, Sweden can use that to shunt them back to Germany or Greece.

Mr Mitchell—That is under the Dublin convention.

Senator BARTLETT—So that operates in Sweden?

Mr Mitchell—Yes, under the Dublin convention, which you are referring to. Probably the greater degree of returns are in fact where Iraqi nationals, for example, were returned back to Germany or other parts of Europe. Obviously, we do not have a similar circumstance here but probably the higher frequency of returnees in Sweden is because of that convention.

Senator BARTLETT—So how do people get to Sweden if they do not go through other countries in Europe?

Mr Mitchell—That is a good question. Some of them go through the Baltic. There are some people who arrive by boat, but not a lot.

Senator BARTLETT—I have another question about the number of 'applicants', for want of a better word, or asylum seekers that arrive in Sweden. Do you know roughly what that is these days?

Mr Mitchell—At the time of the research that I did it was about 16,000 in 2000. That is about double Australia's.

Senator WONG—One of the criticisms that opponents of the system of complementary protection, such as Sweden, make is that governments would not be able to keep proper regulation of the numbers of people entering Australia. That has been put to us when this issue has come up. Do you have any comment to make on that?

Mr Mitchell—Our view, certainly when putting this submission together and from my work with asylum seekers, is that the majority really have no concept of the asylum mechanisms in the countries where they are seeking asylum. So, if you are talking about the temporary protection visa category or mandatory detention or the specific determination system, they are quite oblivious to those. They are responding to what has happened to them at source in terms of having to flee.

I do not believe that it is true that a complementary protection system would open up the floodgates, so to speak, or increase the number of arrivals. It is true to say that, in a country like Sweden, a greater number of people are granted residency on those grounds, but, if you look at a country like Denmark, which does not have a such a high number of successful complementary protection applicants, you will see that they have had previously a slightly looser view of refugee determination, simply because those states do not want to send people back who are at risk. Our concern and the concern we raised in the submission is that there is an uncertainty about whether Australia will, in fact, be able to ensure under 417 that people who may be at risk are not going to be sent back.

Senator WONG—It has been the subject of quite a lot of evidence before this committee that our non-refugee humanitarian obligations and our obligation not to refoul are inconsistently or inappropriately given effect to through the ministerial discretion. So I understand where you are coming from there. What I am trying to gain is some understanding of whether there is any means of providing a system of complementary protection that is not vulnerable to the criticism from certain quarters that that system could not be regulated by government. In other words, once you put in place a complementary system that looks to protect people who have reasonable grounds under other non-refugee conventions or who may go back to be persecuted on non-convention grounds, governments cannot actually regulate the amount of people they have to give protection visas to. Do you have a response to that criticism? I am not saying I agree with that—I am just letting you know that that issue has been raised.

Mr Mitchell—Certainly, from working for the Swedish government, I know there is an understanding that you cannot really regulate the numbers of asylum applicants. I was working there during the former Yugoslavian war, when there were 100,000 Bosnian applicants in the course of just over a year. So, in terms of the government trying to have some control over the

intake, I think the main issue is that the government has some assurance that the international obligations that we have signed to are in fact being upheld. As to how to manage those numbers, I do not think it is possible to do that inside a refugee determination process, because circumstances change and the flow to various countries will change accordingly.

Senator WONG—I am sorry, I think you were asked this question, but I was momentarily distracted. Is it a regular part of your work to assist in preparing 417 applications or making representations on people's behalf?

Mr Mitchell—Making representations and supporting is part of it; not so much preparing them.

Senator WONG—I think in terms of the nationality make-up, you indicated that Sri Lankans were a significant proportion of the cohort of people you act on behalf of. A number of submissions to this committee have suggested that there is inconsistent treatment between different nationalities or people from different countries. Is that your perception or not?

Mr Mitchell—I raised earlier the issue of where there are similar circumstances but reasons for other grounds because of, for example, public interest in certain—

Senator WONG—Such as the East Timorese?

Mr Mitchell—Yes. It is less to do with nationalities—an observation that we have made is that people with Australian connections, family or otherwise, are more inclined to get an outcome from the minister or ministerial intervention. People with circumstances that are purely international obligation based are less likely to get it, in my experience, regardless of which country they are from. It is just harder in general.

Senator WONG—Yes, we have had similar evidence from other groups. In your experience is there any difference between people who may have Australian connections through stepchildren, as opposed to biological children, or situations where they might have pre-existing family?

Mr Mitchell—We have had one case of stepchildren, but primarily it has been married to a spouse or de facto to a spouse and having an Australian child, or where the partner may not be Australian but there are Australian children involved—I think that is the easiest way to say it—either stepchildren or biological children.

Senator WONG—In your experience has there been any difference in treatment if one of the partners has children from a previous relationship—non-Australian children?

Mr Mitchell—We probably are talking about five or six cases, so it is quite a small group that we work with.

Senator WONG—The fact that connections to Australia appear from your work to be more important than obligations under various international conventions is a cause of concern for you?

Mr Mitchell—It is a cause for concern and we have made reference to two groups of individuals in detention: Sabian Mandaeans and Christian converts. In the community we have also raised a few examples of cases involving torture or statelessness and so on. Approaching the minister is the only option they have for their case to be heard. Obviously, if we are only seeing Australian connections getting through that system then we are uncertain of what may happen to this group if they are returned. That is a concern.

Senator WONG—You raised the issue of the Mandaeans, which I want to ask you about. Has there been any whom you have dealt with who have been deported to Iraq?

Mr Mitchell—Not deported, no.

Senator WONG—But they have returned?

Mr Mitchell—I am not aware of Sabians that have been returned.

Senator WONG—What is the outcome? I presume a number of them are awaiting 417 applications; have you had any favourable?

Mr Mitchell—Yes, we have had one favourable.

Senator WONG—How many are waiting?

Mr Mitchell—The remainder in detention—

Rev. Poulos—I do not have the figures of Sabian Mandaeans in detention.

Mr Mitchell—And that have written to the minister. I know that a number of them have approached the minister multiple times but, again, there has been an inconsistency in that a few Sabians—none that we have been connected with, but others—have gotten up, whereas others with presumably similar grounds have not.

Senator WONG—And they remain in detention? Would you say they are reasonable humanitarian grounds for not returning Mandaeans?

Mr Mitchell—I could not speak on those. I can only speak on the cases that we have been involved in.

Senator WONG—But the persecution of that particular religious group is reasonably well documented.

Rev. Poulos—It is very well documented, and documentation continues to come in almost every day.

CHAIR—I want to ask a couple of generic questions in relation to 19C, which is the in camera matter. I remind you that it has been accepted as in camera, so please do not refer to any specific instances and please also advise me if I end up doing so myself. It is headed ‘Ineligible

asylum seekers at the 417 stage'. Have the cases that are included in it been the subject of a 417 application—if we call it that—or a representation on behalf—

Mr Mitchell—They are pending.

CHAIR—That is what I was going to go on to ask: are there any that have been granted, pending or not made? I am happy for you take that on notice and get back to us.

Mr Mitchell—There is one where there—

CHAIR—You can refer to it as case 1 or case 2.

Mr Mitchell—It is the second submission.

CHAIR—Can we deal with case 1? It is pending, made—

Mr Mitchell—I might take this on notice, if you do not mind, and then I will forward that to the committee.

CHAIR—All right. It would be helpful to understand whether case 1 was pending or whether there was a decision made and so on.

Mr Mitchell—The specific reason for the inclusion of this document is to highlight to the committee that, in 1998, one of the first changes implemented for people approaching the minister was the removal of work rights and Medicare both at that stage and at the judicial review stage. The impact of that has been absolutely devastating for single mothers, for pregnant women and for people with disabilities. In fact we are working with two individuals who have cancer and who have no Medicare who are approaching the minister. We have had individuals who have been found to have humanitarian protection needs under our international obligations and who have been denied any right to any assistance—welfare or otherwise—during that time. That is really why we have put this forward for your information.

CHAIR—Perhaps you could take this question on notice: when you tell the committee which ones the representation has been made for and which ones are pending, could you include the length of time that they might have otherwise been in the position of not receiving any work rights or any of the other benefits that you have mentioned. Could you also tell us how long they have had the application in and how long they have been waiting for a response as to whether or not the minister will grant a ministerial intervention, and whether it is their first application or whether they have made others. If you are aware of that, it would provide us with a better understanding of the particular cases and where they might be.

Mr Mitchell—Yes. That is no problem. There is actually an indication in the—

CHAIR—I have not had the opportunity to read it, so if it is in the document then just refer that particular question to the document and I can read it for myself. I just want to clarify your use of the ministerial intervention under section 417. Do you make representations to the minister or don't you?

Mr Mitchell—We have on a number of occasions. We actually support applications, so we write in support. Sometimes that means including new information. As Senator Bartlett indicated, we work with people with psychological or medical conditions that, in most cases, have occurred in Australia. We will often write in support or to verify what their circumstances are, because those circumstances may affect their ability to travel. The minister would need to know that to make a decision, either to refuse them or not.

CHAIR—Would that be under the heading of 'new information that may be helpful in the determination of a ministerial intervention'?

Mr Mitchell—Yes. It may be a letter that we write in support. It may be directly to the minister or it may be to the migration agent or the lawyer. On two occasions we have handed more information directly to the minister.

CHAIR—How many times a year would you do that? How many section 417s would you write as a supporter?

Mr Mitchell—In the last year we have put up 20. Of those, we have had 12 refusals and eight approvals, so around 40 per cent have been approved.

CHAIR—That is out of a possible catchment of how many, because you then go through a process of—

Mr Mitchell—That is right. We do not take up every case. It is hard to say, but, as I said, at any one time we are working with at least 100 applicants who are approaching the minister.

CHAIR—Why do you do that? Why don't you put up the 100?

Mr Mitchell—Some people, for example, have very strong applications. Some people do not need Hotham Mission to write in support of them. Sometimes it is a case that we are far more involved in. Sometimes it is new information. At other times, from looking at previous decisions or for various reasons, we may not feel it is a strong case. In that situation we tend to support and encourage that person to consider returning. We have helped clients look for third countries as well.

CHAIR—Do you refer them on to someone else, like a migration agent?

Mr Mitchell—We make sure that all of our clients have migration agents, which is very difficult, because there is no funding for that and we have to find people who can provide free support for them.

CHAIR—Is there a limited number of migration agents that you draw from to help you in that process?

Mr Mitchell—There are never enough migration agents to do pro bono work.

CHAIR—Do you use non-migration agents?

Mr Mitchell—We have a few refugee lawyers who assist us, but most people are migration agents.

CHAIR—Have you had any complaints from the people you assist about either migration agents or the non-migration agents that help them?

Mr Mitchell—We certainly have, and that is documented. We did research on a whole lot of issues, but one of them was on this specific issue. Sixteen per cent of our clients stated that they felt that they had been represented badly or misrepresented by migration agents. That included being overcharged; not lodging within the initial 45-day period, which meant they were denied work rights and Medicare; not having all their information submitted in an application; and not providing them with updated information that the department or the RRT had sent. We found that there was a whole range of issues that asylum seekers were not complaining about because they either did not know their rights or were afraid it would impact on their case. Those cases had not been taken to MARA. Many asylum cases are not reaching MARA simply because asylum seekers themselves feel uncertain of what it means and what impact it might have.

CHAIR—Do you think a shroud of secrecy surrounds the making of a legitimate complaint because it might detract from their ability to obtain a visa or ministerial intervention?

Mr Mitchell—I think they do not really understand what their rights are, so they tend not to exercise those rights.

CHAIR—Do you direct them to MARA to make a complaint?

Mr Mitchell—We have, definitely.

CHAIR—Do you follow up on it?

Mr Mitchell—It is their decision. In most cases they are too afraid. Asylum seekers who approach the minister or indeed the RRT are in a very vulnerable situation. They are very vulnerable to unscrupulous migration agents who promise all kinds of things, including having connections with the minister, give the impression that they can get them work rights or a visa, charge them a lot and are of course unable to wield any influence. It is a common scenario.

CHAIR—Do you have any documented cases of people who have complained either about overcharging or representations that were clearly unfounded, either by the migration agent or the unregistered migration agent?

Mr Mitchell—The asylum seekers are not putting in formal complaints. We did this research with them, which indicates the percentage of people who felt they were being misrepresented, and that was their word. I do not have any other evidence.

CHAIR—A number of submitters have described very similar circumstances to those which you have described, but there seems to be lack of documentation to establish that. I can understand why but, on notice, would you have a look at your records to see whether you have any documentation? We can certainly discuss in the committee how it could be made available to us. It would be helpful if you would have a look at your records, especially of cases you have

referred to MARA or to the Department of Immigration and Multicultural and Indigenous Affairs, so we can follow up what has happened.

Mr Mitchell—In Melbourne, the Asylum Seeker Resource Centre, which provides legal advice—and Hotham Mission does not—had a pro forma for asylum seekers, which basically spelt out their rights and how to put in a complaint. I could possibly get permission to forward you that.

CHAIR—See what you can do. I understand the difficult nature of the issue, and I do appreciate the evidence that you have given today.

Senator WONG—Let me follow up on two things. The case example in the paper you presented today refers to what I suppose you would call unreasonable charges for making a representation. You can take this on notice, but has that agent been subject to any investigation or referral to MARA?

Mr Mitchell—No. Hotham Mission really encouraged that particular client to do that, and we plan to follow up, but at this stage I do not know.

Senator WONG—Secondly, in answer to the chair, you mentioned that some migration agents had asserted a particular relationship with the minister. Are you able to give us any more information on that?

Mr Mitchell—No. This particular case brings to mind a lot of things, in terms of being able to get a visa, to access work rights and Centrelink.

Senator WONG—I think the chair has asked you to take some questions on notice on that matter. The concern for us is that these stories or issues get raised but it seems to be very difficult for anyone to come forward and say, 'Yes, this is what is happening.' We are obviously hamstrung by that. So you could take that on notice as per the chair's request.

Rev. Poulos—I think this points to one of the core issues we have raised. When you have a system that is not transparent, it breeds that and it is very hard to break into it any point.

CHAIR—Thank you for your submission and the oral evidence you have given before the committee today. I wish you well in your work.

[1.56 p.m.]

GLENN, Mr Howard David, National Director, A Just Australia

CHAIR—Welcome. You have lodged a submission with the committee. Do you wish to make any amendments or alterations to that submission?

Mr Glenn—No.

CHAIR—I invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask you questions about your oral evidence and your submission.

Mr Glenn—Thank you for the opportunity to appear before you today to provide some supplementary evidence and take part in this discussion. A Just Australia's submission looked at some of the broader issues behind ministerial discretion and the origins of this inquiry, in terms of corruption. When those allegations of corruption were being raised in parliament, it occurred to us that it was unfortunate that there was not a similar level of parliamentary activity on the corruption we were most concerned about: the continuing detention of so many children, in contravention of our obligations under the Convention on the Rights of the Child, which has been core to my working life and to many of the people involved in A Just Australia.

We thought we would firstly try to highlight that core concern in our submission and then also point to the looming crisis for the ministerial discretion system arising from the temporary protection visa system. Last month, Ian Chappell, Lowitja O'Donohue, Phillip Adams and I toured around holding public meetings, and we were saying to the media that we were there to talk about the looming refugee crisis. Many in the media were saying: 'What are you talking about? It is all settling down and it is off the agenda.' We were describing what is likely to be happening shortly for people who arrived here fleeing persecution. They have done the boat trip, done time in detention and have been released into the Australian community with reduced levels of support on three-year temporary protection visas. As senators are probably aware, those visas are now starting to expire. As of last month, 64 primary decisions had been made by departmental officials that all the Afghans would be denied permanent protection.

They now have the choice of either returning home to Afghanistan to what is very clearly a very unsafe and unsustainable life—I will give you a little bit more detail there later—or lodging an appeal with the Refugee Review Tribunal. As far as I am aware, to date the Refugee Review Tribunal has not made any decisions about permanent protection for Afghans on temporary protection visas. But if they do not like that decision then they are in the loop that has been adequately described to your committee so far. They have the choice to appeal to the High Court—and there are some very solid grounds for appeal on international law—or seek ministerial intervention. By the end of this year there will be something like 2,200 temporary protection visas which will have expired. I think 8,569 have been provided altogether, about three and a half thousand of them to Afghans and 4,000 to Iraqis.

The Iraqis are in a situation where their applications for permanent protection are not being processed; in our view, that is because no-one could be convinced that it is safe to return to Iraq at the moment, so the processing has been held back. Those people will then be in the ministerial discretion loop. Senator Vanstone is likely to be facing over the next couple of years—if she is in that role for that long—eight and a half thousand requests for ministerial intervention. That is one reason why we think there needs to be a broader category or additional examination of whether discretionary visas are the way to do this.

The second aspect I want to talk about is our concern about the corruption of our migration system and our reputation as a nation when now, in October 2003, 186 children are still detained because of Australian policy—187 now, thanks to the birth of Mrs Bakhtiari's child under guard in Adelaide hospital last week. There has not been a boat, apart from the Vietnamese boat which is now on Christmas Island, for a couple of years. Ninety-three of the children on Nauru have been there for the entire two years. There are another ninety-three in detention in Australia this month. Despite the minister's powers to intervene, those powers have not been exercised to anywhere near the level that would be required under our obligations under the Convention on the Rights of the Child.

As I was preparing for today I was looking back at some material I wrote in 1988 explaining to the public why the Convention on the Rights of the Child was necessary. We described in terms of other countries' problems and in terms of issues for homeless children in Australia and Aboriginal ill health. The issue of detention of children for long periods of time in Australia was not even thought of at the time. Clearly, the Convention on the Rights of the Child has as its primary purpose the protection of children from torture and deprivation of liberty and has the provision that the arrest, detention or imprisonment of a child is to be a last resort. The former minister did not exercise his discretion to do that, except in cases of extreme public attention, and alternative accommodation has been attended to very minimally. Under enormous pressure from the back bench of the government last year, alternative arrangements were proposed for children in detention. Alternative accommodation has been proposed by a lot of people. To date, there are another two children in alternative accommodation in Port Hedland on top of the five that are in alternative accommodation in Woomera. That is a complete failure.

The third area addressed in our submission was the situation with long-term detainees and the need for complementary approaches here. That has been well canvassed in other evidence and in our submission. We believe that there needs to be some sort of a circuit-breaker now with those detainees that have been in detention for over four years. If they did not have great claims for protection when they arrived, we believe they certainly have grounds for protection, compensation or healing now that they have been detention for three or four years now—some for longer than four years. We are proposing additional visa classes to provide some temporary or permanent humanitarian protection for those who are of no threat to Australia's security.

They are the principal parts of the evidence I want to give, but I want to try to make it a little more real. In my opening remarks I mentioned our concern at the parliamentary attention to money changing hands for visas not being as acute as children being in long-term detention. The media today, yesterday and this weekend has covered Senator Abetz and various other senators in Tasmania arguing that a 17-year-old Salvadoran girl should be allowed to stay in Tasmania. We have been pointing out that another 187 children who are there should have the same degree

of community concern. We believe that the difference with this girl is that she is living in the community, is photogenic and has strong community support.

I will table for the committee a photograph of another nine children who are in detention in Baxter at the moment—nine children who are all equally deserving of protection. One would hope that the fact that they can be seen might do something for them. One of them has now received permanent protection on the grounds of section 417, because of media attention to the fact that his younger brother has cerebral palsy and was being pushed in a pram through the sands of Woomera. The media attention to that has finally paid off. But there are another 93 in Australia and 93 in Nauru who are all deserving of protection as well. We think that this committee has a powerful role in recommending that the discretion be used very urgently.

CHAIR—Thank you, Mr Glenn. I will mark that as exhibit 8A and attach it to your submission.

Senator JOHNSTON—Mr Glenn, why is it that A Just Australia does not appear to have had any genesis in Brisbane, Hobart, Canberra or Darwin? From page 1 of your submission, under the heading of 'Background', it seems that your organisation was established exclusively in Sydney, Melbourne, Adelaide and Perth.

Mr Glenn—That is a historical fact. We now have very solid connections in Tasmania, Queensland and elsewhere, but the historical fact is that that is where it started. I do not see the point, Senator.

Senator JOHNSTON—So you did not get anyone starting it off in Brisbane, Hobart, Canberra or Darwin?

Mr Glenn—I thought I just answered that.

Senator JOHNSTON—You say on page 3 of your submission—and there is a graph there—that there are currently 1,200 people in detention. Are you aware of how many unauthorised arrivals there have been during the past four years?

Mr Glenn—Statistics is not my strong point. I will refer to the statistics in the submission. Over the last two years the number of unauthorised arrivals has been minimal, as you would know. The two years before that are there in the table.

Senator JOHNSTON—Between 1999 and 2003, a period of four years, there have been 16,000 unauthorised arrivals. Do we not have some sort of obligation in terms of health and security to go through the application of each of those unauthorised arrivals and make a determination?

Mr Glenn—Absolutely.

Senator JOHNSTON—Do you think that happens overnight?

Mr Glenn—No, but I still do not see your point, Senator.

Senator JOHNSTON—So what is your solution? What do you want to do with them? If Aboriginal people on the north-west coast of Western Australia are affected by tuberculosis or some other problem, that is going to decimate them. So do you think we should just put the arrivals out into the wider community or detain them and exercise a duty of care by reviewing their health? Do you not think that is a practical way of proceeding?

Mr Glenn—Our submission relates to the treatment of those people who are in detention and to ministerial discretion. We do have an alternative approach to future arrivals, but the document that we have put down acknowledges that there have not been any boat arrivals in the last couple of years, except for that one boat whose occupants are now housed on Christmas Island. If you want to go to matters outside the committee's brief then I am not prepared for that.

Senator JOHNSTON—It is in your brief. You have said that there are 1,200 people in detention. Your figures set out that 16,000 have arrived in four years, since 1999. I would have thought those statistics are pretty reasonable in terms of assessing who is coming in and what their security status and health status is.

Mr Glenn—I really do not see how your point relates to the matters in the—

Senator JOHNSTON—All I am doing is going from your submission. You wrote the submission on 3 August and I am reading it. In section 3 you go into some detail about what the status is with people in detention. You are unhappy about people in detention. All I am suggesting to you is that, when you look at the statistics, the result is not that bad.

Mr Glenn—If you want to go to that area, we have acknowledged that there are three things that—

Senator JOHNSTON—I am going there only because you have put it before the committee.

Mr Glenn—If you want me to answer the question—

CHAIR—I might just say at this point in time that I think Senator Johnston is in order to ask you the question. It is not for you to determine what is inside or outside our terms of reference. It is in your submission. More generally, I think you can deal with it, you are competent and you can answer the question. It will flow a lot easier if you try.

Mr Glenn—Surely. As I was about to say, the guts of our submission is that the boats have not arrived in the last couple of years and that we are concerned about three things that need to be done for those who are here and stuck in the system. What we have done earlier this year and what we will do in more detail next year is outline a process that we believe is necessary if the boats start to arrive again. Essentially that would involve a more practical approach to arrivals. Of those 16,000, I think the figures show that some 90 per cent were found to be legitimate refugees. In that case, one would design a process on the basis that, most likely, the people who are coming here are refugees. One would put the processing not in remote parts of the country, as a part of generating a prospect that these people are somehow dangerous, but in capital cities where that could be done much faster, with professional staff that could deal with it much faster. One would do initial health and security checks, which we believe could be done in a maximum of 30 days, given that it is done in seven to 10 days in European countries. But with the distance,

maybe, or with the precedent in Australia of it taking much longer, we are prepared to say that 30 days would be sufficient for the initial health and security checks to protect Australians from the 90 per cent of people who are probably refugees. In that case, we would then allow them into the community for living while their full claims were assessed. So there is another model for dealing with these.

However, as of last week, we have got 1,100 people still in detention. Over 300 of them have been in detention for three or four years through the failure of their claims in the processes. Some 300 in Nauru had the same claims as many others that got refugee status, but, because they came on a later boat, their claim of persecution against the Taliban failed because the Taliban had fallen in that time; yet they are still on Nauru with exactly the same claims. Many of them have family in Australia who arrived on different boats—same circumstances; different time. It is those sorts of situations that we are dealing with in this submission: issues of where ministerial discretion has failed to be exercised in accordance with our international obligations and standards of decency in Australia.

Senator JOHNSTON—Am I to take it that you would accept that the 30-day detention period would be satisfactory from the perspective of A Just Australia?

Mr Glenn—That is what I just said.

Senator JOHNSTON—Of the 350 who are still there and have been there for more than two years, what would you do with them?

Mr Glenn—In the submission we have proposed that an asylum seeker claims processing review committee be established which is given a broad brief to examine whether there is any remnant security threat to Australia or a health threat from these people, and whether there are grounds for them to be released into the community or third country settlements. It is documented in the submission.

Senator JOHNSTON—How long do you anticipate that would take?

Mr Glenn—I hope that it would actually do something faster than the process that is happening now, which is that they are just sitting there.

Senator JOHNSTON—Whatever the process is, you would anticipate that they would stay in detention while that process is undertaken?

Mr Glenn—That is right.

Senator JOHNSTON—You say on page 5 that you want permanent protection for proven refugees. What does the expression 'proven refugees' mean?

Mr Glenn—Those are the people who have received a temporary protection visa, having gone through the very difficult and thorough convention based assessment of their refugee claims and been given a refugee status.

Senator JOHNSTON—So you would release the 4,000 Iraqis and the 3,500 Afghanis?

Mr Glenn—They are released. They are now in the process—

Senator JOHNSTON—You would make them eligible for citizenship?

Mr Glenn—Indeed, we would make them eligible for citizenship—permanent protection—as any other refugee who arrived here was, prior to 1999.

Senator JOHNSTON—Without any further investigation as to their situation in either of those two countries?

Mr Glenn—Indeed. They went through a thorough investigation to prove their refugee claims. Those who failed those refugee claims are still in detention or have left the country.

Senator JOHNSTON—What do you anticipate is a humanitarian visa? Who would determine a humanitarian visa?

Mr Glenn—We have not put that in our submission. Having read the evidence provided to the committee by other witnesses here, I was very impressed with the idea that refugee review tribunals should be reconstituted in a more effective way. We would be able to examine those humanitarian claims at the same time.

Senator JOHNSTON—What does reconstituted in a more humanitarian way mean?

Mr Glenn—If it were reconstituted it would be allowed to examine whether there were humanitarian claims. We also propose that it be reconstituted to have longer term independent appointments outside of short-term appointments by the minister.

Senator JOHNSTON—You said that a child at Woomera suffering from cerebral palsy was recently released as a result of media attention. What evidence do you have to support that?

Mr Glenn—I could take it on notice. The fact is that there was an enormous amount of media attention to this particular case, examination by the human rights commission—a whole range of coverage.

Senator JOHNSTON—Can I suggest to you that it was a throwaway line that really has no basis in fact?

Mr Glenn—I think I am quite justified in saying that, with a lack of transparency—

Senator JOHNSTON—You are just guessing, aren't you?

CHAIR—Let the witness answer. Mr Glenn has indicated that he is prepared to take the question on notice and see if he can come back to you. But, by all means, Mr Glenn, please try to answer the question.

Mr Glenn—Certainly. With the lack of transparency of any reasons for any ministerial intervention, my guess is as good as anyone else's. But in situations where there has been

extensive media coverage of particular cases, those cases have generally achieved good outcomes.

Senator JOHNSTON—Thank you.

Senator BARTLETT—I want to clarify this photograph you have given us of the nine children; they look like teenagers to me—although most people look like teenagers to me if they do not have grey hair. Are they all in Baxter?

Mr Glenn—Yes, they are in Baxter—all but the one on the far left, who is the older brother of the child with cerebral palsy. He has been released, under section 417, in the last couple of weeks.

Senator BARTLETT—So he has been given a visa?

Mr Glenn—Permanent protection.

Senator BARTLETT—I take it from reading your submission and particularly your recommendations—given that all your recommendations call for further exercise of ministerial discretion to resolve the situations you have talked about—that presumably you therefore support retaining ministerial discretion. Do you believe that that ministerial discretion should be widened or are you just suggesting that, given the situation we are currently in and the law as it currently stands, this is what should be done to resolve the problems with temporary visa holders et cetera?

Mr Glenn—We believe that we are in an appalling situation as a result of the way the government has administered refugee obligations in the last two or three years. Being very practical people, we believe that these could be solved in those three simple ways using existing law. The amendment to future law is something that we will be making a more comprehensive submission on next year. Within existing law the situation could be resolved for these thousands of people very quickly by exercise of ministerial discretion.

Senator BARTLETT—I refer to the outline of recommendation 2 where you talk about a claims processing review committee which could possibly be set up under existing law except for the final decision having to be made by the minister. Is that potentially a model that you would see operating long term? The way in which I would read your recommendations is that you believe we have problems at the moment with a significant build-up of TPV holders which will probably not be renewed, long-term detainees and children in detention. You say they could all be resolved, for argument's sake, assuming that the new minister decided to accept your wise suggestions and to do all of that. In terms of the ongoing operation of the system—and this is with 351s as well as 417s, so beyond just asylum seekers—is the model that you have suggested in recommendation 2 of a processing review committee something that you would suggest be adopted or is that just an interim idea?

Mr Glenn—It was developed as an interim idea to try to clear this backlog of over 300 who have been in detention for three or four years now. Having read a lot of the evidence to your committee about the failure of any analysis of Refugee Review Tribunal recommendations for 417s or humanitarian consideration—I mean the overall lack of analysis of where the discretion

is used—I think there would be some value in having some oversight of what the department or the Refugee Review Tribunal or the minister's office are not providing in the outcome of claims for protection for humanitarian reasons, so there may be another role for it. But our submission really goes to the practical problems that are occurring now which need some urgent solutions.

Senator BARTLETT—Given the range of people you have got involved in A Just Australia and that obviously a lot of them are involved in various ways with the issue of asylum seekers, one of the other threads of argument that have obviously come through to this committee is whether or not the discretion is being used inappropriately or potentially even in a corrupt way, but I will settle for 'inappropriately' for starters. Are you aware of any sorts of solid indications of that being the case? Are the discretionary powers being used in what would seem to be an inappropriate way or is it just a matter of a lack of transparency meaning that people cannot assess these things?

Mr Glenn—Seriously, the inappropriateness or the corruptness to us is in the lives of these children that remain in detention. That is the worst case of corruption. I do not have evidence of or views on the claims that have been made about the way the minister operates. I have had a long association with the minister over many years and he has told me some of his reasons for the way he operates, but I do not think it is necessary to go to that, particularly as we have a new minister who is not as compulsively wedded to all the past decisions as the previous minister was. So we want to stick to our major ground, which is that the corruption is in the lives of these children. That is worse than any allegations of money changing hands when you look at these kids in detention and you cannot offer them hope.

Senator BARTLETT—So your criticisms are about the policy itself—

Mr Glenn—And the failure to act in support of our obligations under international conventions and Australian standards of decency. That is where we came from as an organisation.

CHAIR—Mr Glenn, so when you talk about conventions you are referring to the refugee convention or to those that are dealt with by the use of ministerial discretion, such as the ICCPR, the International Convention on Civil and Political Rights—

Mr Glenn—Yes, and the Convention on the Rights of the Child principally.

CHAIR—It makes it a little bit easier when we read the transcript later on. The issue that I understand you are trying to put forward is that the use of section 417 obviously meets those conventions, and there is CAT as well. Are those the ones that you are referring to specifically or are you also then using the refugee convention?

Mr Glenn—Particularly the Convention on the Rights of the Child. That is most clearly breached by the failure to exercise discretion under section 417 to remove children from detention.

Senator SHERRY—I was looking at the graph in your submission on the arrivals, which contrasts arrivals by boat as distinct from arrivals by plane. I had seen something similar—and I do not know whether this is identical to the graph I have seen—at Senate estimates committees

on these matters. Why do you think it is that so much of our policy and public debate in this area seems to be focussed on arrivals by boat as distinct from arrivals by aeroplane, which interestingly exceeded arrivals by boat for eight of the last 12 years?

Mr Glenn—The reason I believe that that is the case is that it is purely a question of perception. We do not believe that the boat arrivals represent a refugee crisis to the extent that they became the central political issue in Australia in 2001 and stayed as one for another year or so afterwards. But boat arrivals are very visible: they are people who you can see and they come in a group. While 90 per cent of them have legitimate refugee claims they create a sense of fear and apprehension because, I believe, deep within our national identity—along with the concept of a fair go—is this fear of invasion from the north. When we see boats arrive, the media can whip up fear of invasion from the north.

When a similar situation occurred in the seventies, the Fraser government took the decision to try and settle down that fear by saying, 'This is a problem but we can handle it.' We believe that this government took the decision to say, 'This is a problem and we should be fearful about it and we should introduce further laws.' In fact, some members of the government equated these people, who were fleeing terrorism, with terrorists. It was an outrageous time. So it is the visibility, I believe.

Senator SHERRY—You have given us a photo today and we have heard of lots of individual cases of refugees. But I get the perception that the refugees we tend to be talking about and focussing on at these hearings and in other policy forums are all boat arrivals. I do not see much material presented about arrivals by air. Can you give me some insight? Are there any people detained who have arrived by air? The statistics appear to show there are significant numbers but there does not seem to be much focus on them.

Mr Glenn—Too right. But what we are focussing on is the change in laws that occurred. The introduction of temporary protection visas for those who arrived by boat was the most significant change in 1999. That is where we have been focussing, because those people are in the most difficult situation. Last week or the week before senators rejected extending temporary protection visas to all who arrived and sought asylum, so temporary protection visas only apply to those who arrive by boat.

Those who arrive by air who claim protection after 45 days are in a situation where they do not get access to work rights and medical benefits, similar to those who are about to hit the welfare sector in a big way—those on temporary protection visas who have been refused permanent protection and who are appealing to the minister. They will lose their work rights and their Medicare rights fairly promptly, too. There is an equation between the lack of services provided for those asylum seekers who arrive by air and the lack of services provided for temporary protection visa holders—an equation which will be much closer shortly.

Senator SHERRY—You support the establishment of an asylum seeker claims-processing review committee; I think that is the terminology you have given for it.

Mr Glenn—Yes.

Senator SHERRY—How would you subsume the current ministerial discretions within such a review committee?

Mr Glenn—It could either be established by regulation or by ministerial direction as an advisory body to the minister. The minister would still have to exercise the power but might want a process by which certain criteria could be checked off: is this person who has been in detention for longer than four years still a threat to the country? Is there any security threat left? Is there any reason why they could not live here now that have been in detention for four years? The minister may want an external process to check those sorts of things off, rather than having to do it all him- or herself.

Senator SHERRY—Would you see that the minister would only exercise his or her powers contrary to the recommendations of those committees for publicly stated reasons only in exceptional and very rare circumstances?

Mr Glenn—I think that by setting up such a mechanism a lot of things would be sorted out. For example, of the 300 or so people who have been in detention in Australia now for longer than two or three years, I think—and I would need to check the number—that 230 of them are Iranians. The minister has reportedly wanted to encourage those Iranians to go back, through processes of threatening forced removal if they do not choose to go back. Many of those Iranians, as Reverend Poulos and others have talked about, are people who face discrimination in Iran but maybe not sufficient discrimination to justify a persecution claim. The past minister has taken a very hard stand on them. An advisory committee might allow a political softening of that stand, and that would clear well over half of the long-term detainees. So we are trying to suggest processes by which some of the hard decisions of the past can be backed down from.

Similarly, there are a number of people who have evidentiary problems in their initial claims—so they have lost credibility in the process—but for whom it is pretty clear that they would face persecution if they were returned home. They have done something wrong in their application. A non-legal, practical review committee could say, 'A humanitarian visa might be the solution. There's a problem in their claim, but four years of detention is a bit of an overreaction to the problems in their claim.'

Senator WONG—You indicated that there are about 187 children still in detention in Australia.

Mr Glenn—By Australian policy. There are 93 in Australia and 93 on Nauru.

Senator WONG—Has section 417 been used to facilitate the release of many children over the last few years? You made reference to some cases where you say media attention, in your view, has led to the use of ministerial discretion for the purpose of releasing children. Do you have any figures telling us how often that has occurred?

Mr Glenn—No, I do not have figures. I will not name the family, but there is the case of the child in the photo and two brothers who have just been released under 417, as I understand it. There was a famous case on *Four Corners* of a child released by ministerial discretion. There are others in similar circumstances who have not been released. There are no statistics available on the success or otherwise in that regard.

Senator WONG—Is it correct to say that, from your experience, the majority of positive 417 decisions that have allowed a child out of detention have been associated with some sort of public campaign around that child?

Mr Glenn—It is not entirely the case. For example, the public attention to the Bakhtiari family has not helped them. In fact, I think it has damaged their claim. We do not recommend that our supporters take a lot of individual cases to the media because of the Bakhtiari experience, but many stories would horrify the public. That is why we are so desperately keen for the human rights commission report on children in detention to come forward—they looked at many of these cases and, whilst it is a couple of years since they took evidence, many of those children are still there.

Senator WONG—Was the December announcement last year by Minister Ruddock that the government would look to different alternatives for detaining children followed by any change for most children who were then in detention in Australia?

Mr Glenn—Frankly, no. An alternative housing arrangement is now in place in Port Hedland and there are two children living in it. It has actually got worse for those who are in Woomera. With the closure of Woomera Detention Centre, the five children who are in alternative accommodation in Woomera are now separated from their fathers, who are in Baxter. So they have to be bussed backward and forward from Baxter to Woomera to have any family contact. That has been enormously stressful for those families. So, essentially, the good work that government backbenchers did in raising these issues with the minister and getting some changes announced has come to very little.

Senator WONG—In your organisation's view, is the detention of these children consistent with our obligations under the Convention on the Rights of the Child?

Mr Glenn—Absolutely not. I will read from what I described in 1998 as the dummy's guide to the Convention on the Rights of the Child. It said that the convention includes the right:

- to protection from torture, capital punishment and deprivation of liberty. This includes a provision that the arrest, detention or imprisonment of a child is to be a last resort only

We were talking about this as it applied to other countries in the world in 1988. We never expected it to apply to Australia.

Senator WONG—Do you think most Australians understand that the system the government has is pretty obviously breaching these international conventions in respect of children?

Mr Glenn—I think that the acquiescence that was there amongst the public a couple of years ago on these hardline policies was in a context of fear of a new world order and insecurity. All of the research that we have done shows that insecurity was the major factor in attracting support. Two years down the track, with no boats having arrived for a couple of years and the fact that there are still 187 children in detention, the public is uncomfortable with it. If you listen to talkback, even the hardline talkbacks that I go on whenever I cannot get out of it, they say, 'We don't support children being in detention.' Yet the children remain in detention. The opinion poll that was released on Sunday shows that attitudes are softening terribly. Over 61 per cent of

Australians recognise now that refugees are no threat to Australia's security. So I think that attitudes are changing, yet those children are still in detention.

Senator WONG—How long have some of these children been in detention?

Mr Glenn—When we look at the children in the photograph I showed you, the boy who got a permanent visa two weeks ago had been in detention for three years. The child next to him has been in detention for 2½ years now; the girl, 2½ years; and his brother, 2½ years. Going along the row, the next one has been in detention for three years, the next one three years; the next one, three years; the next one, 2½ years; the next one, three years; the next one, three years; and the last one, 2½ years.

Senator WONG—So we are not talking short periods of time, are we?

Mr Glenn—No, not at all.

Senator SHERRY—Do you have their ages? I would be interested to know the proportion of their lives they have spent in detention.

Mr Glenn—No, not on the statistics we get. Funnily enough, the government does not cooperate with our research on some of these things, so drawing out some of the information is very difficult.

CHAIR—Thank you for your submission and for answering senators' questions today. I think there is a question on notice from Senator Johnston that you will undertake to answer—is that right?

Mr Glenn—Yes.

CHAIR—Thank you.

Evidence was then taken in camera, but later resumed in public—

Dr Crock later agreed that her evidence should appear in the public transcript. At a meeting on 11 February 2004 the committee agreed to publish Dr Crock's evidence.

CROCK, Dr Mary Elizabeth, (Private capacity)

CHAIR—Thank you for appearing today. For in camera proceedings, we ask you to state the reasons why you wish to proceed in private. Could you state those reasons briefly for the committee.

Dr Crock—I am a bit of an unusual academic in that I continue to hold onto my practising certificates and I have had experience directly in acting for refugee claimants. I think one of the reasons why it might be useful to have this evidence taken in camera is that, should you wish to ask me questions directly involving specific refugee claimants, I would only feel comfortable responding to you if we were able to keep the identities of the people involved secret.

CHAIR—Is it is the wish of the committee that we proceed in camera? There being no objection, we will now proceed in camera. Now we are in camera, I am required to read a short statement: the parliamentary privilege resolution requires me to advise you that it is in the power of the committee to publish in camera evidence, although we must advise you if it is our intention to do so. The Senate also has the authority to order the production and publication of undisclosed evidence. It is important that you be aware of the committee's and the Senate's reserve powers in this matter. I now ask you to provide your evidence. Do you have an opening statement that you wish to make? I am happy to proceed with an opening statement, if you want to make that first.

Dr Crock—I have said a lot already to you in open session about my concerns with the current system that we have. I suppose the issues that I would like to explore with the committee today relate to the culture of arrogance that the current system has created within the bureaucracy. From my personal experience, the whole process of applying for an exercise of the minister's personal discretion strikes me as being an extremely arbitrary one that really does depend very much on who is making the application rather than on the merits of the case in hand. I can talk to you personally of my experience of how that has worked.

In many respects I am much less concerned about those who have got through the system than I am about those who are not getting through the system. For some people who are talking about this inquiry—both in parliament and outside it—it seems to me to be a bit of a game, trying to see who can trip who up and who has been corrupt and who has not been corrupt. As I stated in my open evidence, my concern really is with the systematisation of a regime that focuses all the power on one person but in so doing actually creates this barrier—this impermeable power—within the department, because if a person's case is not taken through to the minister personally then there truly is nowhere for that person to go.

When I talk about a culture of arrogance—and a culture of corruption too, in the looser sense of the word—I see this in the creation of a regime that allows the politicians to send a message through to the administration that will say something as simple as, 'There are to be no further temporary permits issued to TPV holders—full stop.' The bureaucracy under the present system

really has the ability to take that on board and make it very difficult for people to either expose what is going on or do anything about it. It is a particular concern I have at the moment.

We talked last time about the relationship between the offshore program and the onshore refugee program. The same thing is happening there in that there is a real potential for a culture of imperviousness whereby politicians can send out directives. At the moment, because of all the concentration on the issue of offshore visas and so on, we are seeing for the first time in years a good number of real refugees coming in through the offshore program, and that is fantastic—it is great to see. It certainly runs right against the current that was dominant before a year or two ago. If you have a look at the statistics, the number of 'humanitarian' cases coming in through the offshore program far outnumbered the number of people who were allocated the title of 'refugee' by the UNHCR. So, to summarise, my concern is much less with who is getting in under this system and who is exercising what degree of influence than it is with the arbitrariness of the system and the lack of accountability that has crept in.

CHAIR—Do you deal with section 417 applications on behalf of clients? Do you still practise in the field?

Dr Crock—I have in the past. I still have a full practising certificate. I have applied this year for my migration agent certificate. I get a bit of grief each year. They find it a little difficult to fit academics into the migration agents registration scheme. All things being equal, I should be registered again shortly. So I have all of my qualifications to keep practising. In fact I do not take many cases on because I am rather busy at the moment with all the things I have going on in my life.

Having said that, in the past I have interceded on behalf of individual claimants. In part this is due to the fact that I have known Mr Ruddock for many years. I think in some ways he has treated me as a bit of a wayward daughter. I have known him since I set up a legal service in Victoria in 1989. He was very supportive of what we were doing at that time. I think because I have become an academic at his old alma mater, I do not know why but he has made considerable efforts to keep in contact with me. One of the reasons why I felt a little uncomfortable about giving evidence in open session is that I have always had an open door arrangement with him. He has always given me the time of day and my success rate, certainly until recent times, has been 100 per cent.

CHAIR—That is what I was going to ask you. In pursuing ministerial intervention you have had contact with the relevant minister and I understand from what you have just said that you were granted access. In your view, was that more favourable than it was for others?

Dr Crock—I am very careful in the cases that I take up, and I think he respects that. He knows that. Having said that, some of the cases I have taken on have been absolute end stage, failed in the High Court cases. He always played the game. One of my concerns with the whole discretionary system is really summarised by what I would call compassion fatigue. It was very evident in Mr Ruddock. He had an answer for absolutely everything. You could not make a single criticism that he could not come back straight away with an answer to, saying, 'You have been duped.' His typical response when you took cases to him would be to ring you at 7.30 in the morning on your mobile and say, 'Mary, I have read all your submissions. I reject them all'—dramatic pause—'but I have decided to give her a visa anyway.' It put me in a very

awkward position in a sense in that I do not think I have ever particularly held back in my criticisms of the government. In fact, I have happily gone head-to-head with him. Interestingly, his staffers have often reacted very adversely to that. He really does induce a lot of faithfulness.

CHAIR—Loyalty.

Dr Crock—Yes, loyalty in his staffers. I think my criticisms have often met with a lot of anger from them. He likes a good stoush, as you all know.

CHAIR—When you say that attracted anger from them, do you think it was because you have been granted intervention in certain cases where you have made representation to the minister and they thought that in response you should be less vigorous in criticism directed at the minister? That is in their mind; I am not saying that is the case.

Dr Crock—I think that it has something to do with the notion of compassion fatigue. I really believe that the minister and a lot of his staffers thoroughly believe the rhetoric that they put out all the time. So to have someone come in and answer that rhetoric calmly, dispassionately and very effectively in a public forum angers them greatly.

CHAIR—You have talked about the treatment you have received in terms of ministerial intervention. A number of submissions have indicated how difficult it is to understand the process. Do you think it is hard to understand the process or do you think that you are advantaged by having that contact with the minister?

Dr Crock—My point is that I really feel that a lot of the time, unless you have a personal contact, you just do not make it through. There must be any number of cases that merit intervention as much as the ones that I have taken to the minister. That is my point. My concern is not with who has been granted a visa; it is just that you have a system here that really does not work on its merits.

CHAIR—And do you think it is open to abuse?

Dr Crock—Absolutely.

CHAIR—By?

Dr Crock—Abuse in the sense—if you take it just in the most unemotional way—that to have a system that privileges an applicant on the basis of who is interceding on their behalf is corrupt, I think. In an administrative process what you really want is a system that is going to treat everybody fairly and equally. If you look at the last few people, the last few Afghan asylum seekers, for example, who have been granted permanent residency, the young man that I was interceding on behalf of most recently was granted permanent residency the day after I gave evidence the last time. That must have been going through the pipeline and he pushed it through just before he left to go overseas. I think with the penultimate one, the intercessor was a former Governor-General of Australia. A system should not work like that.

CHAIR—Thank you.

Senator JOHNSTON—Doctor, you are a doctor of laws, aren't you?

Dr Crock—Yes. Don't trust me with your appendix!

Senator JOHNSTON—You have known the minister for some long time. How many years?

Dr Crock—I would say I would have met him in about 1987 or 1988.

Senator JOHNSTON—You practice in this area of administrative law as an academic? Excuse my ignorance—I am from Western Australia. Tell me a bit about yourself.

Dr Crock—I was born in Perth, Senator.

Senator JOHNSTON—Good.

Dr Crock—So I am a sandgroper too.

Senator JOHNSTON—A wonderful place. Tell me about what area you practice in.

Dr Crock—I was born in Perth and raised in Melbourne. I went through Melbourne University and became a lawyer. Eventually, after doing this and that, I ended up falling into a practice of some kind in immigration in the mid-1980s. There was not really a practice for lawyers at that time; it was very much something that was the preserve of migration agents. To cut a long story short, I helped establish the first legal service in Melbourne dealing with immigration refugee issues, and I cut my teeth as a very young lawyer with the arrival of the first Cambodian boat people. In fact, just last week I got articles in Melbourne—

Senator JOHNSTON—Are we talking late seventies, early eighties?

Dr Crock—No, the eighties—30 November 1989 was the arrival of the first boat people. So I cut my teeth very much with the Labor Party in power, and that is when I first—

Senator JOHNSTON—You are currently an academic?

Dr Crock—Yes.

Senator JOHNSTON—But you obviously have specialist expertise, both practical and theoretical—academic—in this area of the administration of immigration laws, its framework et cetera.

Dr Crock—Yes.

Senator JOHNSTON—That would set you apart from probably 99 per cent of other legal practitioners in this area. They do not participate in the academic and theoretical side of it as much as probably you do.

Dr Crock—Yes, there are a few of us around.

Senator JOHNSTON—There are a few of you around, but you yourself would be a bit of a—

Dr Crock—Freak!

Senator JOHNSTON—a leading hand on the subject such that the minister would respect you and view you slightly differently from the migration agents and the lawyers who practice in this area on a regular basis, because you have a comment—you have made two submissions to this committee to this point. The minister is a bit of a quintessential lawyer himself, isn't he? Wouldn't you describe him like that?

Dr Crock—Oh, yep.

Senator JOHNSTON—So it is not extraordinary—the relationship that you would expect to have with him given your association since 1987—is it?

Dr Crock—I can understand what you are saying, and that is true: I have got a long association with him and, yes, you might expect it on the basis of that. A lot of his associations are with people who he has known for a long time.

Senator JOHNSTON—And he likes a joust!

Dr Crock—He has been in this area for a long time—that is true. My comments go to the system, though. They do not just go to him, all right?

Senator JOHNSTON—Certainly. That is right.

Dr Crock—One point that I would make about the tenure of the former minister—and I re-emphasise the point I made before about compassion fatigue—is that, having been in this area for so long, he had an answer for everything. One of the reasons why I have come back to speak to you in camera is that this is not a game for me. At the moment I am doing a research project looking at separated children in the refugee determination process all over the world. It is not a game for me. I see these kids, who are now 14 but who came to Australia a couple of years ago—

Senator JOHNSTON—Or five or six.

Dr Crock—yes—and the system is having a devastating impact on them. They are great kids; they are terrific kids.

Senator JOHNSTON—I understand that. The point I am making is that the minister is the sort of person who is respectful of your capacity and expertise in this area. That is the point I am seeking to make.

Dr Crock—Sure. But the point I am trying to make here is that—

Senator JOHNSTON—It should not be like that.

Dr Crock—it should not be like that. You should not have a system that works like that.

Senator JOHNSTON—Given that there are three ports of call before you get to the minister, potentially four—

Dr Crock—Yes, but you have to have a look at what I was saying earlier about it. What you are seeing within the immigration field now is very much a reflection of the whole ethos that has developed since the 'children overboard' affair. What you are seeing is a concentration of power in the highest political circles—or should I say 'interference' from the highest political circles—when it comes to the bureaucracy's treatment of these issues. I am sorry, but the ports of call that have been set up actually do not work to remedy the system as it has been established.

Senator JOHNSTON—Why do you think that 2001 is a watershed in that event? You talk about 'children overboard'. These tribunals have been in existence in one form or another for a lot longer than that.

Dr Crock—One of the by-products of my particular position—and you are right when you say that I am unusual—is that I have been in this area for a long time and I have gained a degree of prominence. I have all sorts of people come to me and seek my advice or seek intercession or tell me about what is happening behind the scenes. All I can say to you is that some of the representations that I am getting from within the immigration department are highly concerning when it comes to the degree of interference with the merits of cases—such that, for example, in relation to the current Afghan refugees in Australia who hold temporary protection visas, the word has gone out in the department that nobody is to be granted another visa. That is what I am hearing through the department and I am seeing it through the kids who come to me.

Senator JOHNSTON—That is anecdotal, of course.

Dr Crock—I have not seen a single acceptance case. I have seen identical rejection letters coming through, all of which contain the same fundamental legal error: a refusal to treat these people as refugees and to recognise that they are refugees. It pervades every single TPV rejection letter that I have seen to date. There is that sort of political interference. Combined with that is something else I have been hearing about the placement of officers within the department: the rewarding of people who are prepared to be harsh within the department. If you do your statistical analyses—I cannot do that as an academic; you can do it from behind the scenes—within the bureaucracy and within the review authorities as well, you see that people are put on short-term contracts and they are reviewed.

Senator JOHNSTON—Are you saying that if you were to intervene on behalf of the TPVs there would be a strong chance that such a determination would be reversed?

Dr Crock—Sorry?

Senator JOHNSTON—Are you saying that if you were to intervene and to take the case on for the TPV letter receivers who have been told that their visas will expire you would expect that there would be a substantial chance of success?

Dr Crock—I do not know the present minister.

Senator JOHNSTON—That is a good answer. I keep forgetting that we have changed ministers.

Dr Crock—In relation to the former minister, my intercession in relation to not the TPV holders but those people who were denied a TPV has to date been 100 per cent successful.

CHAIR—And, under the previous minister, you would have expected that to continue?

Dr Crock—I do not know about that—it depends. Again, I have been very—

Senator JOHNSTON—How many have you done? When you say 100 per cent, are we talking about five, 10, 15, 20 cases?

Dr Crock—It would certainly be less than 10 cases. In recent years I have not been taking them on at all.

Senator JOHNSTON—But you are pretty discerning when you take them on.

Dr Crock—Certainly.

Senator JOHNSTON—They are time-consuming and you do not give up your valuable time—

Dr Crock—I said that before; I said that I am very careful with what I take on.

Senator BARTLETT—You said that you cut your teeth back in 1989 with the Cambodian arrivals. Without going through that whole saga, one of the ironies of the current focus on ministerial discretion is that the previous Labor ministers did not use it very much at all. Robert Ray, in particular, virtually never did. Do you have any comment on why that was so? Was it just that there were fewer cases, or was it the different scenarios or different ministers' attitudes?

Dr Crock—I have very strong opinions as to why that was the case. I really do not think there was the same need for intercession in those days. Ironically, those ministers were much more hands off when it came to letting the process operate on its merits. It is very hard to make comparisons here, because we have been dealing, since 1989, with the highest concentration of genuine refugees ever seen in Australia. What I can say is that there were just not the same efforts made under the Labor government to put pressure on the decision makers to reject people outside of certain categories.

The Cambodians have to be put to one side altogether. In fact, they were ultimately dealt with en masse in a separate way: they were sent back to Cambodia and a special visa class was created for them. I have to say that the politics in this area have always been utterly bizarre. Outside those global groups, which presented particular problems, there just was not the individual pressure on decision makers to reject cases. Compare what happened under Labor—and they were still concerned with a number of appeals that went to the courts, although they tended to be in relation to the global problem areas, such as the Cambodians—with what happened after 1999, when acceptance rates were bumping around between 75 per cent, and 98 to 100 per cent for Afghans and Iraqis. After this started to become such a hot political issue, the

government, I think, applied considerable pressure within the department to try to reduce those acceptance rates down from 98 or 100 per cent. Over a number of years the rates of acceptance were going down, and I think it got down from 100 per cent to about 75 per cent.

That is the statistical evidence that is open to everybody. The anecdotal evidence I have heard from my departmental sources, particularly from people in Canberra, is that absolutely direct pressure was placed on departmental members to be tougher with their assessments, that people were brought in from other areas, such as security and enforcement, and placed in the area, that some experts were removed from the area, in a very direct attempt to drive that acceptance rate down. That did not happen under the Labor Party, I am afraid. I think that, in turn, is reflected in the pressure that was placed. That is what I am trying to say to you when I talk about the corruption of the whole system through the politicisation from the top. You get this edict coming down from the Prime Minister's office and from the minister for immigration: 'This is not acceptable. Get the acceptance rate down.' That did not happen under Labor.

Senator JOHNSTON—How do you know about that? Is someone telling you that?

Dr Crock—I have given you two sources. One is a straight statistical source. I am meeting some of the people who have been rejected, and I can tell you that 10 cases went through the Federal Court just the other day where people were on permanent visas in September 2001—they had been processed and given permanent visas—the law changed on 26 September and those people were called back into the immigration office and were told 'Give us your visas.' The visas were ripped up in front of them and they were given temporary visas. If that is not political interference with the system, instead of allowing the law to take its course, then what is it?

Senator JOHNSTON—What is the edict? You talk about an edict. Is there such an edict, or are you just surmising? Is it a figure of speech?

Dr Crock—My departmental sources said it was an edict.

Senator JOHNSTON—An edict is a written document.

Dr Crock—I am not in a position to bring you the body, am I? All I can do is—

Senator JOHNSTON—So it is anecdotal?

Dr Crock—It is anecdotal, but there is also the surrounding evidence, which you may care to look at or not.

CHAIR—I just want to establish whether, in your view, it was a written edict or an edict in the sense that a statement was made and then followed through?

Dr Crock—I have no idea.

Senator WONG—Could I clarify: the statistical source you referred to—

Dr Crock—Which statistical source?

Senator WONG—Perhaps I will come to it when it is my turn.

Dr Crock—If you look at the statistics that are given out by the government, you will see that they reflect what I have just said to you.

Senator WONG—Do you mean the reduction in the granting of humanitarian protection visas?

Dr Crock—Yes. The minister is on the public record talking about the acceptance rates. Don't you remember what he used to say at about that time? He used to say, 'If you are an asylum seeker from Iraq and you apply for refugee status in Australia, you are six times more likely to succeed than if you apply in Indonesia.' Again, I cannot give you exact references, but I recall him saying—or should I say 'celebrating'—that the acceptance rate had dropped to 75 per cent. Again, that marries with what my internal Canberra sources are saying about the changes of personnel and the direct pressure being placed on people to be harsher in their assessments.

Senator WONG—In their initial assessments?

Dr Crock—Yes.

Senator WONG—Could I go back to the statistical issue. The government has been quite open about its stated policy position of reducing the number of asylum seekers who are granted permanent protection, and I assume that is what you are talking about when you say that there is statistical evidence for your comments earlier. Is that right?

Dr Crock—Yes, for refugee acceptance. We are not talking about permanent/temporary; we are just talking about recognition as refugees.

Senator WONG—You made reference in earlier evidence to there being statistics collated in relation to officers within DIMIA, regarding the rates of approval and so forth. Is that something that has been communicated to you?

Dr Crock—I am sorry, I—

Senator WONG—You made a reference in earlier evidence that you had been told that there was a process whereby people who are likely to be harsher in their decision making had been advantaged, as opposed to people who were seen as being a softer touch. Do you have any evidence of those sorts of statistics being collated by DIMIA and used for the purpose of internal allocation of duties or any such thing?

Dr Crock—No.

Senator WONG—Can we go back to your 100 per cent success rate.

Dr Crock—I would not actually claim it to be 100 per cent, I have to say. Last year I remember there was one case where I made some representations. They were not as full as some of the others that I had done, but I certainly got nowhere near the minister. I think I got a call

from his office saying that the person on whose behalf I had interceded should be on the plane right about that time.

Senator WONG—So it is all but one. Obviously, as Senator Johnston said, you are reasonably well known in this area, but you are not alone in that. There are other academics who have significant expertise.

Dr Crock—It is a small pond, I think you could say.

Senator WONG—The sort of conversation that you described as occurring between you and the former minister—and I mean no criticism of you in this—suggests that, despite a rejection of the submissions made, the visa was going to be granted in any event. Do you have a view that your clients—I am not sure whether you charge them or not—or the people on whose behalf you represented were advantaged by your relationship with the minister?

Dr Crock—That is very hard to say, because, generally, I would have been one of a team. In fact, I have worked with an incredible number of people from every imaginable political background, with the exception of the One Nation party, I think. I have taken cases up with Senator Helen Coonan and all sorts of people. Perhaps my involvement helped. I am not that arrogant.

Senator WONG—It is not a question of your perception of yourself; it is an observation based on the assessment you make of the system, which, I think you have said on a number of occasions, in both open session and in camera, is a system that privileges those—

Dr Crock—Those with connections.

Senator WONG—Yes.

Dr Crock—Yes, that is right.

Senator WONG—What I am saying is that, from the evidence you have given today, your own experience actually confirms that.

Dr Crock—Yes, I felt that very strongly for a long time. I have felt that I am in a position of privilege. I suspect it has a lot to do with being one of the only academics in this area with dirty hands in that I am also a practitioner. I am not just a theorist.

Senator WONG—Let us just unpack that a bit. Does the fact that you are one of Australia's leading academics in this area necessarily mean that the people whose cases you take on have more weighty cases for humanitarian intervention than those that any other migration takes on?

Dr Crock—I suppose, like everybody, I tend to work through or take on cases that are of interest for a variety of reasons. Sometimes it is because of the particular legal complexity of the case and that is how it has come to my attention. On other occasions I have taken on people with absolutely no particular legal complexity in their cases; it is just that they have been brought to my attention because of the humanitarian aspect of it.

Senator WONG—And your legal expertise in respect of those cases, with all due respect, is not the critical issue, is it?

Dr Crock—It is not relevant at all, no—with the exception of only one case. There was one case where the complexity of the submission that we made was based on an analysis of how the law could not help the individual involved. On Senator Johnston's point from before, you think about the system being a Rolls Royce system that has all of these checks and balances in it but a lot of the time if a case is not dealt with sensitively enough the person never gets to put their case effectively. A particular example I was thinking of was a young woman whose claim was based essentially on an assault of a very personal nature on her. I discovered when I became involved in the case that she had never had a woman involved in her case. She had been interviewed when she first arrived in Australia by a woman immigration official but beyond that point she had been appointed all males. She had a male adviser; she was interviewed by a male DIMIA officer. On appeal she went to the RRT. The first thing I asked her was, 'When did you first tell them that you'd been sexually assaulted and this and the other had happened to you,' and she said, 'About 2½ months after I had arrived in Australia.' Someone like that the legal system cannot help, because the law is only there to find legal flaws; it cannot correct failures that operate at the very first point.

Senator BARTLETT—Exploring a few different groups of people, and I do not want to get too much into the history, but going back to the Cambodian scenario—partly because I am not 100 per cent aware of how that played out—my subsequent recollection of what happened is that with that group there was basically a special visa category determined for them after they were sent back. There was a political solution, if you like. Going with your comment before about the politics involved in various situations, a vaguely similar parallel that springs to mind is the East Timorese, where in hindsight it appears now that there was probably an intention all along by the minister to use his discretion to assist the vast bulk of these people and—for what seemed to me to be political reasons, although he may say it was for legal purity reasons—he did not want to create a special category and therefore have to go down this path.

Is the potential there for the same sort of thing to happen with the Afghani TPVs where they basically decide, 'Okay, they'll all be knocked back. Then we'll put them all in the pile and have a look at them using this discretion'? I have not got any signals that that is the case, I might say, but is this potentially becoming a way of being able to deal with these outside of the legal system to enable better political management?

Dr Crock—I think the point is you either have a legal standard or you do not. Where you set the system up so that the legal rules cannot run their course you really are corrupting the system.

Senator BARTLETT—But even going back to the Cambodians, was it the case that the legal system was not able to deal with their situation?

Dr Crock—It is interesting you should say that, because one of the criticisms that was made, and actually upheld in the Federal Court, was that there was a group directive made: 'No Cambodian is to be granted a visa.'

Senator BARTLETT—That was found by the court?

Dr Crock—Yes. They found that there was institutional bias—it was quite interesting, actually—in a test case bought be a young woman called Mok Guek Bouy.

Senator BARTLETT—Was that the 1989 version of a ministerial edict?

Dr Crock—Yes. The same thing happened. In some ways, that matter was resolved because the Federal Court brought them up short. She won her test case and the government, by that stage, had something like 40 actions running across Australia. I had a bit of a hand in it. The easiest resolution was to allow them to go back to Cambodia for one year, where they were placed on a government stipend, before they were all sponsored back into the country. I think we sent about 400 people—I have not got the correct figures here—back to Cambodia and about 600 returned, as some of them got married.

Senator BARTLETT—It seems to me that some of the words you and others have used with regard to the department, such as departmental arrogance or corruption—in the more benign sense of the word, perhaps—makes it seem, at best, a fairly cumbersome and clumsy way to deliver a just outcome. In a sense, we have still got the same situation now.

Dr Crock—I think the situation is worse now, because people are being pressured to go back to a country that is patently unsafe to return to, for a variety of reasons. It is absolutely inappropriate to send many of these young people, who have now been in Australia for three years or longer, back to a very unsafe situation. It does not matter who is in power there, these people are going to be at risk. It is not just a case that these people are being placed in limbo; they really are being pressured greatly to go back to a situation where they face pretty dire dangers.

Senator BARTLETT—Finally, on the point of structural corruption—and again I use the word 'corruption' in a more benign sense—you have talked about getting information from inside the department with people telling you about the atmosphere in there and about perhaps some strong pressures to get particular outcomes. My next question is probably going a bit broader than sections 417 and 351—it is the whole determination process, which might be going outside our terms of reference—but is there anything specific about the immigration department that heightens the risk of improper pressures in decision making? There is always a risk of bureaucrats making decisions that people are not able to properly scrutinise and improper interference, but are there any aspects that make it more of a risk in the migration area?

CHAIR—Can I ask you to answer that with particular reference to sections 351 and 417, to keep it within our terms of reference?

Dr Crock—I think the danger here again comes back to the question of who is accountable for what. I am not aware of any other administrative process in Australia that has such a heavy focus of involvement of the responsible minister within a department such that an edict from above can have such a dire impact at an operational level within the department.

Senator JOHNSTON—There is actually quite a number. The granting of mining tenements by most states is a power that resides almost exclusively with state ministers.

Dr Crock—Except there is a big difference between something like mining, which deals with quintessentially inanimate objects, and an area that actually deals with real, live human beings.

Senator JOHNSTON—Private rights are at stake in both instances.

Dr Crock—Life and death is not at stake, though. People are dying through this. You have had TPV holders committing suicide, throwing themselves over high-tension wires. It is not a game. I tried to say that at the beginning. These are real people. The young person on whose behalf I was interceding was in the direst medical state. I would ring up and think, 'God in heaven, when are you going to intervene?' Fifteen months they kept us waiting. He was in and out of psych wards; he was absolutely suicidal on a number of occasions, and they would come back every time with an answer saying, 'It's your fault.' They would always turn it around somehow—that it was our fault, that we were doing this and we were doing that. It is the casual cruelty of this system that really gets me going. When you get out there and you see how it operates in practice, you find this casual cruelty.

The minister, in response to these suicides, has pointed his finger at the advocate, saying, 'It's your fault.' It is just mind-blowing the way that he has had an answer for everything and has slipped away from any sort of responsibility. I have never experienced the extent of the suffering that is happening in Australia in the refugee area, and I have been in this area for an awfully long time. I have never experienced the degree of suffering that I am seeing nowadays. And that has got to be as a result of the way the system is working and the politicians who are so deliberately taking responsibility for this. They say they want it, yet they are not owning up to the human pain that it is causing.

Senator JOHNSTON—Isn't it about 16,000 people in the last four years?

Dr Crock—I am sorry?

Senator JOHNSTON—Haven't about 16,000 unauthorised people come in over the last four years?

Dr Crock—It is fewer than that, isn't it?

Senator JOHNSTON—No.

Dr Crock—There are now 8,000 TPV holders.

Senator JOHNSTON—But I am talking generally—about people who are coming into Australia and pressurising the system from stem to stern.

Dr Crock—Since 1989 we have had about 12,000 people come and claim asylum here.

Senator JOHNSTON—Yes, that is the number of unauthorised entries in the last four years. The statistics that I am looking at today that have put to us in a submission show that there have been 16,000 unauthorised entries since 1999.

Dr Crock—About 4,000 a year. And? What is your point?

Senator JOHNSTON—That is an extraordinarily large number, compared to what had been going on previously.

Dr Crock—That is a tiny number; it is a tiny number. The only reason that we have been able to behave with the consummate cruelty that we have is because of the tiny numbers we receive.

Senator JOHNSTON—Not for us it is not.

Dr Crock—We are a huge country, Senator.

Senator JOHNSTON—It might be a tiny number globally—for Europe, for example—but for Australia it is a substantial increase.

Dr Crock—We have created the problem—we really have. We should deal with it the way that we used to deal with it: by giving people who are recognised as refugees permanent residence and letting them get on with their lives. We took in 30,000 people over the period from 1989 to 1994. This is arrant nonsense, saying that we have had 16,000 and this is a huge number. Tiananmen Square—

Senator JOHNSTON—I am just looking at the statistics—I can tell you the submission.

Dr Crock—You can play with statistics till the cows come home.

Senator JOHNSTON—They are not my figures.

Dr Crock—We had 30,000 refugees from China who were given permanent residence here, who settled very happily into the community. There was none of this angst that we have nowadays.

Senator JOHNSTON—They did not come in boats. They did not come in circumstances where their health status and their security status was completely unknown.

Dr Crock—We are talking about people who have been through the process and have been recognised as refugees. The TPV holders have been through the process. You can forget all the boat stuff; I am talking about people who are recognised as refugees.

Senator JOHNSTON—You are talking about the 8,000?

Dr Crock—Yes.

Senator JOHNSTON—Right. Okay, the 8,000.

Dr Crock—What is your comment on my reflection that we have never seen the degree of human misery in Australia—

CHAIR—Unfortunately, Dr Crock, Senator Johnston is the one entitled to ask questions!

Dr Crock—Sorry. Thank you, Chair.

CHAIR—As much as we would like to sometimes, we do reserve that capacity! Senator Johnston, did you have a follow-up question?

Senator JOHNSTON—No, I do not have a question. I will come back to the issue.

Senator SHERRY—I have two questions. Following on from that last conversation you were having, do you recall the number of Vietnamese refugees we got in Australia in the mid-1970s, in 1974-75, after the fall of Saigon?

Dr Crock—Direct boat people who came directly to Australia? We have had no experience of boat people here really, in practical terms, because of our geographic and political isolation. We had just over 1,000 boat people arrive in Australia, including one boatload that arrived in the garden of the chief immigration official in Darwin. But we took in more than 200,000, I believe.

Senator SHERRY—I did not think it was that high.

Dr Crock—Yes. It changed the demographic face of Australia. There were absolutely huge numbers. They came under what was known as the orderly departure program, so they were settled. Some came direct from Vietnam and some came from all of the camps in the region, but we took in huge numbers.

Senator SHERRY—Do you believe that, in at least some of the cases that you handled in which you were successful with the minister because of your relationship, if someone else had represented those people they possibly would not have been successful?

Dr Crock—It is hard to say. As I said before, I do not think there has been any case—maybe one case—where I was the only person who was interceding on their behalf.

CHAIR—It is a very hypothetical issue.

Senator SHERRY—We are entitled to ask hypothetical questions.

CHAIR—I know.

Senator SHERRY—Let me put this hypothetical question another way then. Can you think of any cases that have similar circumstances of background and similar facts to your knowledge where people did not obtain a TPV?

Dr Crock—Certainly.

Senator SHERRY—What does that lead you to conclude?

Dr Crock—I am on the record as saying that any system that operates according to who is interceding rather than on the merits of the case and on the law properly applied is a system that is corrupted.

Senator SHERRY—You mentioned getting a phone call from the minister at 7.30 in the morning—he would ring you and discuss these matters. I have some idea about the workload of ministers. Why would he be ringing you on a one-to-one basis on these types of issues? I find it quite extraordinary that a minister would do that.

Dr Crock—You have to go back to 1981 and Ian MacPhee to find a minister who micromanaged as much as Minister Ruddock did. He had an extraordinary capacity for work. The case I referred to before was the case of Seniet Abebe. Virtually every senator I know interceded on her behalf, including Senator Bartlett, Senator Harradine and Senator Coonan. I took up a submission—it was 60 pages long—and went to see the minister. He spoke to me for 45 minutes and took me to page 58 in the attachments to the submission. He had an extraordinary capacity for attention to detail. I would never accuse him of being slack in his ministry. He was extraordinary; just amazing.

Senator SHERRY—Thanks.

CHAIR—Thank you, Dr Crock. It seems that we have concluded. We do appreciate the evidence in camera that you have provided. If there is any reconsideration of the evidence you have given in camera—if you do decide or wish to change the status of that—then you can notify the secretariat. There have been a couple of names and cases mentioned. If there were portions that you thought you wanted to change then by all means do so. If not, it will remain in camera.

Dr Crock—I am happy to leave that to your discretion, if you like.

CHAIR—If you are happy to leave it to our discretion then I will happily take that—

Senator SHERRY—I am sure the minister will want those comments about his hard work on the public record.

CHAIR—I will take that on board.

Dr Crock—Could we excise the cross-questioning of Senator Johnston?

Senator WONG—No. It is good for your reputation, Dr Crock.

CHAIR—If we decide to publish we will be in contact with you and let you know what portion will be published. Thank you, Dr Crock.

Dr Crock—Thank you.

[4.48 p.m.]

COSENTINO, Mr Clyde Patrick, Caseworker, South Brisbane Immigration and Community Legal Service

CHAIR—I welcome by teleconference Mr Clyde Cosentino of the South Brisbane Immigration and Community Legal Service. You have lodged your submission, No. 21, with the committee. Do you wish to make any amendments or alterations to that submission?

Mr Cosentino—We are satisfied with that submission.

CHAIR—I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Mr Cosentino—Senators, I do not want to add too much more to what is written in my submission. Our experience here at the South Brisbane legal service has been over a period of 20 years. In the last few years we have dealt with many persons who have come in at the end of either the Migration Review Tribunal stage or the Refugee Review Tribunal stage and are seeking advice as to where they go from there. We certainly advise all of them, but to many we simply say that they do not fit within the ministerial guidelines that have been set. However, there are those who we do accept and take on as clients. Those clients are normally those who have children who are Australian citizens or a spouse or de facto spouse who is an Australian citizen or a permanent resident in Australia. The other category is persons about whom there is a strong humanitarian concern but they do not fit within the strict definition of the 1951 Refugee Convention.

We have four part-time caseworkers. We work at a free community legal centre. Our concerns as caseworkers are that 417 and 351 matters are not transparent. Much if not all of the time, when a decision comes back it is simply that the minister will not exercise his discretion—at that stage it was 'his'—with no reason given whatsoever. Our concern was that there were no written reasons as to why a particular person did not fit within the guidelines. So our first concern is transparency.

The second concern is consistency. While we can advise our clients that if they have Australian citizen children and/or an Australian citizen spouse or permanent residence spouse, there is a chance that the minister will consider this application, there will be other issues such as character issues and other matters such as genuineness of the relationship and, in our experience, that has been more consistent in the last year or so. However, when it comes to humanitarian matters, we are at a loss to know whether a person will fit within the ministerial discretion guidelines, and we are unable to advise the client at all as to the prospects of their case. So we do have a concern in relation to the humanitarian side of things. Also in relation to consistency: we have just got used to a minister and now there is a new one. We are unsure as to how the new minister will apply the guidelines or whether the guidelines will be changed entirely. Our concern is that as ministers change the guidelines change, and so does the accountability.

Finally, we still believe strongly that a humanitarian visa at any stage of the proceedings should be included either at the beginning stage or at the review stage, giving the tribunal member an option. Many clients who come to us at the very end have stated, 'We didn't think that we fit within the strict refugee definition. However, we will be persecuted and we will be killed if we return to our country of origin.' We have a perfect example of a particular matter of a person from an African country who came to us. When he saw us we advised him that we could not see where the convention reason was, but from the evidence that he had presented in front of us we said that there was a strong humanitarian concern and that it should be emphasised at the tribunal. We assisted with the legal submissions. So strong was the evidence that the tribunal member then included in the decision that there was a strong humanitarian argument. We believe that it was that inclusion at the tribunal stage that assisted the client to have the matter considered before the minister. Again, that is arbitrary because not all members will do that, and we are unable to know when the tribunal member will actually take that on.

The humanitarian visa is something that can be offered only at the end stage. A person has to jump the hoops by applying for a protection visa, getting to the tribunal, and then getting to the minister in order to argue a humanitarian class of visa. We would state that it would be good to include some sort of humanitarian visa class at the very beginning or at the review stage. Apart from that, I think you have already read the submission, which I admit is brief. If you have any questions, I am happy to try and answer them.

CHAIR—Thank you, Mr Cosentino.

Senator JOHNSTON—Your submission raises concerns about discrepancies in the way departmental case officers interpret the guidelines. Can you give us some examples of the differentials between decisions that you have come across in your practice in this area?

Mr Cosentino—I have the guidelines in front of me and I am looking for the specific part. Section 4.2.2 of the guidelines says:

Substantial grounds for believing a person may be in danger of being subject to torture if required to return to their country of origin, in contravention of the International *Convention Against Torture* ...

There is one particular case, going back three years ago—mind you, it is still current—which has been before the minister. It is about a woman from an African country, but I would rather not say which specific country—

Senator JOHNSTON—That is fine.

Mr Cosentino—There was evidence to show that there was clear trauma, torture and rape. Much evidence was provided in that regard: statutory declarations and other documentation. The particular person was at the end of her stage and we applied to minister. It was refused, but it was such a strong matter that we actually applied to the minister three times, utilising members of parliament and members of the community to show that there was a serious concern. It just so happens that this particular person is currently being considered by the minister, but in the first instance her case was refused. In the second instance, there was an acceptance and then there was a refusal. We again had to approach a member of parliament as well as a high-standing member of the community to put forward the case again. Again it is before the minister. So we

are unsure, as each day goes by, as to whether this particular person is going to get another simple two- or three-paragraph letter that says: the minister has decided not to exercise his discretion—for no reasons at all. That concerns us. Our concerns have been humanitarian concerns. That is one example.

We are clearer when it comes to Australian citizen children. Again I have two matters from the Pacific Islands in front of me now whereby the minister is considering the matters because there are Australian citizen children involved. That certainly fits within the ministerial discretion guidelines, which say:

Strong compassionate circumstances such that failure to recognise them would result in irreparable harm and continuing hardship ...

We accept that and thank the minister for actually taking that on board. But the humanitarian matters are something again that we are unable to gauge.

Senator JOHNSTON—In respect of the African lady, were the subsequent submissions introducing different material to the minister on each occasion?

Mr Cosentino—I have to admit that, yes, there was a change of circumstance in that she did marry just prior to—

Senator JOHNSTON—That is a fairly significant alteration, I would have thought.

Mr Cosentino—Yes, I have to admit that.

Senator JOHNSTON—Thank you.

Senator WONG—You comment in your submission—and you have also done so today—about the fact that persons with Australian children are more likely to be supported. How long has that been the case? I think you said today that this is a more recent development; is that right?

Mr Cosentino—I must say that I came here in June 2000. I have to admit that maybe it is because there are, for some reason, more people walking in with Australian citizen children, saying, 'Look, we have an Australian citizen child. We are at the end stage. What do we do now?' And we are able to look at the ministerial guidelines and say that it is something that we can argue. In my experience as a case worker here, the department has come back and stated, 'We want more information concerning the Australian citizen child and the spouse or de facto spouse that is also a part of this application.' I certainly do not want to say whether or not it has improved in the last few years, but I must say that it has been much clearer as to a next outcome, if you like, after the application is made, in that a letter does come back from the department to say, 'Yes, we need more information. We need to know why this particular person has been here in Australia for such a long time period,' and, 'Tell us more about the genuineness of the relationship.' We certainly want to congratulate the minister, if that is possible, in that, in relation to transparency concerning Australian citizen children and spouses who are Australian citizens or permanent residents, there has been consistency and consideration at that stage. We certainly want to give due regard to the minister in that respect.

Senator WONG—Regarding the humanitarian claims—claims on the basis of humanitarian concerns where there are no children involved—your submission suggests that there is inconsistency in respect of those sorts of applications. Is that your view?

Mr Cosentino—Sorry, Senator. Would you repeat that?

Senator WONG—You say in your submission that your organisation is concerned with the inconsistency and lack of accountability relating to applications made on a humanitarian basis.

Mr Cosentino—Yes.

Senator WONG—How do you correlate that with your discussion about the privileging of applications where Australian citizen children are involved?

Mr Cosentino—With regard to the humanitarian concerns about Australian citizen children, there is nothing that we can pick up which says, 'Look, here are the boxes that have been ticked in order to say you have reached the next level.' We can only advise someone when they come in by saying, 'Here is the ministerial guideline and here is section 4.2.8, which is one sentence—four lines. We will have to argue that particular matter according to 4.2.8 of the ministerial guidelines.' There is nothing further for us to do. It is left in front of the minister; we have no other way of knowing how this matter is progressing or whether a letter will come back and simply say, 'Sorry, we will not be considering this. Thank you very much.' There is no letter that comes back saying, 'This is the reason why this has taken place, according to our guidelines.' It is just a letter that says, 'The minister has decided not to exercise his discretion.'

That being said, we have dealt with other matters of humanitarian concern where those who have applied for a protection visa have children, and where there are strong humanitarian arguments, yet the minister will not exercise his discretion as a result of saying that this particular person does not fit within the guidelines, even though there might be children involved. Again, it is just a one-page letter that says, 'Thank you very much for your application,' without giving any reasons why the particular person failed under the guidelines.

Senator WONG—Is it your observation that the presence of an Australian citizen child is only going to advantage people if they are making non-humanitarian visa applications?

Mr Cosentino—It is interesting. Anyone who goes before the minister has made any application, really. I can give an example of certain persons who came from the Pacific islands who made an application. I cannot remember what the application was at the initial DIMIA level, but it was not a protection visa application; it was another application. They failed, went before the tribunal and were able to make an application to the minister. At the time that may not have been a humanitarian concern but now it has become a humanitarian concern because there are Australian citizen children involved. There are others who have children here who are not Australian citizens and who make applications for protection visa matters and then reach the minister. The minister then needs to consider the applicant as well as the children on compassionate grounds. In the end he has decided not to exercise his discretion and has sent a one-page letter saying, 'Thank you, but I will not exercise the discretion,' even though there are non-Australian citizen children involved. We believe that there are still concerns about sending those particular persons back to certain African countries.

Senator WONG—Some submissions have suggested that there is favourable, or less favourable, treatment of particular ethnic or community groups. Does that correlate with your experience?

Mr Cosentino—No. We look at it on a case-by-case basis. When we believe that there are strong humanitarian concerns for someone who is coming from South America, Africa or the former eastern Europe, we make those applications, but we do not have any experience of some being treated more favourably than others.

Senator SHERRY—We have heard considerable evidence about malpractice in the advisory area. Very briefly, we have heard about at least some migration agents giving incorrect, misleading advice; about cash payments; and about some non-migration agents being involved in giving advice. Do you have any knowledge about those things in the Brisbane area, where you practise?

Mr Cosentino—That is a tough one. Our organisation is a community legal organisation. Therefore, we offer a non-fee-charging service. It is the only one of its kind in Queensland, because four of the caseworkers who are here part time are also migration agents. Even Legal Aid Queensland does not have migration agents operating in it. Matters seem to come to us, whether they are deportation or cancellation of visa matters, from all over Queensland. We give telephone advice, and we do evening advice services with between 30 and 40 registered migration agents, over a period of weeks, who volunteer their services here as well.

In relation to the charging of applicants, I am certainly not the person to be talking to. It is a wonderful privilege to be able to sit down with someone and look at a case on its merits without having to be concerned with whether the person can pay. In fact, our criteria are that, if a person fits within a vulnerable class, is from a non-English-speaking background and fits within a very low means test, then we will consider taking that person's case on.

In relation to the provision of advice by non-migration agents, I can only speak from here. We certainly do not allow that. Our advisers, who give free advice sessions on Monday and Wednesday evenings, go through a strict orientation program before they are even able to provide advice. We have caseworkers then sign off, shortly after the advice has been given, to see that the proper advice was given. Registered migration agents are actually giving that advice. I have not come across any of those other matters which you brought up here in Brisbane. Again, I would not be the person to speak to.

May I say, in relation to the ministerial discretion stage, that not everyone can actually deal with migration agents when it comes to that stage. Many people come to us because we have experience in that area, and we certainly sit down and put together a format in relation to evidence and give advice to the applicant on where they stand in relation to the bridging visas, what happens if the minister does not exercise his—or now her—discretion, and what their options are from that point onwards. It is true, at that stage, that those with migration experience are going to save someone who knows very little about the compliance issues and bridging visa issues a whole lot of heartache.

That said, many others out there do not have the opportunity to actually see a migration agent when their case comes to the minister. There is always very strong and passionate support from a

community—community leaders or mayors or whatever write to the minister and say, 'This person has a strong connection with the community here and we don't want this person to go,' so they certainly send their letters and references et cetera to the minister. I am not sure whether there would be a concern if only migration agents were able to write to the minister asking for that benefit.

As to advice, that must always be provided only by a migration agent. We have had situations where people have come in and said, 'Where do we stand now?' and we have said, 'My God, you're unlawful.' Then we have to go through and regularise their status by contacting compliance and immediately lodging an application to the minister to exercise his or her discretion. Regularising a person's status can only be done by a migration agent. Has that answered any of your questions?

Senator SHERRY—Could you perhaps ask your officers who are giving advice and handling cases in this area whether they have had any reports about what could be considered malpractice from clients or other people practising in the area, and also about the other issues I have raised? Could you provide us with a supplementary submission if you are able to obtain any information in the areas I have asked about?

Mr Cosentino—We will certainly bring that up with all of our volunteer migration agents. Persons are always provided with the information that, if they have any complaints, they should contact MARA. But we will certainly do that. We will at least contact the volunteer migration agents and ask them to inform us if they have any information. If any information is forthcoming from those migration agents, we will then send in a supplementary submission—but only if that information is forthcoming.

CHAIR—In the general overview in your submission, at point 3 you say:

That a framework should be put in place to avoid any misconceptions that there might be a conflict of interest in the Minister exercising his or her discretion to substitute a more favourable decision ...

You then say:

Such a framework might involve the establishment of a recommendatory advisory committee made up of representatives from the community.

Do you want to expand on that? Do you say that there is a need to remove the discretion that the minister has, or to curtail it? If so, what are your reasons for coming to that conclusion?

Mr Cosentino—We certainly do not want to remove the discretion. I may not have made it very clear at the beginning, but we are very strong about not having the ministerial discretion removed. We think there is great benefit in having the discretion there, provided we can see a process. We should not take the discretion away from the minister but we should have, if you like, a level down from that. Rather than just having department officers making a determination at the Ministerial Intervention Unit, or making that determination only if the application gets before the minister—and we are not even sure that the applications get before the minister—there should be some sort of advisory committee made up of a member of the community, a migration agent, a department officer and someone from the minister's department. That

committee could make an assessment of the applications, advise the minister and then make the recommendations to the minister. I suppose we are asking that there be some sort of accountability, so that we can say, 'You made these recommendations, but we think you're wrong—we think you misunderstood the application that is before you and we think you need to look at this issue again.'

I realise and appreciate that that is like opening up a can of worms, that it is almost like asking for a whole review process to be opened up. We understand that that is probably almost impossible, but I suppose we want to take it out of the hands of the ministerial interventions unit as much as possible and have more of a broad-brush approach across the community that says, 'We have looked at this application and we do not see that there is any merit here; we will advise the minister accordingly and send this back to you,' rather than having the department simply saying, 'We've got 5,000 matters on our desk and we're just going to send back a standard letter.'

CHAIR—Do you say then that there is some unaccountability, in relation to both the minister's discretion now and the department's use of the current process, and a requirement for it to be changed?

Mr Cosentino—Yes, there is. I can recall two instances where we have had to directly seek the intervention of an MP to get the minister to look at those matters because we believed—and it is only our belief, mind you, because we are not sure—that they did not get past the departmental level. We believe that there were such strong arguments in those cases that there should have been some sort of consideration given to the matters that we put to the minister, and we did not believe that those matters even got before the minister. We pleaded and intervened with certain MPs, asking could they please put this on the minister's desk so that he could at least look at it and then send it back. Only after we had done that did it happen. That process then allowed for a letter to follow saying, 'We need further information.'

I think that instance is correct. It is the constituent—us—utilising our members of parliament in the best way possible. They are out there to listen to our concerns. We went to various members and we said: 'There is a strong humanitarian argument here and we do not think that it has actually gone past the department. We want you to present this directly to the minister.' They stated that they would. It just so happens that, following that, we received a letter from the department saying, 'Could you please provide us with further information?' Our concern is: does that mean that we have to keep on doing that every time we think there is a strong argument or a strong case? Do we have to go through the most unbelievable means to get the minister to see this particular case? That would be our concern—that there is inconsistency there.

CHAIR—May I say that the evidence presented to the committee so far seems to suggest that you should continue to do that, but that is a matter for you. What is the number of the MSI that you are currently working under?

Mr Cosentino—I think it is MSI 225. Maybe they have changed it since then. I do not think they have changed much.

CHAIR—No, I think the current one is MSI 368, but I am open to correction by the department if it has changed since last I was there. We thank you for the evidence you have presented to the committee and wish you well.

Mr Cosentino—I would like to clarify something. The matters I referred to when I was referring to the paragraph before were certainly with MSI 225, date of issue 4 May 1999—the ministerial guidelines. We certainly do use the current ones; I just unfortunately picked up the old MSI. So, when I was referring to the actual guidelines and the specific paragraphs, I was referring to MSI 225, date of issue 4 May 1999.

CHAIR—Thank you. That is why I took the opportunity to check which one you would operate under.

Mr Cosentino—Thank you.

CHAIR—Thank you very much for your evidence.

Mr Cosentino—Thank you, senators.

[5.25 p.m.]

BITEL, Mr David, Managing Partner, Parish Patience Immigration

CHAIR—I now welcome Mr David Bitel from Parish Patience Immigration.

Mr Bitel—I am the managing partner of the Sydney law firm Parish Patience Immigration. It is in that capacity that I sent this submission to the Senate inquiry. For the record, I am also the national president of the Refugee Council of Australia, which has also sent in a submission. I am not formally representing them here, but I can answer questions about that if the committee wants me to. I am also the secretary-general of the Australian section of the International Commission of Jurists, which has not sent in a submission.

CHAIR—I had noted there was one from Justice Dowd, who sometimes does make appearances.

Mr Bitel—Yes. He and I have spoken. I also am a member of the New South Wales Law Society's migration subcommittee and the Law Council of Australia's migration subcommittee. But, again, I was not wearing any of those hats when the submission was made. I intended it to be a practitioner's submission rather one made in an NGO capacity.

CHAIR—Thank you very much. We thank you for the experience that you bring to the committee. You have lodged submission no. 26 with the committee. Do you wish to make any amendments or alterations to that submission?

Mr Bitel—No.

CHAIR—If you would like to, I now invite you to make a short opening statement, at the conclusion of which I am sure my colleagues will have questions for you, at least in your capacity as a practitioner in the field.

Mr Bitel—I perhaps could indicate without pomposity that I am probably one of the leading practitioners in the area in Australia. I have been practising exclusively in immigration law since the mid-1980s, and my law firm was probably one of the first law firms in the country—the Erskine Rodan firm is a correlate firm in Victoria—to go into immigration in a serious way. So I was around in the late 1980s when there was the Fitzgerald inquiry, the CAAIP report was published and when Senator Ray introduced the new legislative regime.

I can indicate from the outset that I—and probably other practitioners of my ilk—had reservations about the whole schema and the fact that when the new law was introduced, with effect from 19 December 1989, it was stated that the regime was intended to encapsulate the previous discretionary regime but all its features. There was one significant omission, and that was section 6A(1)(e) of the former legislation, which was the compelling humanitarian and compassionate ground on which people could get onshore residence.

I had my researcher get all the material that is before the Senate but I have been away and have not had a chance to go through any of it, so I do not know whether this committee has been apprised of that significant history; if it has not, it really is important. In my view, the purport of the legislation was to capture, if you like, all the cases on what we in the refugee area call complementary protection grounds. The new regulatory regime does not do that. There is no provision for an onshore humanitarian application in any meaningful sense, nor any provision for any onshore compassionate application other than in the defined visa classes under the current visa regime. The residual discretion that was vested in the minister I suppose was intended to capture those two classes, as well as all the other difficult cases.

The failure of the legislation and the regulatory regime to catch these classes has in part been the cause of the abuse of the onshore protection system. As successive ministers have said on various public occasions, they expected that in order for people to access the ministerial discretion they would have to go through the refugee route—even though it meant a bastardisation of the term 'refugee' in its proper legal sense. That has been a matter of the gravest concern to the refugee council and professionals who do not like the way things have gone.

Then of course you had the massive rorting that you saw in the mid to late nineties. You also get things like the current legislation which is before a parliamentary committee, the Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003. That is my opening statement. That is the context within which I have made my somewhat brief submission.

CHAIR—Thank you. I can indicate that the committee has some general knowledge in respect of the history of the matters going back to the Fitzgerald inquiry; but if there is additional information that you do want to make available to the committee, the committee would be only too happy to receive it. We can always make arrangements to have it photocopied and returned to you, if you wish.

Mr Bitel—Unfortunately I do not have a nice succinct thing for you. I can certainly try and look through the archives to see if there are any papers which I had prepared or presented going back over the years. If I do, I will certainly be happy to make them available to the committee.

CHAIR—I will leave it up to you.

Senator WONG—Mr Bitel, in your submission you make the statement that you:

cannot recall one case where Ministerial approval has been granted on "humanitarian grounds"—

with the exception of an Australian connection and particularly one with Australian citizen children. We will leave them out of the picture for the moment. You make that statement, but about how many applications for that type of visa have you participated in? I am not asking for specific numbers.

Mr Bitel—I see the departmental record says that we were the third biggest or the fourth biggest firm—

Senator WONG—In representations.

Mr Bitel—in terms of numbers of representations. We do not maintain the statistics in the office but I got my staff, in anticipation of being asked that question, to try and come up with some figures. I can really only give you figures from the last couple of years. That figure surprised me. I did not realise it was anywhere near that many. I would have thought it would have been somewhere between 100 and 200. But I will accept the departmental figure as accurate for the purposes of this inquiry and say on the basis of that—and this is fairly accurate—that within the last two years we have had no cases approved where there has not been a nexus to an Australian, be it a spouse with some serious compelling reason or a child.

There has been one case, very recently approved—and I did not refer to this case in my inquiry—where the woman involved was an elderly Filipino lady who fitted within the category of an age dependent relative of sorts, although she was not an age dependent relative when she first arrived in Australia. She had virtually no family in the Philippines but, significantly, she did suffer from serious medical problems. She had lupus. That would normally have been a ground for disqualification on health grounds. My recollection is that the power to waive the health criteria does not apply to the age dependent relative category, but the minister exercised his discretion and let this particular woman stay, in view of the particular circumstances of that case.

From time to time you get that sort of case. To answer your question specifically, neither I nor any of my staff can recall a case—where there was absent any Australian connection and where there was a bona fide refugee claim which fell outside the strict definition of the convention—where the minister exercised discretion in the applicant's favour. In every case the minister sheltered behind the decision of the RRT.

Senator WONG—The 291 referred to is a number which would refer to both 351 and 417 requests.

Mr Bitel—Yes.

Senator WONG—Just so we get a sense of what your failure rate—for want of a better term—

Mr Bitel—I think I would certainly fall out under the proposed legislation if they looked at 417s!

Senator WONG—How many—

Mr Bitel—For how many have I had approvals?

Senator WONG—No. What is the cohort? In other words, how many 417 applications would you say you have made in the same period, for which you have had none succeed unless there is an Australian connection?

Mr Bitel—I can certainly identify that later on and send that to the committee.

Senator WONG—Perhaps you could take that on notice.

Mr Bitel—I will take that on notice. But my guess is that it would be about 70 per cent 417s and 30 per cent 351s. We have not had any appeals under—I think it is 419—the section following the AAT determination.

Senator WONG—I do not think we are inquiring into that. It has been put to us reasonably forcefully by a number of advocates that, given that 417 is essentially Australia's answer to a number of international conventions—excluding the refugee convention, the Convention on the Rights of the Child and ICCPR—

Mr Bitel—The torture convention is significant.

Senator WONG—which obviously has particular non-reforming obligations—417 is not succeeding in terms of ensuring Australia meets it obligations. You make the point in your submission that there does not appear to be any audit of that. In other words, where those sorts of obligations arise where the 417 has resulted in visas being granted in respect of those people, the department tells us that that is not possible to do, for various reasons. In terms of your practice, do you have examples of people who have applied for ministerial intervention under 417 where you say there were compelling arguments on the basis of Australia's international obligations?

Mr Bitel—I only know of one case where I made a 417 appeal, which the minister declined. The applicant went back to his country and was killed as a consequence of the refusal of the refugee application. I only know of one case of mine.

Senator WONG—I was not setting the bar quite that high but thank you for that evidence. Was that matter referred to any of the UN committees?

Mr Bitel—No. It was a person who accepted the arbiter's decision, went back and was killed within three months.

Senator WONG—Has that matter received any media attention?

Mr Bitel—No. The family did not want to. It involved a Filipino, in the early nineties.

Senator WONG—Did the person return to the Philippines?

Mr Bitel—Yes.

Senator WONG—Are there other cases which, in your interpretation or your view of the facts, when considered in the context of our international obligations, ought to have resulted in a grant via the 417 stage and have not?

Mr Bitel—Yes, frequently. I am not in the habit of submitting abusive applications or encouraging the lodgment of applications which in my professional assessment have no merit. Certainly there are cases which might be borderline, given there are no defined criteria for what is humanitarian discretion, other than what is contained in the former ministerial policy direction, MSI 225. I have not had a chance to read the new one. There was extensive jurisprudence in relation to the former section 6A(1)(e), which has not been incorporated into the way in which ministerial discretion has been exercised. One would have to say that Minister

Ruddock was by far the most generous applier of the discretion. His predecessor, Senator Bolkus, according to the figures also had a fairly high approval rate. But Minister Hand and certainly Senator Ray made a mockery, if you like, of the whole purpose. Senator Ray was the instigator of the legislation but never approved a case, as I understand it, and yet this was the case in which the former section 6A(1)(e) was supposed to be the catch.

I remember giving evidence to another Senate inquiry in Parliament House in relation to the privative clause legislation some years ago. I remember hearing the evidence from the RRT that in 49 cases—this was in 1999, I think—people had successfully appealed to the Federal Court, the matter was remitted to the RRT and then the RRT found they were refugees. That is not directly relevant here, of course, but it is indicative of the fact that the RRT gets it wrong and gets it wrong frequently. When it does get it wrong, unless there is a transparent and open way in which people can properly have their claims assessed in this difficult area—the humanitarian area—I am convinced that mistakes will be made.

Senator WONG—I now go to the issue of stepchildren. Your submission suggests that, while the existence of Australian citizen children is a plus in terms of the likelihood of getting the minister to grant a visa, that does not apply when they are stepchildren. I presume you base—

Mr Bitel—Certainly that is based on my professional experience. There may be other cases where it does apply. But I have had cases where I considered it to be clearly meritorious, where the father has disappeared, a new gentleman has taken the position, and the child is young and has developed close personal bonds with the applicant father, which have been confirmed with expert reports by psychologists or psychiatrists, and yet they have not been successful on ministerial appeal; whereas if they had been the natural child then, on normal form, they would have been successful. There may well be cases where the minister has declined applications involving an Australian citizen natural child.

Senator WONG—But you have observed differential treatment—is that your evidence?

Mr Bitel—Yes, I have not seen a case involving an Australian citizen child in which Minister Ruddock refused an application. I have not seen a case involving an Australian citizen stepchild in which Minister Ruddock has approved an application, unless it was an Australian citizen natural child.

Senator WONG—Have you had any discussions with DIMIA regarding this?

Mr Bitel—No. I have always thought, quite frankly, what is the purpose? The minister has an absolute non-compellable discretion, and DIMIA theoretically just prepares a file to send to the minister.

Senator WONG—Can you offer an explanation as to why there should be that distinction between biological children and stepchildren?

Mr Bitel—No, and that is why I raised it as an issue of concern to me. It is my understanding that it may well fall foul of the Family Law Act. It is many years since I practised family law, but my understanding is that a stepchild is still considered a child of the marriage for the purposes of the Family Law Act, so I do not see why there is a distinction.

Senator JOHNSTON—With respect to the Filipino man that you mentioned, were the circumstances leading to his death directly anticipated by his application?

Mr Bitel—Yes. I can tell you the circumstances of the case. The gentleman was a man who came from the central Luzon part of the Philippines, north of Manila. I have no authority from the family to say this.

Senator JOHNSTON—We will call him Mr X.

Mr Bitel—He worked for the Philippine equivalent of the Australian Electoral Commission, COMELEC, at a time when there were egregious human rights abuses going on in the Philippines, in the late eighties. In fact I was up there with an Australian on a couple of occasions—once with Justice Dowd and on another occasion to look at the human rights situation in the Philippines. We compiled a report for the ICJ on the human rights violations up there. Anyway, he received threats from corrupt politicians to do the wrong thing in the course of his public duties. He refused. He came to Australia and sought protection. The application was refused. I cannot remember whether it was refused on credibility grounds or on the basis that they did not think he had had a problem. He appealed to the RRT, or it may have been prior to the RRT—it might have been the old RSRC. That was refused. The ministerial appeal was refused, as I recall it. The guy went back to the Philippines, and within three months—as told to me by his relatives in Australia—both he and his young son were killed by the opposition politicians that had made the threat.

Senator JOHNSTON—What year did that happen?

Mr Bitel—It was about 1993.

Senator JOHNSTON—Thank you.

Mr Bitel—In my capacity as Refugee Council President, I hear these stories all the time. It has been a matter of concern that the Australian authorities wash their hands of returnees once they have left Australian shores and say, 'It is no longer our responsibility.' The fact that the Australian refugee determination system has failed to make the correct assessment, which leads to the person suffering—be it by way of execution, torture or whatever—when they return to the country they have come from, has to mean that Australia has been in breach of its obligations under the convention.

Senator SHERRY—From a number of witnesses over our days of hearings we have heard some reports relating to malpractice by some registered migration agents and others who are not registered migration agents. The type of malpractice that we have heard about has been, for example, giving misleading false hope to applicants. I wonder if you have any knowledge about those practices.

Mr Bitel—Every day I would meet somebody who has been the victim of misadvice, misinformation or improper practice by a migration agent, and less frequently by a solicitor.

Senator SHERRY—Can you give me some examples?

Mr Bitel—In the area of ministerial discretion? It is so broad.

Senator SHERRY—Ministerial discretion and other areas.

CHAIR—At least to stay within the terms of reference we should start off with 351 and 417, I should imagine.

Mr Bitel—Yes. I suppose the most common within this area is the people to whom it has never been explained how the process works. They have completely unrealistic expectations. I think that probably the level of abuse in the ministerial discretion stage is a lot lower than in the other stages because, of course, no work permits are given. Frequently amongst applicants whose sole aim is to extend their stay and obtain permission to work and obtain some money, the ministerial discretionary stage is not that significant. I really cannot call to mind any immediate cases of significant abuse by an agent in this direct area. It is more just the totality of the way in which people have been brought through the system. At times one hears of cases where claims have not properly been prepared for the tribunals. Most frequently it is cases where claims were manufactured by agents or by applicants, at the instigation of agents, and then those claims are pursued through to the minister, on ministerial discretion, with the knowledge that the claims were false.

Senator SHERRY—Are you aware that there are non-registered migration agents giving advice?

Mr Bitel—Yes, other than what one reads in the media. I have reported to the predecessor of the current MARA several incidents of advisers within the communities who were not registered—commonly translators and interpreters who then extend the boundaries and become migration agents and give immigration assistance and charge fees for doing so. Often the significant fees which are charged are couched in translation charges for translating a document or for attending at an interview.

Senator SHERRY—On the issue of fees, are you aware of cash payments for advice, whether it is by a migration agent or a non-migration agent? You have actually referred to some of that.

Mr Bitel—Are you talking about payments to the agents by the clients?

Senator SHERRY—Yes, by the clients.

Mr Bitel—Yes, I am aware of a case which is currently under investigation by MARA, so I do not know if I can go into that.

Senator SHERRY—How are you aware of that case?

Mr Bitel—I have been asked by MARA to give evidence to them in relation to their investigation.

Senator SHERRY—What sort of cash payment is involved?

Mr Bitel—That case was not in relation to the preparation of a ministerial appeal, I am sorry; it was in relation to the prosecution of an application before the RRT. The amount involved was about $2½ thousand.

Senator SHERRY—Have you ever been the subject of any sort of spot auditing or auditing process by MARA?

Mr Bitel—No, in fact. I have had four complaints filed against me since MARA have been in existence. Three have been dismissed and I have one currently which I have made submissions about. I am anticipating that, but they have never come to my office and said, 'We want to have a look at some files,' if that is what you mean by spot audit.

Senator SHERRY—Yes, that is what I mean by spot audit: someone turning up out of the blue.

Mr Bitel—Indeed, and one of the recommendations which the Law Society of New South Wales has made to MARA is that they develop a system of doing that. I would certainly be in support of it.

Senator SHERRY—The reason I raise this is that another area in which I have more direct involvement in policy terms is financial planning and the advice given, and recent spot auditing of financial planners revealed a significant minority of malpractice.

Mr Bitel—We have suggested that that should be in relation to not only fund management but also accounts management. Lawyers are subject to an annual review of their accounting procedures—the Law Society sends in its auditors and they go through the books once a year. We have made the suggestion that MARA do the same in respect of migration agents, just to audit the accounts. As an aside, we have also suggested that there be compulsory professional negligence insurance for migration agents. None of those suggestions have been acted on, or not that I am aware of.

Senator SHERRY—We have had previous evidence about cash payments. Do you think this area is particularly susceptible to cash payments? If so, why would that be?

Mr Bitel—I do not know that this area is any more susceptible than any other area in the immigration field. You are dealing with vulnerable people who are quite frequently desperate for a variety of reasons and usually totally ignorant of the legal system. Quite commonly, people will come into my office after having spoken to other persons whom they identify to me as lawyers. In fact, they are rarely lawyers and frequently they are not even registered migration agents. When you talk to them, you find that they have never met a lawyer before. They do not know what the law is. They come from societies where the law is for international companies and the super-rich, and most people live a completely different existence. In many of those societies, there exist Mr Fix-its who are middlemen between the bureaucracy and individuals. So their perception is that Australia runs the same way. When you add all of those things together, you get a cocktail of disaster for many people.

All the integrity legislation in the world will not solve the problem of corrupt agents who will not register and just go and give advice. They are not only giving advice in Australia; they are

also giving advice overseas. Earlier this year I went to Bangladesh. A few weeks before I was there, an Australian had been through, seen large numbers of people and made all sorts of unrealistic promises to them. He asked them to pay him a fee, which was not exorbitant, and many people had paid that on the understanding that that would get them some money. It is a bit like putting an advert in the paper saying, 'Send me $10 and you win a prize.' There are so many desperate people around the world. It is a very lucrative way of making money in many of these countries and, unfortunately, a lot of unscrupulous people do it. I do not know how the legislation will catch those people. Most of them are not migration agents; they are just people who operate outside the system and prey on the vulnerability, ignorance and desperation of people, for financial or economic reasons or for the quasi refugee reasons that we were talking about earlier.

Senator SHERRY—Thank you.

CHAIR—There are no further questions—

Mr Bitel—Chair, with your permission, there is another thing from my submission that I would like to stress. We have to assume that the current statutory regime will continue. What I have tried to do in my submission is point out that, in many significant cases, the regime just fails to enable people to access the discretion.

I gave as an example the case of the Indian man—it is in paragraph 2 on page 3—who for a variety of reasons failed to submit the RRT appeal within time. We lodged an appeal to the RRT within the time of his becoming aware of the RRT decision but outside the 28 days. It is that inflexibility about time limits within this jurisdiction which is frequently the cause of so many problems. Ultimately the appeal was refused because it was deemed invalid by the RRT. Somewhat precociously, I lodged an appeal to the minister, in my mind intending to bring to this committee's attention the fact that there was this lacuna.

A couple of weeks ago I got a letter from Minister Hardgrave telling me that I should know better and that I should not have lodged the appeal, because there was no jurisdiction for the minister to hear it. The letter said that it was considered to be a vexatious appeal, and that it was a pity the new legislation was not afoot because, if it was, I would be losing my licence. I wrote a letter back to the minister saying: 'I knew what I was doing. I did it purposely to draw to the attention of this committee that you have had cases which in all other respects should have been approved and would have been approved because they met the minister's guidelines but could not be approved because of that provision of section 147 and section 351 that you can only access ministerial discretion after you have had a refusal from the review authority.

CHAIR—Yes. If you have that correspondence available to the committee, it would be helpful.

Mr Bitel—I am happy to forward it to the committee.

CHAIR—I think that issue has been raised before in evidence to the committee, so anything you have in response from the department about that would be helpful.

Mr Bitel—I think the minister's letter came to me after I had made this submission, which had been made public, and the rap over the knuckles was, I thought, a bit—anyway.

On another point, I will plead a mea culpa. On one occasion I have personally approached the minister about intervening. It is the only time I have ever done it. I wanted to draw it to the committee's attention, not to say that it is common practice but to again highlight the areas where there are problems. This was about an Indian gentleman whom I had not acted for at any stage. He was in his mid-20s when he came to Australia and he had absolute kidney failure; he was on dialysis. He came from the Punjab, and you would be aware that the basis of claims by Punjabis is a grey area. In any event he was refused by the RRT, and previous agents had submitted two ministerial appeals. The first was declined because I do not think it had been prepared very well, and the department refused to let the second one get to the minister because they put the usual barrier up: 'There has been no significant change of circumstances, therefore we are not going to let it go to the minister.'

He came to see me. It was quite desperate, because he would have died. There is no facility for dialysis for people in India unless they have significant amounts of money. He did not have the money. There was no opportunity for a kidney transplant, and all the medical evidence was that within a week he would be dead. That was the only time I specifically rang Minister Ruddock and said: 'Look, I have this case. It is a matter for you what you decide, but I want you to have a look at the file. Could you please call for the file from the department.' The next day the minister sent him for medicals, and he is now an Australian citizen. But, had I not done that, who knows?

To their credit, the department's compliance officers just did not know what to do, because they knew he would die if he left but how could you get it to the minister? Previous attempts to get it to the minister had been blocked by that intransigent wall in the department. I think it was wrong that I had to ring the minister personally and I might say there should not be a system like that, where it depends on the luck of whom you see to get to the minister to save a person's life.

CHAIR—Would it surprise you that some of the submissions to the inquiry have indicated that there are personal representations to the minister's office on behalf of people and that it seems a regular occurrence to get cases before the minister in that way?

Mr Bitel—I think it is improper. It is like going to a judge who is hearing a case and saying, 'Can you have a look at the file?'

CHAIR—What does that suggest to you occurs?

Mr Bitel—If it occurs, I think it is wrong. I think it is an improper practice. The barrier should be the same for everybody. It should not be a case of how you can get to the minister or who you know who can get to the minister. Everybody should start equally. They should be assessed by open and public criteria. There should be an independent assessment. There has to be—sooner or later we will get it—a visa class for onshore, strongly compassionate or humanitarian grounds, the same as there was under the old section 6A(1)(e). When that happens there should be an appeal process. This perhaps is not the place to talk about these things. We have postulated ways in which you take the refugee processing system away from ministerial appeals so that you do not get this misuse of the refugee system. I think that would significantly reduce the number of cases. If you have a system of application and a system of meaningful, independent review of

those applications, those sorts of cases that I have mentioned would be heard and would not land on the minister's desk.

CHAIR—You represent clients in respect of matters under sections 351 and 417. As I understand from your submission, it would be in a very rare case that you would seek ministerial intervention, in terms of trying to contact the minister.

Mr Bitel—I have only ever done it once. In all cases, I fervently believe that successive ministers have said: 'Send me the files, send me the details and I will review it. If you can do a proper submission then I will consider it favourably.' But I think it is wrong to make personal representations to a minister. I know I could. Of course I could, in whatever capacity I wanted to—as President of the Refugee Council or as Secretary-General of the ICJ.

CHAIR—You come with a lot of hats.

Mr Bitel—Yes. Of course I can do it, but I just do not believe it is correct.

CHAIR—Do you think you are helping your clients by choosing not to put their cases forward?

Mr Bitel—Yes, I do, because if I become known as a person who is going to go cap in hand to the minister every time, that will demean my place as a lawyer.

CHAIR—Thank you, Mr Bitel. Your evidence before the committee has been very helpful. I think you have taken one question on notice from Senator Wong.

Mr Bitel—Yes. She wanted the break-up of section 417 and section 351 applications from within my office.

CHAIR—Yes, thank you.

Mr Bitel—I will also try to work out the decision rates. I find it odd that the department say they cannot do that, given their ability to provide the most extraordinarily intricate statistics on almost every other area.

CHAIR—I am going to question the department at some length, when we get to them, about these particular issues. It does seem that the information is there; it is a question of how we obtain it.

Mr Bitel—The process is to send the application by fax to the minister. When I said I did not make personal representations to the minister, perhaps I should clarify that. I meant taking it in person.

CHAIR—I took it as meaning in person.

Mr Bitel—Obviously, all correspondence is directed to him. Indeed, we send it to the minister's office, as we consider that to be the appropriate way to do it. Then, presumably, the file goes down to the department, is processed in the department and goes back to the minister.

But the letter will say under which section of the act we are seeking to access the minister's discretion. One would have thought that there would be some computer entry of that information.

CHAIR—So would we. Thank you, Mr Bitel. That concludes the hearing for today. Thank you, committee senators, witnesses and the secretariat. Your time today is much appreciated.

Committee adjourned at 6.10 p.m.