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SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

Reference: Ministerial discretion in migration matters

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SENATE
SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS
Monday, 17 November 2003

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

Senators in attendance: Senators Bartlett, Humphries, Ludwig, Santoro 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 provisions by ministers, in particular what criteria and other considerations applied where ministers substituted a more favourable decision; and
- (d) the appropriateness of the ministerial discretionary powers continuing to exist in their current form, and what conditions or criteria should attach to those powers.

WITNESSES

GODWIN, Ms Philippa Margaret, Deputy Secretary, Department of Immigration and Multicultural and Indigenous Affairs	1
HAIGH, Mr Bruce Douglas, (Private Capacity).....	51
ILLINGWORTH, Mr Robert, Acting First Assistant Secretary, Refugee, Humanitarian and International Division, Department of Immigration and Multicultural and Indigenous Affairs.....	1
LINDSAY, Ms Louise, New South Wales State Manager, Onshore Protection, Department of Immigration and Multicultural and Indigenous Affairs	1
MANNE, Mr David Thomas, Board Member, Refugee Council of Australia; Co-ordinator, Refugee and Immigration Legal Centre	42
NICHOLLS, Mr Nick, NSW State Director, Department of Immigration and Multicultural and Indigenous Affairs	1
PURCELL, Mr Marc Dorian, Executive Officer, Catholic Commission for Justice, Development and Peace	33
WALKER, Mr Douglas James, Assistant Secretary, Visa Framework Branch, Department of Immigration and Multicultural and Indigenous Affairs	1

Committee met at 9.32 a.m.

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

ILLINGWORTH, Mr Robert, Acting First Assistant Secretary, Refugee, Humanitarian and International Division, Department of Immigration and Multicultural and Indigenous Affairs

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

NICHOLLS, Mr Nick, NSW State Director, Department of Immigration and Multicultural and Indigenous Affairs

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

CHAIR—Welcome to the 6th hearing of the Senate Select Committee on Ministerial Discretion and 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 under sections 351 and 417 of the Migration Act 1958. The committee has received 41 submissions for this inquiry, most of which have been authorised for publication and are available on the committee's web site.

Witnesses are reminded of the notes 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 resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I remind senators that, under the Senate procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy. If necessary, they must be given the opportunity to refer those matters to the appropriate minister.

Ms Godwin, since your last appearance before this committee you have provided several batches of additional information. Do you wish to make any amendments or alterations to that additional information?

Ms Godwin—Not to what has already been provided—that I am aware of, I should clarify—but I would like to make a couple of comments. One is that there are still two groups of questions outstanding—the groups labelled 'S' and 'T'. We are working on 'S' and would expect to get those answers to you very quickly. I think you have asked for 'T' by 2 December. The other point to make is that a fair amount of work has gone into preparing what is already before you, but if you require any additional information or clarification of what we have currently

provided we are, as we have been previously, very happy to take that on notice and we will try to provide anything further that would assist the committee.

CHAIR—There are a couple matters in relation to the answers that you have provided already. The committee are trying to get a sense of the issues surrounding the refusal for the provision of the files that had been requested. What we are concerned about is that, effectively, you do not want to provide them, and we would like to know what your reasons for not wanting to provide them are. It could appear, to anyone looking from outside, that issues other than privacy or workload may suggest why you do not want to provide the files. From our perspective, up to the point where you say that it is an open and accountable system, the committee understand—although we may have something to say about that. At the point where it goes to the minister, how the files are then dealt with—backwards and forwards, it seems—and whether they are generated from the minister’s office or how they are generated seems to be, at least from my perspective, a bit of a black hole. Without the file to provide detail as to how the letters go backwards and forwards or who raises the actual inquiry, I must say it is very difficult, at least from my perspective, to understand how it happens.

To give you an example: where the list is provided to the minister it seems to me that in the ordinary course of events, if a perfect file is generated—and please correct me if I get this wrong—the department assesses it according to the guidelines. Then, if it is recommended that intervention should take place or if it is considered that the guidelines are met, the minister may select it, once it is put in an orange folder—in other words, once it makes it to his table. But that seems to be in a perfect world; it does not seem to happen that way in truth. What seems to happen is correspondence goes to and fro and comes in from other places and goes in all sorts of different directions.

We are also trying to understand—and we can take Kisrwani as an example—whether, the 17 cases in which intervention was successful all went through the process of meeting the guidelines and then being put up to the minister, at which point the minister selected them, saying, effectively, that he agreed with the department’s conclusion—or did they come from elsewhere? Were they generated from the minister? Did they all get on the schedule? It seems to me that without an understanding of how that works there is still the suspicion that something untoward might be entering the process.

Ms Godwin—I guess there are a number of elements, if I can comment on that. I think I set out in my letter what our concerns were about the files in their entirety, as a group. First of all, there is a significant workload issue. Secondly—

Senator WONG—Ms Godwin, I might just interpose there. Frankly, you said in your opening statement you had done a lot of work to answer the committee’s questions. With respect, I think you have done a lot of work to create reasons why you ought not provide things to the committee. One of the sets of questions that you refuse to provide files about relates to an answer the then minister gave to Ms Gillard. You would have had to have done all of the things in the question in order for the minister to provide the answers that he gave. I am referring to question S, which sets out what has happened in respect of the Kisrwani files. You have indicated, ‘We don’t want to do this because of the workload.’

Ms Godwin—Senator, I said at the beginning that we know that group S is a group of questions we have not provided yet.

Senator WONG—Are you going to answer them? Or do they also come under the general heading ‘this is too much work for us and we don’t want to provide the files’?

Ms Godwin—No, we are going through the files on all of those things. We do have to check the documents for privacy or any public interest immunity issues. That is standard practice. We are going through those files. It is just that that is the last group of questions from that group that we have not concluded the work on. It is not because the work is not going on.

Senator SANTORO—So you expect to have answers to those questions?

Ms Godwin—We certainly are working on that.

Senator WONG—When do you expect them by?

Ms Godwin—I expect that people will have material for me to have a look at when I get back this afternoon.

Senator WONG—Are we going to get another answer that says, ‘We don’t think we should have to provide this; this is too much workload’?

Ms Godwin—As I said, the files are there. The people have pulled the files and they are going through them. I have not personally gone through each of the elements of the question to see whether or not there are issues to do with that particular group, but I know that there is a bunch of staff who, pretty much as we speak, are going through each of those files now.

Senator WONG—Was this done before the minister provided his answer in the House?

Ms Godwin—I am not sure that staff in central office had the files or whether we just collated the information from inquiring into the ICSE records and those sorts of things. I honestly do not know the answer to that.

Senator WONG—I will await the department’s response on this with interest, and I trust it will be a little more fulsome than what has previously been provided. Frankly, I will put you on notice—I do not see any basis on which you can assert that the information in that question ought not be answered.

Ms Godwin—I have not asserted that. We are, as I say, examining those files now. In fact, I might go back to a couple of the issues the chairman asked about. I guess what we were trying to do was in part reflect your question, Senator, to understand the toing-and-froing. The file does not necessarily move back and forth. The other issue, as you will see from the case studies we have put together—and I have already commissioned some additional work on those; I spoke very briefly to Alistair this morning saying we just need to sit down and have a look at that—is that the files do not necessarily reflect all of the steps, because some of the steps in relation to processing are in fact recorded in the ICSE system and are not on the file. You will see reference

in the case studies to what is called a file dump or a print-out from ICSE, but not every step is printed out and put onto the file in that way.

If you go through the case studies, and in a sense this is the sort of issue you are confronted with when you look at the files, there is a lot of repetitive material, there is lots of toing-and-froing, there are lots of copies, and there are also things that are not reflected there. For instance, not all of the files have a print-out of the schedule that the case was on, if it was on a schedule, and so forth. So what we are now doing with those case studies is trying to flesh them out by drawing material from ICSE and wherever else to give a complete picture.

As I understood your letter to me and as I understood your question, your focus is on that process of things that come in, what happens to them, how they move back and forth through the various processes, and you are right: there is no single pathway. Things are often happening simultaneously, so you might be processing one request and another request comes in. Then it is a question of whether that is in effect added to the request that is in process or whether it is regarded as a repeat request, and that is not always clear from the file and that is what we are trying to construct for the case studies.

On the files themselves, as I said in my letter, when documents are being provided it is quite standard practice to check them for privacy and any other public interest immunity sorts of questions. That is a time-consuming process. We were not trying to be unhelpful to the committee; we were trying to construct something that would enable the committee to understand the process without necessarily going through all of that sort of workload.

More case studies are being worked on and we are seeking to flesh out the ones that we have developed, but the case studies as we have constructed them do, it seems to me, give the opportunity to focus on elements of the process to identify those parts of the process—in relation to those files—that you might then want to go into more detail about. We can then focus on that, rather than on every single folio. So we do not regard this as something where you will not have other questions and where we will not be able to pull together other information. As I said, the case studies, it seemed to us when we put them together, gave an opportunity to focus on those elements where you wanted to concentrate, rather than on the very significance of the bulk of the files, which are not necessarily in question.

CHAIR—Yes. That is why, at least from my perspective, we in the committee have, I think, been trying to be accommodating—in the sense of reducing the number and trying to focus on the area of interest and then also indicating the type of information we want. From our perspective we have gone as far as we can. We now expect to see if you can meet at least that line.

Ms Godwin—The issue from our point of view is that even in seeking to narrow it down—and I understand that point—there are still 70 or more cases, which amount to somewhere around 150 files. That is where the workload issue arises. It is just a very substantial amount of paper. So what we are trying to do is give you a sample and construct it in as much detail as possible so that you have then got the capacity to say, ‘We do not want a couple of hundred folios: can we focus on that group or on that period in the case study where the intervention process seems to have started or where there seems to have been a first request and then a repeat

request,’ or whatever. As I said, I have already got people working on fleshing out the case studies, but even that is a significant amount of work.

Senator SANTORO—What you are saying there is that in the cases that you think would be useful to the committee you are actually trying to isolate paperwork that could add to your workload considerably and give us that information in the case that you believe would be of assistance to the committee. Is that what you are telling us?

Ms Godwin—Yes. We are trying to be as helpful as possible to the committee, but we recognise that there are very significant workload implications. As I said in my letter, the fact is that just going through those 70 cases—and I think we worked out that there were 150-odd files related to those—is itself a very time-consuming process. I indicated in that letter that I would be very happy to talk to either the chair or the secretariat in order to try to refine the request in some way, which is what we are seeking to do by constructing the case studies.

We have tried to focus on the groups of cases that the committee has indicated an interest in. The group of questions at S specifies a smaller group, so we are working through that group of files but, as I say, all of this is a fairly significant workload. I truly mean this: we are not trying to be unhelpful, but we are trying to refine the request in a way that means we can manage it but can give you something that is useful.

Senator WONG—To be blunt, you are not doing that to date. So far, our reasonably narrow request for the provision of files has been met by the department saying, ‘We do not want to give them to you,’ and finding various ways of achieving that.

Ms Godwin—I have already explained—

Senator WONG—You have explained your reasons. I do not find them particularly compelling. Has there been any discussion with this minister’s or the previous minister’s office regarding the provision or non-provision of the files?

Ms Godwin—I have certainly advised the current minister of the response that I was giving. So she is aware of that response.

Senator WONG—What about Minister Ruddock?

Ms Godwin—I have not consulted with Minister Ruddock on that particular response.

Senator WONG—Not at any time?

Ms Godwin—I have not spoken to Minister Ruddock about this, no. We were consulting with Minister Ruddock’s office up until the change of minister, but I have not spoken to him about that response.

Senator WONG—Have you received any direction not to provide the files?

Ms Godwin—Not a formal direction, no.

Senator WONG—What does that mean?

Ms Godwin—I advised the minister that we had this question and that I had examined it, had taken advice of various sorts, and that this was the response I was proposing to give. So she was aware of the response but did not at that point direct me one way or the other.

Senator WONG—I note that you have also refused to provide Mr Knobel's notebook.

Ms Godwin—There is more than one notebook.

Senator WONG—Notebooks then.

Ms Godwin—The issue about the notebooks is a complex one. While the notebooks are filled out by the DLOs, because they go to transactions within the minister's office, they are not really just personal notebooks; they are records that are held in the minister's office.

Senator WONG—Mr Knobel's evidence was that he kept a record of all third parties that contacted him directly regarding cases. If there is stuff in the notebook that relates to internal conversations within the minister's office, blank it out—on the basis that you say it is advice et cetera. But in the context of significant public concern regarding the probity of a process which you assert to be above board, I have to say that saying to us, 'We know you had evidence about a record kept of all third parties giving the minister's office a call in order to progress a matter'—an issue that goes to the heart of the issue of public concern—and saying to us, 'Despite the fact you have that evidence, committee, we the department are not going to provide you with that and nor are we going to provide you with any of the files about which potential questions have been raised'—

Ms Godwin—There are two separate—

Senator WONG—From this side of the table it essentially looks like the department is simply covering up and trying not to assist the inquiry.

Ms Godwin—I certainly do not want to create that impression. Recognising the significant workload involved, we are trying to find a way to provide the committee with material that is helpful. I am sorry to hear you say that what we have provided so far has not been helpful. We have answered on notice 160 questions. Many of those have required very significant work on the part of a group of officers. There are something like eight officers who are doing nothing but trying to pull together information to answer questions for the committee, so it—.

Senator WONG—But Or trying to pull together information so that you do not answer the questions.

Ms Godwin—No, we have been trying to pull it together in a way that is helpful. Going through the files would have taken weeks and weeks, and I made that point in my letter. So rather than sending people off to do something that would be extremely time consuming, we have tried to cut through that process by developing the case studies—.

Senator WONG—But they are not helpful to us. From my perspective—I cannot speak for the whole of the committee—the case studies are particularly unhelpful. They do not go to the heart of issue, which is: is there proper probity at the core of the ministerial discretion process? While we are on that, perhaps we can go back to the Knobel notebook. If your concern is that it might record issues of advice to the minister, I would accept that those aspects are not properly before the committee. It might be that there are other aspects on which a reasonable case could be put that they ought to be deleted. But not providing, at all, a copy of a record about which we have had clear evidence in this committee—a record of interactions with parties lobbying for people who are seeking the exercise of ministerial discretion—I do not find helpful. Nor do I find your arguments about its non-provision particularly cogent. Perhaps we could now discuss what deletions or marking out in the record you would require in order to facilitate our request for provision of the document.

Ms Godwin— At this point, I have not gone through those notebooks personally. I am advised that there is a significant amount of material in them—there is a variety of material. I would need to check the actual records. I am not sure that Mr Knobel said they recorded every telephone conversation, but he said he kept notebooks.

Senator WONG—My recollection of his evidence is that they may not be 100 per cent accurate but he tended to record, in the notebooks, telephone conversations, or perhaps a note regarding correspondence which was on its way, and so forth, of people—including Mr Kisrwanī—who were seeking to lobby on behalf of somebody making an application for ministerial discretion. It was pretty well within the bounds of the inquiry before us. I am asking you again—.

Ms Godwin— I am sorry. I was not meaning to quibble. I just did not want to find a difficulty later, if they do not have everything in them.

Senator WONG—I do not think his evidence was that it was 100 per cent. What are we going to do about the notebooks?

Ms Godwin—As I say, I have not personally looked at the notebooks. We did consider the notebooks as a group. In a sense, they are documents which are records of transactions with the minister's office, notwithstanding that they were recorded by the DLOs.

CHAIR—They are third party contacts. They are not internal to the minister's operation. They are third party transactions. They are recording a phone call coming in from representation in relation to a 417 or a 351. They are not—and they do not amount to—matters that you should not put on the record. They are not internal decisions or cabinet issues, where the minister could say, 'These are matters which are privy to me and the decision I make in the executive.' She is making a decision in respect of 417, 351 or 48B from external representations. There is no reason why they should not be available.

Ms Godwin— I am not necessarily arguing precisely the point that I think you are making—potentially.

CHAIR—You might need to.

Senator WONG—That is what you have written, Ms Godwin.

CHAIR—That is what you have told us.

Ms Godwin—No. I said they are records that are the minister's.

CHAIR—They are not the minister's. They are the DLO's and the department's. They are your records—unless you are telling me that the DLO works for the minister?

Ms Godwin—No.

CHAIR—Thank you.

Ms Godwin—This is where the records are, I think, slightly different. The DLO is clearly a departmental officer, but when people ring into the minister's office, they are not ringing specifically to speak to the DLO.

Senator WONG—That is not advice to the minister which is outside the purview of this committee. Just because he works in the minister's office does not render it advice from the department. As I have indicated, I can accept—obviously other committee members may have a different view about this—that, if there is a record in there of advice given to the minister by the DLO, that is probably not properly before the committee.

CHAIR—I would accept that that should be deleted.

Senator WONG—But records of conversations with third parties lobbying on behalf of people who have files before the minister are absolutely properly before this committee. I ask you again to provide the notebooks, with the deletions which I have already indicated I think would be acceptable.

Ms Godwin—In that case, I will need to consult directly with the minister. As I said, she is aware of the response that I have provided but has not indicated a view about this matter; so I would need to do that. We are seeing you again tomorrow and I presume that I could do that either this afternoon or tomorrow morning.

Senator WONG—And I presume you will make clear the parameters of the request.

Ms Godwin—Sure.

Senator WONG—Can we go back now to the files.

CHAIR—Senator Santoro, did you have any issues in response to the couple of points about the provision of information—

Senator SANTORO—I might follow up on some questions in relation to files.

CHAIR—Before we do that, I wanted to deal with some answers to questions that you have provided. I would like to get this clear in my mind: taking Mr Kisrwani as an example, I think

the original request was for both Marion Le and Kisrwani. You can talk to the secretariat about trying to narrow that down a little bit. I have not consulted with my colleagues yet, but we are hearing from Marion Le tomorrow, so we might be able to delete that request, depending on the evidence that she might give—or we might be able to narrow it down to one or two files from her, so that we can take that lot out of it, which might make it a little bit less. We are also keen to understand—I think there is a question on notice, and without the answer to that, we cannot narrow it down much further—

Ms Godwin—Is this group S that we are talking about?

CHAIR—What we are trying to identify is where the representation on behalf of the person may not meet the guidelines; so it is then put on the schedule—

Ms Godwin—Yes.

CHAIR—And it would then stay, for how long?

Ms Godwin—There is no predetermined amount of time. If a request is made or if a case coming back from the RRT is assessed as not meeting the guidelines, and then subsequently a request is made and it goes on a schedule, a number of things can happen from that point. First of all, the schedule could go to the minister and the minister could mark the schedule saying, ‘I want more information’, and I think we have answered a question that indicated that he had done that in a number of cases. Or it could simply come back ‘noted’, indicating that he agrees and does not seek to intervene in any way, and that would be the end of it—and then subsequently a further request could be made, which could enliven the process again. Or, as happens from time to time—and I would need to have a look at whether there are specific cases—because information can be coming in, even though something is in process, something that may have started out on a schedule, new information may overtake the process and it may then be upgraded to a submission. That could happen even though the process with the schedule had not necessarily been concluded at that point.

I guess the difficulty for us—and I know that this is what the committee is trying to get at—is that there is an assumption that there is a single process, a bit like a visa application. But there is really not, because any number of things can enliven the question of whether there is, in the minister’s mind, a public interest. Things can be happening simultaneously, on a serial rolling basis, or something can be resolved on the face of it and then subsequently brought to attention again. So it is not, strictly speaking, like a visa process where there is a steady progression through a single process.

CHAIR—Logically, I can accept that, but everything still has a date on it—or almost everything has a date on it—and then can be put into chronological order?

Ms Godwin—Yes.

CHAIR—So it is no more difficult than preparing submissions for court where there are multiple issues but you can put them in a chronological order and present them in that way?

Ms Godwin—Sure.

CHAIR—For argument's sake, in respect of the answer in relation to table 1—

Ms Godwin—Sorry, which question is it?

CHAIR—It is a question taken on notice. It is on page 81 of *Hansard*. The question is not numbered. There is not an easy way to find it, but it is at table 1 and refers to the number of submissions requested by the minister after receipt of the schedule. Although it is on the schedule, the minister has—

Senator WONG—It is 24F.

Ms Godwin—Is this question from the hearing on the 23rd?

CHAIR—Ours is numbered 24F.

Ms Godwin—Yes, we have that.

CHAIR—So that is where they got to the schedule because the department considered it did not meet the guidelines?

Ms Godwin—Yes.

CHAIR—And then there was a request from the minister's office for the department to reposition it—in other words, put it on the list, pull it out, have another look at it or do something more with it?

Ms Godwin—Send further information.

CHAIR—Can we get a breakdown of who they are—the 25, the six, and the 25 between 2001, 2002 and 2003, in relation to 417—and the same for 351?

Ms Godwin—When you say a 'breakdown', do you mean by name?

CHAIR—Yes—or by representor.

Ms Godwin—If we were going to do that, we would have to go by the name and then work back to see who the representative was, because we do not record it in that way.

CHAIR—How is the correspondence from the minister or the request from the minister generated? Is there a letter, email, fax or telephone call? I think you can understand what I am trying to put to you, without me spelling it out.

Ms Godwin—Yes.

CHAIR—If the department assesses that it is not meeting the guidelines and yet a fax or a telephone call comes from the minister's office and it then goes off the schedule and onto a line, that is a process I do not understand. I do not understand at all how that happens. You have

already said it does not meet the guidelines, so what happens to it? Does the minister then say that it meets the guidelines in his head—in which case it becomes a black box?

Senator WONG—And what prompts the minister's request?

CHAIR—And what prompts it? Will it be in the DLO's notebook? Will it be from a representor such as Karim Kistrwani who says, 'Can you take it off the schedule and put it on?' They are the questions we are left wondering about.

Ms Godwin—Maybe part of the answer is if we can find some samples to show you, without finding all the individual cases. But a couple of different things can happen. The schedule itself can come back with a notation, simply asking for more information. At that point, that is all it is—it is a request for more information. It does not indicate that the minister has in his own mind thought the person meets the guidelines. It does not necessarily indicate anything; it simply indicates that he wants more information. At that point it would go in a submission. The fact that the minister may ask for more information is, in a sense, without prejudice—

CHAIR—It is a prompt, though, isn't it?

Ms Godwin—A prompt to what, sorry?

CHAIR—For you to have another look at it to see if you can get it off the schedule and make a proper or more fulsome submission and then—

Ms Godwin—It usually just goes as an information brief. If the minister has asked for more information, we provide more information.

CHAIR—But it must dictate the type of information the minister has asked for.

Ms Godwin—Sometimes not; he will just ask for it to be—

CHAIR—Relooked at?

Ms Godwin—He does not ask for it to be looked at against the guidelines; he asks for more information.

Senator WONG—Because you have already assessed it as being outside the guidelines, and the minister then says to you, 'Even though you've assessed it as being outside the guidelines, I want a full submission on it.' I think the committee is entitled to know what prompts that.

Ms Godwin—But we will not necessarily know that. The minister simply looks at the summaries. As I said, it might be useful if we give you some samples of the schedules and the summaries. This is about the public interest as it is in the minister's mind, and the fact that at that point the minister asks for more information does not necessarily mean that he or she has formed a different view. Sometimes those briefs go to the minister with more information and that is the end of the matter, and sometimes they then result in an intervention.

Senator WONG—Well, in respect of the files you have identified where the department has assessed them as being outside the ministerial guidelines and the minister has requested a full submission nonetheless, I am going to ask you to provide the following information: the RRT and MRT outcome in relation to each file; the outcome of the minister's consideration pursuant to section 351 or section 417 and the date of that decision; the date of the initial assessment of the file as falling outside the ministerial guidelines; the date on which the full submission was requested; details of the nature of the request, whether it was by phone call or correspondence; and the names of any persons making representations on behalf of the applicant. I assume you will take that on notice.

Ms Godwin—Yes.

Senator WONG—In respect of the last issue, can you also provide the date on which the third party representations were made.

CHAIR—In respect of question E9—and I think it was raised in Sydney—I asked whether there had ever been an external audit or any audit findings. Your answer was that, according to the department's records, there has not been an internal or external audit of MIU operations specifically nor the MIU process in general. How long has this MIU unit been in operation without an audit?

Ms Godwin—Mr Nicholls may be able to comment on when the MIU was set up. The intervention process used to be just an adjunct to the normal case management. I think we separated it out in about 1998 or something like that.

Mr Nicholls—It was 1998-99.

CHAIR—What about before that?

Ms Godwin—Before that it was just part of the case management process. Each case was assigned a case manager and it was the case manager's responsibility to do everything in respect of that case, from the beginning to the end, including managing requests for intervention and so forth.

CHAIR—Is it intended that it will be audited? Will you have an internal review of how it operates?

Ms Godwin—I cannot recall that it is on our audit program at the moment.

CHAIR—Why wouldn't it be on your audit program? They make significant decisions in respect of visa applications for people who are unlawful entrants and who might be waiting in detention centres for decisions after RRT decisions. It seems to me that it would be high on their agenda that the process be open and accountable, as you have said it is—and I would hope that you have also checked to ensure that that is in fact the case and not an empty statement.

Ms Godwin—The administrative process that the department is responsible for is part of our overall onshore protection arrangements, at least in terms of section 417. We have a rolling program of audits. Obviously, there is a lot of stuff going on in the department at any given time,

including a variety of audits. I cannot speak for why there is not a particular audit of this at the moment. But, in terms of our ongoing processes of supervision and so forth, it is, of course, continually looked at from that point of view—it is just that it is not on the formal audit program.

CHAIR—You can see how it paints a picture of an area where you have discretion. You indicate that a document meets the guidelines—or a representation or a file meets the guidelines—and you then have schedules and a minister requesting files or more information in respect of a schedule. There is certainly a lot of media interest that has been generated about problems that have occurred in the area, which would generate, at least from my perspective, the need to look again at the area to make sure that it is operating in the way it is supposed to operate. Yet you say that it is not even on the audit list—it is not even on your horizon. With the number of cases—we will take the opportunity to go through some of them shortly—there is more than an inch of material that has been in the public domain about problems that might be associated with ministerial discretion. An inquiry has now been generated as a consequence of some of those issues, yet you say that it is not even on the horizon. I just find that very difficult to understand.

Ms Godwin—Senator, as I said, our responsibility is to have a process that feeds information through to the minister, because it is essentially an administrative process in support of a function that is the minister's and the minister's alone. As I have said, our focus is on making sure that the process gets things fed through in an appropriate fashion. We obviously keep an eye on whether all correspondence has been answered. We keep an eye on things coming back with requests for information, to make sure that we are responding to those requests and so forth. But your question seems to go to the outcomes. In the end that is a matter for the minister's assessment of what is in the public interest. Our process is an administrative process. There are hundreds or thousands of administrative processes in the department which are looked at through normal supervision processes, and from time to time there are audits. But even if there were an audit, it would look at the administrative process that—

CHAIR—Yes, I understand that. That would certainly be a start, though. This is my last question in respect of some of the answers that you have provided before we go directly to the MIU. The department's answer to question G3, which was provided on 9 October 2003, stated that the minister has chosen to intervene in 21 cases during 2001-03 while judicial proceedings were under way. You did intervene prior to the RRT making a final determination, as I understand your answer. So there are cases that do not have to be completed before the minister will intervene—is that right?

Ms Godwin—Yes, it is right, Senator. In fact—

CHAIR—I am sorry, after the RRT decision then a High Court or a Federal Court decision, I should say.

Ms Godwin—I beg your pardon. Yes. I am sorry.

CHAIR—So it had not exhausted all possibilities before the minister chose to intervene.

Ms Godwin—Yes.

CHAIR—That happened in 21 cases. Is that publicised? In other words, when you talk about guidelines do you tell participants in the system—representatives—that they can obtain a ministerial intervention prior to judicial proceedings being exhausted? Because what I understand you have told the committee is that in fact the minister will not intervene until judicial proceedings are exhausted—but that is not the case. There are 21 cases in which the minister has intervened.

Ms Godwin—We discussed this at a previous hearing, Senator. As a general practice, no, the minister has chosen—given that it is up to the minister—not to intervene under normal circumstances, if there is a judicial review going on. But in fact I think the MSI mentions that and says that it is general practice, but it also talks about the fact that in particular circumstances the minister may seek to intervene earlier.

In a previous question I think we talked about some of the circumstances in which the minister may not wait until judicial proceedings have been concluded. It is certainly true that we have said that, as a matter of standard practice, the minister would not normally do that or it has been the previous practice not to do that but it is certainly not a requirement and clearly there have been circumstances where, for a variety of reasons, the minister has chosen to intervene prior to the outcome of the judicial proceedings.

Senator SANTORO—I want to go back to the issue of audits. In your view, Ms Godwin, when would an operational unit within your department attract an audit? What would prompt an audit? Would it be administrative inefficiency or administrative failure? What stimuli would say to you or one of your operational managers, ‘Let’s have an audit of that unit’?

Ms Godwin—I guess there a couple of things to tease out. There are various layers of audit, if I can put it that way. There is clearly the ANAO audit program and they set their own program although obviously in consultation with the department. They are keeping an eye overall and will identify areas of the department’s activities that they want to look at and that is a rolling program. We have our own internal audit rolling program which we set each year.

Clearly it is not possible to audit everything every year so we have to make judgments. The things that would go to the judgments about what is on the audit program can vary from issues where we have had problems, areas where there are significant financial issues, the collection of fees or moneys of some description, major contracts and those sorts of things through to the fact that an area may not have been the subject of an examination at some point over the last few years. We try to keep a picture over a period of years of what has been audited to try to ensure that elements of each program are covered in our audit program on a fairly regular basis.

There have been audits in the past in the onshore protection area by the ANAO and internally. But the question was whether there had been a specific audit on the MIU and the answer to that is no. However, we would not normally cut out a single process like that. For example, if you are doing an audit of the Sydney office you say, ‘We’re doing an audit of the Sydney office,’ and then it is up to the auditors to sample various processes. If you were doing an overseas office the same thing would apply. If you were doing the onshore protection program you would look at various aspects of the management of the onshore protection program.

Senator SANTORO—Which the MIU is part of.

Ms Godwin—Potentially, that is right. We just have not got the MIU on the audit program at the moment.

Senator SANTORO—What time span, on average, would attract an audit of a unit? On average would it be three years, four years or five years? Without going back and doing all the statistics, what would the time span be on average?

Ms Godwin—There is no particular time span. Generally speaking we try to keep a bit of an eye back over the last two, three or maybe four years, and forward looking for a couple of years because the ANAO has a current program and then it has a list of contingencies or areas of interest that it might include in subsequent programs. We try to keep a bit of an eye on that and ensure that we have looked at various elements of various outcomes or outputs over a three- or four-year period, I suppose.

Senator SANTORO—Presumably if you receive complaints about an operational unit within your department that might attract some attention?

Ms Godwin—Yes, it would and then it would go to questions of whether an audit was the appropriate activity or whether you would look at it from an internal investigations point of view or something of that sort. It would depend on the nature of the criticism.

Senator SANTORO—Prior to this issue arising, to put it delicately, politically within the parliament a year or so ago, were you given any reason to be concerned about the way that the MIUs were operating?

Ms Godwin—Not particularly. Clearly we have always got an eye on workload—and there have been workload pressures in onshore protection over a period, which we have sought to respond to in a variety of ways—but there was not a particular focus on the MIU process at that point.

Senator SANTORO—You haven't had a rash of complaints from people dealing with it? You haven't had a rise in the level of angst or matters about inefficiency or whatever drawn to your attention, apart from workload issues? I am talking about malice and misconduct—the sorts of issues that would be looked at by this inquiry.

Ms Godwin—I am certainly not aware of those sorts of complaints except to say that individuals sometimes say that they are not happy with an outcome and will make comments about the process as well as the outcome. That is not to say there have not been comments over a period of time but I would not characterise that as a particular focus, if you like, of a rise in the level of complaints or whatever. Our focus has been on the associated workload, and clearly the number of requests has increased. So we have had to make sure that we have had processes for managing the number of requests. That has been the main focus.

Senator SANTORO—From an operational or managerial sense—from a professional point of view—you wouldn't regard the absence of an audit on MIUs as something that was out of the ordinary or unusual in this case?

Ms Godwin—No. As I say, it would be unusual to single out a subset of a process in this way. We have generally seen the intervention process as the end part of an application process. As Mr Nicholls was saying, or as I was commenting earlier, until 1998 we did not even have a separate process. It was only as the workload—

Senator SANTORO—It has been operating for about three or four years.

Ms Godwin—As an MIU. Before that it was simply part of the end point of the application process. I stand to be corrected but I would need to look at the audit program just to see whether there are any examples of this. Generally speaking you would not cut off a single bit like this.

Senator SANTORO—I am trying to flesh out the chair's question a bit more. I am trying to get your opinion on whether or not the lack of an audit is, at this point in time and notwithstanding the political stuff that was raised in the parliament a year or so ago, nothing out of the ordinary.

Ms Godwin—I certainly would not have been particularly concerned at that point.

Senator SANTORO—I am not trying to put words in your mouth.

Ms Godwin—No.

Senator SANTORO—I am just trying to see if there is a reasonable perspective. I listened very carefully to what you had to say about the MIUs being administrative units providing that sort of support to the minister, as opposed to determining policy or making judgments on applications of guidelines and outcomes against guidelines. Would you regard this process as a reasonable audit process on MIUs at this stage?

Ms Godwin—We have certainly looked at a lot of things from a perspective from which we would not normally have looked at them. Depending on the comments that this committee ultimately makes, there may well be issues arising out of that that we would, subject to the government's view about the recommendations, want to look at from an administrative perspective. It may well have an impact on those administrative processes, but I obviously cannot comment until—

Senator SANTORO—Until we are through with it all.

Ms Godwin—Yes.

Senator SANTORO—Has anything that we have raised with you given you reason to have a major concern about the way the units operate administratively, apart from the workload matters that result from so many more of these cases being brought to the attention of the minister and therefore increasing the workload of the MIUs? Is there anything very dramatic?

Ms Godwin—No, not specifically at this point. Clearly there are a variety of questions that the committee has asked which we have had to put a lot of effort into because we do not normally collect the information in the way that it has been asked for. I guess the question arises of whether that means we ought to routinely collect it in a different sort of way. I guess that is a

general question that has arisen, but that really goes to, as I say, whether we would do things differently in the future. The answer to that question will depend very much on the recommendations and the government's views on what the committee recommends.

Senator SANTORO—Thank you, Ms Godwin. Chair, are we going back to case studies and requests for case studies now?

CHAIR—No, I think Senator Wong has some questions directly related to the ministerial intervention unit that she wants to pursue now.

Senator SANTORO—Ms Godwin, you have talked about workload, and I am not dismissive of the suggestion that your workload is heavier. Having been a minister very briefly, I know that often requests are made of ministers—either within the parliament or elsewhere—and I understand the concept of a workload relatively well. If the ambit of our requests—and, in particular, you mentioned 150 files—were to be satisfied, what sort of time frame are we talking about? You mentioned that it would take weeks and weeks.

CHAIR—I think it was 70.

Ms Godwin—It was 70 cases but each case has got a couple of files with a couple of hundred folios.

Senator SANTORO—I heard that it was 150 files—correct me if I am wrong, Ms Godwin. You mentioned that there are eight people working practically full-time to assist the committee. What additional time would be involved, to the best of your knowledge, to satisfy these requests? I am just asking for the sake of the public record.

Ms Godwin—I think in the letter to the chair of the committee I said that we thought it would take six to seven hours—give or take a day—per file to go through the files in the way that had been requested. The difficulty also—as has become clear from constructing the case studies—is that the file on its own does not necessarily give you the complete picture, which the chair and others have been focused on, because apart from the paper file there is what we called the ICSE record. Some of the steps in the process are in fact in the ICSE record and not in the file. So, to get a complete picture of what happened at a particular point, you need to match up the paper file with the ICSE record.

Senator SANTORO—What is the ICSE record again?

Ms Godwin—ICSE is the integrated client service environment; it is what we call the database we have constructed over the years where every client of the department has a sort of single record where we try to keep track of everything that has happened to them. So it is not just a question of going through the file; in order to give the picture that we are talking about, you have to interrogate the ICSE record to it match up to the steps in the file to get a complete picture.

I guess what we were trying to do with the case studies was show you what the flow of the folios looked like so that we could start to focus on those segments as opposed to the file in its entirety, but also construct some case studies that draw together not just the file but the

companion ICSE records so that you actually could see the toing and froing. I have some people looking at that element now to try to bring together the flow of the paper record with the computer record. But it is not insubstantial, because each case has got to be interrogated separately; you cannot just tap in a few questions and have it spit it out at the other end.

Senator SANTORO—You mentioned in response to a question by the chair that it may be possible, in order for you to provide the information in a timely fashion, to isolate that component of the file where the ministerial intervention process starts. Is that what you were alluding to?

Ms Godwin—Given that that process can go back and forth, as you will see from one or two of the things that we have already provided, references to intervention happen at various points. But it would certainly be possible to home in on those elements. Indeed, I think group S, which we are still working on, sort of does that for a smaller group of cases. It asks some specific questions and focuses on some specific documents as opposed to the file in its entirety. So we still have to go through the file and we still have to match it up with the ICSE record, but at least we are looking now for specific bits of information.

Senator SANTORO—So the provision of that information, from your point of view, would be sufficient to assist the committee without providing the whole massive amount of paperwork that presumably is not associated with the file?

Ms Godwin—I believe so.

Senator SANTORO—Would that assist the department to satisfy the reasonable request by the committee?

Ms Godwin—Obviously, from our point of view, if you are looking for something specific as opposed to just trying to put together huge volumes of material, you can then focus the resources on getting that specific thing. Notwithstanding some of the other comments that have been made, part of the issue is that even drawing the information together that we have already provided has entailed an awful lot of work. So while someone is doing that work, there is this work that cannot be done. In the end we have had to move the resources to try to respond across the variety of questions that have been asked. That is what we have tried to do. Given that we have answered, I think, almost all of the questions except the last two sets, we are now able to focus much more specifically on those last two sets of questions and the case studies and try to construct those in a way that may be of assistance to the committee.

Senator SANTORO—Thank you, Ms Godwin.

Senator WONG—I am not sure to whom I should direct this, but there were some questions I asked last time regarding a Mr Greg Kelly. I referred the department to an article in the *Sydney Morning Herald* from January 2001 in which it was asserted that Mr Kisrwan organised a function for Mr Kelly subsequent to his promotion. In your answer you said you could not find the article. Is that right? Was that you, Mr Nicholls, who investigated this?

Mr Nicholls—No.

Ms Godwin—I will take these questions because I did set out—

Senator WONG—Can I hand to you an extract from the *Sydney Morning Herald* dated 31 January 2001, by Andrew Clennell?

Ms Godwin—Yes.

Senator WONG—I will need it back, actually.

Ms Godwin—Thank you. I did two things. The committee asked me to have a look at the SBS transcript, which I did personally.

Senator WONG—I will come to that in a moment.

Ms Godwin—Then, because we did not have a copy of that, officers interrogated the *Sydney Morning Herald* interactive web site, but we were not able to find—

Senator WONG—Okay, you were not able to find that.

Ms Godwin—But, having said that, Mr Kelly does recall a function. It was not in 2001; it was some time earlier than that—because he moved from Bankstown to Parramatta in, I think, 1999.

Senator WONG—Does he recall any subsequent function that Mr Kisrwani organised for him—or was there more than one? Mr Nicholls, to whom does Mr Kelly report—to Ms Lindsay or to you?

Mr Nicholls—He reported to me.

Senator WONG—Was this something you were aware of?

Mr Nicholls—That he attended functions?

Senator WONG—That he attended functions organised and paid for by Mr Kisrwani.

Mr Nicholls—Mr Kelly would report all of his attendances to me, so I would have been aware of that.

Senator WONG—Did you note how many times Mr Kelly attended functions organised or hosted by Mr Kisrwani?

Mr Nicholls—I cannot recall the exact number.

Senator WONG—It was more than once?

Mr Nicholls—Mr Kelly, during the normal course of his duties, would have attended somewhere in the order of 15 to 20 functions per week.

Senator WONG—How many of those would the minister have been at?

Mr Nicholls—Mr Kelly's duties as the senior departmental officer in Western Sydney included providing assistance to the minister. I cannot give you an exact number, but there certainly would have been a large number of functions where Mr Kelly would have been present to support the minister in Western Sydney.

Senator WONG—Subsequent to the last hearing, did you as Mr Kelly's supervisor meet with him to discuss the questions that the senators had raised?

Mr Nicholls—I am no longer his supervisor.

Senator WONG—Who met with him then, or did no-one meet with him?

Ms Godwin—Mr Kelly is now on an overseas posting. He is out of the country.

Senator WONG—So how were these questions answered?

Ms Godwin—The head of the values and conduct section of the department spoke to Mr Kelly. That is the area that would normally conduct an internal investigation, if there was one.

Senator WONG—Prior to this matter being raised in the Senate committee, was there any investigation process undertaken by the values and conduct section of the department into any of these allegations?

Ms Godwin—No. They were not allegations that had previously come to our attention.

Senator WONG—They have been in the national media, Ms Godwin. We have been through this: they were on SBS; they were in the *Australian* and in the *SMH*. I do not want to rehash the discussion we had last time, but just to clarify again: the values and conduct section of the department did not interview Mr Kelly regarding these allegations until after this Senate committee had raised these issues with you?

Ms Godwin—That is correct.

CHAIR—Does that surprise you? It surprises me. This is a serious allegation made by a very senior departmental official in Sydney. It was in the media, it is well known, and you look at it and say, 'I did not know about it.' I find that extraordinary. Don't you read the paper, especially if it relates to immigration matters? Don't you get clips?

Ms Godwin—We do get clips. But, as I have pointed out, for a start that article was in January 2001, which is some while ago. I don't recall—

CHAIR—That is when it would have been done. Mr Nicholls, do you live in Sydney?

Mr Nicholls—I do.

CHAIR—Do you read the paper?

Mr Nicholls—I do.

CHAIR—Did you read that and think, ‘I know Mr Kelly. Perhaps I should at least start a preliminary investigation into whether there is any veracity in the matter that has been raised’?

Mr Nicholls—I do not recall having read that particular article.

CHAIR—No-one in your office brought it to your attention?

Mr Nicholls—No.

CHAIR—Mr Kelly didn’t say, ‘By the way, I am in the paper’?

Mr Nicholls—No. I do not recall Mr Kelly bringing that to my attention at the time.

Senator WONG—Who are Wally and Albert Wehbe?

Mr Nicholls—They are prominent business people in Western Sydney who are active in the Lebanese community.

Senator WONG—Is it Mr Kelly’s evidence or his advice that the function was organised and paid for by the Lebanese community? This was the celebration for his moving or promotion or however one so describes it.

Ms Godwin—It was not a promotion; it was a transfer. I do not know whether Mr Nicholls has anything further to add. Mr Kelly says that he attended the function; he records that it was hosted. I am not sure whether he would have known about how it was—

Senator WONG—Did he pay for his meal himself? It is pretty easy to know whether someone else is paying for you.

Ms Godwin—I presume he was there as a guest.

Senator WONG—I want to clarify something. He moved from Bankstown to Parramatta, so were these people farewelling him? Was it a function to farewell or to welcome?

Mr Nicholls—From my understanding, the Wehbe brothers are prominent in the Bankstown area. My assumption is that it was part of the farewelling of Mr Kelly from that office.

Senator WONG—Where is Mr Kirsani prominent?

Mr Nicholls—In terms of his community profile?

Senator WONG—Yes.

Mr Nicholls—His office is in Harris Park.

Senator WONG—Which regional office of the department covers Harris Park?

Mr Nicholls—The Parramatta office.

Senator WONG—So the community giving the farewell also invited to the function a prominent member of the community to which Mr Kelly was going and in which he would be perceived as having responsibility. You are not aware of who paid?

Mr Nicholls—I am aware that at the time there were a number of functions to which Mr Kelly was invited, given by a range of communities. Part of his duties—

Senator WONG—I understand your evidence on that, Mr Nicholls. So your answer is that you do not know who paid.

Ms Godwin—No, Senator. Can I clarify a couple of things? In the question before, you said he would have known who had paid for his dinner. As I understand the function, it was a stand-up reception lasting an hour to an hour and a half.

Senator WONG—But you know if you are paying for your drinks or not.

Ms Godwin—Sure. He was there as a guest. I am just trying to make the distinction that it was not a dinner of some description; it was a reception.

Senator WONG—In your answer you say that Mr Kisrwani hosted a dinner at the River Canyon restaurant in Parramatta on 14 November 2000 to farewell Mr Kelly from the Parramatta office. This dinner was attended by the minister and the New South Wales state director—is that you, Mr Nicholls?

Mr Nicholls—That is correct, yes.

Senator WONG—It was also attended by members of the Lebanese community and some departmental staff. Was that function pay as you go or did someone else pay for it?

Mr Nicholls—No. The departmental officers were guests, so we did not pay for it.

Senator WONG—Who were you guests of?

Mr Nicholls—From memory, Mr Kisrwani was the host on that evening.

Senator WONG—And the minister was there too.

Mr Nicholls—Although whether he was the only host I cannot recollect. Yes, the minister was present.

Senator WONG—Presumably as a guest of Mr Kisrwani as well.

Mr Nicholls—I make that presumption.

Senator WONG—Was any fundraising associated with that dinner?

Mr Nicholls—Not to my knowledge, no.

Senator WONG—About how many people were there?

Mr Nicholls—My memory of it is that there were 26, maybe 30, people. I cannot quite remember the exact number, but something of that order.

Senator WONG—Were all costs met by Mr Kisrwani, to your knowledge?

Mr Nicholls—That I cannot answer. I was a guest at the function. I do not know who actually paid for it. Whether he personally paid for it or whether somebody else did, I cannot answer.

Senator WONG—You do not have any issues with that, Ms Godwin? You do not have any issues with departmental people being taken out for dinner with the minister by community representatives? You do not think that presents any particular perception that some people might have a closer relationship than others with the department? That is what is in the media. Whether the media report is correct or not, the perception is that Kisrwani has a man in the Parramatta office. That is what is out there. They are not my words.

Ms Godwin—If that is the perception, it is not, in my view, a correct perception.

CHAIR—But you have not taken any steps to combat it, in that sense.

Ms Godwin—I will say a couple of things. It is clear that Mr Kelly was well known to community organisations in that area generally, and we would expect that of managers. He was farewelled when he moved, having had, I think, three or maybe four years in Sydney, during which he had become well known to a whole variety of community organisations. He was farewelled by a number of communities, not just by that one. Of course we ask officers to be careful about issues to do with hospitality—to do with perceptions and so forth. But where someone, on leaving an office, is being farewelled—and, as I say, we would certainly expect that managers would get to know the communities in their area and get to know the issues that those communities have—

Senator WONG—But does that mean being wined and dined by them?

Ms Godwin—It was a farewell dinner when someone was leaving to go to Canberra. That was a courtesy that the community extended to Mr Kelly. In those circumstances I would not particularly see it as a problem. As I say, he was equally farewelled by a number of other community organisations.

Mr Nicholls—We are also very careful to ensure that we return hospitality as well. Mr Kelly would have been in receipt of a representational allowance for those purposes. In terms of meeting the perception, as you say, we are very careful to ensure that we return the hospitality where that is possible and appropriate.

Senator WONG—Are records kept of that? Do you require your officers to say how they have spent that money?

Mr Nicholls—To my knowledge there is no record kept of it. Mr Kelly would generally have reported to me, as to his—

Senator WONG—You call it a ‘representational allowance’?

Mr Nicholls—Yes.

Senator WONG—How much is it?

Mr Nicholls—For Mr Kelly it would have been in the order of \$500 to \$750 per annum.

Senator WONG—You have no record of how that is spent?

Mr Nicholls—There is no existing record, that I am aware of, of how that is spent.

Senator WONG—Do you know how many times he took Mr Kisrwani out?

Mr Nicholls—No.

Senator WONG—Do you want to add to that?

Ms Godwin—No.

Senator WONG—I think I have asked whether any fund raising was undertaken on the night of the dinner at River Canyon restaurant, which Mr Kisrwani apparently paid for. Was there a raffle?

Mr Nicholls—Not to my knowledge, no.

Senator WONG—It is not unusual for the minister to attend these sorts of dinners for departmental officers?

Mr Nicholls—Can you repeat that?

Senator WONG—Is it unusual for the minister to attend these sorts of dinners?

Mr Nicholls—Do you mean is it unusual for the minister to attend community functions? No.

Senator WONG—No, I mean a function, organised and paid for by a community, for a departmental officer who is moving. In your experience is that a normal thing for a minister to attend? In your memory, has he ever attended anything else?

Mr Nicholls—Indeed, my hesitation is because I am searching my memory. I cannot recall the minister having attended other functions, other than those around the time of the function that you are asking about.

Senator WONG—Mr Kelly also says, through you, Ms Godwin, in an answer, that he attended no political fund raisers. So were any of these other functions at which any fund raising occurred?

Ms Godwin—Any of the other functions?

Senator WONG—Yes.

Ms Godwin—In what he says, that is what he has advised. As Mr Nicholls has said, he would have attended dozens—and probably hundreds—of functions. Mr Kelly says that he does not recall any of them being political fund raisers, and I am not aware of any that would have been.

Senator WONG—Mr Kelly also says that he used to give Mr Kisrwani lifts to departmental or community events because his office was near Mr Kisrwani's.

Ms Godwin—He said he did it on a small number of occasions.

Senator WONG—Do we know how many times?

Ms Godwin—He cannot recall precisely the number. He said it would have been a small number and that, equally, it was a courtesy that he extended to others. It is not uncommon in a community setting for people to give each other lifts. Equally, Mr Kelly may well have been given a lift on occasions by others.

Senator WONG—But we are talking about a perception here, aren't we, Ms Godwin? There is a perception of a close relationship between Mr Kelly and Mr Kisrwani. You have functions where Mr Kelly is hosted by Mr Kisrwani and he takes him in his car to various community events. Mr Nicholls said he may also have returned the compliment by providing some hospitality to Mr Kisrwani as well. Does it not concern you that there might be a perception—whether or not it is actual—of a relationship which is privileged as compared with other community leaders, in a context where, rightly or wrongly, the community perceive that relationship as having some bearing on visa applications?

CHAIR—Or if it was from a non-migration agent where there had been allegations of people charging or where you cannot establish whether or not money has changed hands in relation to assistance for section 417s.

Ms Godwin—To some extent this question of perception has arisen more recently than when Mr Kelly was actually there.

CHAIR—It concerns me that you did not even notice that it was going on. I find it extraordinary—I really do. Surely it dawned on somebody's mind that the perception could be created. I have worked in enough organisations in my past to understand that you have to

maintain an arms-length contact to avoid that. Whereas your department just says after the event, 'Oh, yeah, well it could be raised.' I just find that extraordinary.

Ms Godwin—Just to clarify that: of course we ask officers to be very careful about those issues of perception. The difficulty is that, in the proper discharge of his duties, which required Mr Kelly to be available to and understand the needs, interests and concerns of community organisations in the area where he worked, he of course had close working relationships with a whole variety of people. The difficulty for me is that those are now being characterised in a different way retrospectively. At the time—and this is what we are trying to explain—Mr Kelly would have been in close contact with a whole variety of community leaders for a whole variety of purposes, all of which would have been proper to the discharge of his duties.

In attempting to answer the questions that you put to us last time, I have been at pains to try to be as clear as possible about what happened and what Mr Kelly was involved in. As I say, part of the difficulty is that at the time most of this would have been regarded as entirely proper to the circumstances and duties—

Senator WONG—How do you know, Ms Godwin?

Ms Godwin—Because, as I say, it would have been—

Senator WONG—Have you investigated this?

Ms Godwin—It would have been an expectation of Mr Kelly's work in that area—and previously in Bankstown—that he was available and known to the community and understood the issues that were being raised by community organisations and the sorts of concerns, issues and interests that they were putting in a proper context. After the event, questions have arisen about the perception of that, and I am trying to put—

CHAIR—No, it was at the time. Some of the—

Ms Godwin—In 2001 he had already left the office. I think Mr Kelly left Parramatta in about October or November 2000 to return on term transfer to Canberra. This is all part of the normal sort of rotation process that goes on. As I say, the questions that have arisen are trying to put in context retrospectively the sorts of activities that Mr Kelly would properly have been involved in.

Senator WONG—The even-handedness you describe is making sure that departmental officials are not seen as having a closer relationship with one community or one part of a community than the other. I presume that is something you actually expect your officers to adhere to?

Ms Godwin—Certainly, we expect people to be even-handed and to have contacts across the broad range of communities, but Mr Nicholls may want to comment because he is actively involved in this daily.

Mr Nicholls—Yes, we do. It is easy to pick out just one individual. Mr Kelly would have had contact and developed professional relationships with a wide range of people and organisations involved in community affairs and settlement service delivery, which was his job.

Senator WONG—It is a bit more than that, isn't it? It is not rocking up to some migrant service provider or migrant group to talk to them about what sort of settlement service they can have and those sorts of things. You are talking about provision of hospitality where your departmental officers are paid for by members of a certain community. We may have a different view about what community relationship means, Mr Nicholls. Is this in your code of conduct somewhere? I was trying to find before in what you provided to us anything to—

Ms Godwin—It does talk about hospitality and various things like that.

Senator WONG—And you are confident, Mr Nicholls and Ms Godwin, that Mr Kelly has complied with the code of conduct?

Mr Nicholls—Yes. To the best of my knowledge, I believe Mr Kelly complied with the code of conduct during his time at the Bankstown and Parramatta offices.

Senator WONG—Have you done any investigation, Mr Nicholls?

Mr Nicholls—I was his supervisor for that period and—

Senator WONG—But, subsequent to these allegations being made, have you conducted any investigation?

Mr Nicholls—Subsequent to the allegation in the newspaper in 2001?

Senator WONG—Yes.

Mr Nicholls—No, I have not.

Senator WONG—So you make that assertion without having actually conducted an investigation?

Mr Nicholls—I make that assertion based on my knowledge and observation of Mr Kelly's work at the time that he was at the Bankstown and Parramatta offices.

Senator WONG—Ms Lindsay, were you at the MIU when Mr Kelly was at the Parramatta office?

Ms Lindsay—No, I was not.

Senator WONG—Were you, Mr Nicholls?

Mr Nicholls—I am sorry?

Senator WONG—The MIU. You actually head up the whole regional offices.

Mr Nicholls—I head up all of the New South Wales operation.

Senator WONG—Do we know if Mr Kelly made frequent contact with the MIU regarding applications for ministerial intervention?

Ms Lindsay—I have no idea. I was not there at the time.

Senator WONG—Do you know, Mr Nicholls?

Mr Nicholls—To my knowledge, there was not frequent contact, although it would have been part of Mr Kelly's duties to pass on to the folk in the MIU any representations or information that may have come his way.

Senator WONG—Would he have passed on representations from Mr Kisrwani?

Mr Nicholls—Personally, I do not know.

Senator WONG—Have you looked at that?

Mr Nicholls—No, I have not looked at that.

Senator WONG—There have been quite a lot of allegations over the last two years now about Mr Kisrwani, suggesting—rightly or wrongly, and I accept that they may be incorrect—that Mr Kisrwani had a privileged relationship with the department and the minister's office. You have not looked at what representations were made through your Parramatta office passing on Mr Kisrwani's representations?

Mr Nicholls—No, I have not.

CHAIR—I might just call Senator Humphries. I understand Senator Humphries has some questions. We are running short of time and I do not want to deny him the opportunity to ask questions.

Senator HUMPHRIES—Thank you, Chair. I have a few follow-up questions to the department. Ms Godwin, you mentioned that there are a number of communities that celebrated Mr Kelly's transfer. Were these other ethnic communities or were they communities of interest of some sort?

Ms Godwin—In the answer that we provided we mentioned a number and, yes, they are all ethnic community organisations.

Senator HUMPHRIES—Would that be a reflection of the working relationship Mr Kelly would develop with those sorts of communities?

Ms Godwin—I believe so. I feel I should put on the record that Mr Kelly is both an experienced and a well regarded officer within the department. He is very conscientious in his duties. I am certainly aware that when he was in Sydney one of the things that he was commended for by the community across the board was his approachability, his willingness to try to resolve concerns and to ensure that things were properly followed up and so forth. In terms of having a proper working relationship with the department, the role of the manager is a pivotal and critical one. I would regard the fact that Mr Kelly was farewelled warmly by a whole range of community organisations as reflecting on the fact that people had very much valued his contribution during his time there and were wishing him well in his next appointment.

Senator HUMPHRIES—I think most people would. I assume that you would not regard it as unusual in your experience in DIMIA to see officers at functions where they were being hosted by particular ethnic communities for a variety of reasons—maybe a promotion to a position or being welcomed into a position in the department.

Ms Godwin—The personal focus of the functions is less regular, but it is a fact that, because of the working relationship that had developed through all of the other contacts, Mr Kelly had become known as a key person. As I say, he had been in Sydney for about four years and would have in a sense been the most obvious point of contact for a whole range of community organisations, so he would have become well known throughout the community. It is certainly not uncommon. In fact, as Mr Nicholls was saying, departmental staff probably attend dozens of functions a week and it would be very common for those functions to have a hospitality component. That is something people obviously need to be careful about, but it is certainly not uncommon.

Senator SANTORO—Or improper.

Ms Godwin—Or improper—that is right. In order to develop an appropriate working relationship with ethnic communities across the broad range of issues and concerns that they might bring to the department's attention, clearly people need to get to know each other in their professional capacities. As I say, we require that of managers. It is not that we would regard it as untoward; we actually require people to know the communities in their area.

Senator HUMPHRIES—So an officer who did not engage in that kind of behaviour—an officer who stayed at home and refused invitations to fraternise with particular communities—would not necessarily be regarded as an officer doing his job particularly well.

Ms Godwin—It is hard to do your job in those sorts of circumstances, because it means that it is hard to get to know people and the sorts of issues and concerns that they have. Officers are invited to things that you might call general activities—festivals, celebrations and things like that—which we regularly attend in order to develop a professional working relationship that I think is a proper aspect of the discharge of this department's responsibilities.

Senator HUMPHRIES—As a politician, I am very familiar with that phenomenon. Mr Nicholls, you mentioned that you had not observed other functions that were being held to honour or celebrate an officer's movement that had also been attended by the minister. Presumably if there were such functions attended by the minister in other states, you would not be aware of those functions?

Mr Nicholls—In other states?

Senator HUMPHRIES—In other states.

Mr Nicholls—No. I would not generally be aware of the minister's attendance at functions outside of New South Wales.

Senator HUMPHRIES—But you wouldn't be surprised if you discovered that the minister was attending a function at the invitation of a particular community in another state to celebrate some officer's achievement?

Mr Nicholls—No. I would assume that that occurs. I did not see anything out of the ordinary in the way that the minister attended these functions in Sydney, but obviously I cannot comment categorically about what happens outside of New South Wales.

Senator HUMPHRIES—How long have you been with DIMIA?

Mr Nicholls—About 25 years.

Senator HUMPHRIES—Was it your experience that previous ministers for immigration would attend functions of that kind as well?

Mr Nicholls—That was certainly my understanding, yes.

Senator HUMPHRIES—I see. Was there anything about that function with the Lebanese community, which has been the subject of questioning today, that struck you as being unusual or improper in any way? Was there anything that stood out?

CHAIR—You may have to demonstrate which one, Senator Humphries.

Senator HUMPHRIES—There was particular questioning about the function that you attended.

Mr Nicholls—The one that I attended?

CHAIR—The one that you attended.

Senator HUMPHRIES—That is the one I am referring to.

Mr Nicholls—The one at the River Canyon restaurant?

Senator HUMPHRIES—That is the one, yes.

CHAIR—That was on 14 November 2000.

Mr Nicholls—I cannot recall the exact date but—

Senator WONG—It is in your answer.

Mr Nicholls—Yes.

Senator HUMPHRIES—Nothing inappropriate or unhealthy struck you about that function that you attended?

Senator SANTORO—About the food?

Mr Nicholls—We did not get food poisoning!

Senator HUMPHRIES—Was there anything unhealthy in a political sense?

CHAIR—You might want to narrow it down further!

Senator WONG—That is an opinion of Mr Nicholls.

CHAIR—It is an opinion.

Senator HUMPHRIES—We have been asking for opinions all day.

Mr Nicholls—Perhaps if I could speak of my observations. My observation was that that function was attended by a diverse number of people. There were people from a number of different religious backgrounds and representatives of different groups. Both Mr Kelly and I saw it as a good opportunity to meet with a diverse range of people and for me to continue the professional relationship.

Senator HUMPHRIES—Thank you very much.

Senator WONG—Ms Godwin, in the answers to a number of questions, you have expanded the list of Kisrwan cases from 17 to 24. It may be that we do not have time now, but could you explain to us how that occurred?

Ms Godwin—I think we touched on it at the last hearing. The original list that was handed to the minister had 17 or 18 names on it, but there were subsequently another six or so names that brought the total that were provided—I think by Mr Ferguson—of that group, which we have included as a group—

Senator WONG—I notice Mr Illingworth says 18, but the minister's letter refers only to 17 names, so I presume therefore that the minister's letter of 16 June was erroneous. You can take it as read that I do not accept your answer about providing a list of those names and you will note that the answer to the question on notice requests that that be provided in camera.

Ms Godwin—Sure. We have noted that.

CHAIR—With regard to the question R1 in relation to matters regarding Mr Kisrwan and associates and their involvement in ministerial intervention applications, you have indicated at

answer D that it is not appropriate to write copies of documentation as they are material to an ongoing investigation. You might want to have a look at that to see whether or not there is material that you can provide in camera or with names that have not been in the public domain blanked out, so that the committee can understand the process. It also may be worthwhile understanding who else has provided documentation in camera to the committee on this issue as well.

Senator WONG—Just trying to be circumspect here.

CHAIR—In that the investigation obviously includes a number of other organisations.

Senator WONG—That was going to be my question on that.

CHAIR—Perhaps you could have another look at it and talk to the secretariat about what you can provide.

Ms Godwin—I think we will need to. My advice—and I did check this with our investigations area and our legal advisers—is that it is standard not to in a sense divulge an ongoing investigation, in case you in some way, even inadvertently, compromise the outcome of that investigation. I am operating on the basis of advice here, so I would certainly appreciate the opportunity to take it for further discussion and I will talk to the secretariat about it. But, as I say, that answer already incorporates legal advice.

Senator WONG—This is regarding Mr Kisrwani's investigation?

Ms Godwin—It is standard practice, where there is an ongoing investigation, not to do anything that will in any way compromise that.

Senator WONG—Mr Illingworth, you were right; it is 18 names.

Proceedings suspended from 11.16 a.m. to 11.39 a.m.

PURCELL, Mr Marc Dorian, Executive Officer, Catholic Commission for Justice, Development and Peace

CHAIR—I now welcome, via teleconference, Mr Marc Purcell. You have lodged submission No. 15 with the committee. Do you wish to make any amendment or alteration to that submission?

Mr Purcell—No, thank you.

CHAIR—I now invite you to make a short opening statement, at the conclusion of which I am sure members of the committee will ask you questions in respect of that submission and your oral evidence today.

Mr Purcell—Thank you for the opportunity to provide some testimony. You are all probably extremely familiar now with the detail of the workings of section 417 in particular, which is the area I would like to talk about. If I may, I would like to bring the conversation towards some possible practical solutions. I do this in the light of a conversation that I had with the former minister for immigration on 19 June. The meeting was about another area—alternative forms of detention—but in passing the former minister made some comments which I do not believe were confidential. He was expressing his frustration at the sheer volume of requests that were coming through under section 417 and saying that it was beyond any one individual to be able to work through that volume of applications. I am paraphrasing the meaning of his comments, but it highlights a larger problem. We now have the East Timorese also claiming under section 417, and I have just received some statistics from the Victorian branch of the Australian Red Cross which I would like to include in my opening statement so that they are part of *Hansard*.

As you would be aware, many East Timorese are applying under ministerial discretion to be allowed to stay. At the moment we have 186 cases, which include East Timorese families who have gone off benefits, because they are post the Refugee Review Tribunal stage, and are appealing to the minister. Essentially they have no means of financial support or livelihood unless, of course, they are working. Seventy-six of those cases have no source of household income, 15 cases have a current threat of homelessness, and 51 cases are forced into inappropriate living arrangements, by which Red Cross means that they are overcrowded. The reality of trying to force a whole lot of humanitarian cases through a mechanism which relies on one individual ultimately is that the welfare concerns are very real. They are only going to become more dire, because we also have over 8,500 people on temporary protection visas who, if their claims are rejected at the RRT, could be expected to also make claims under ministerial discretion on humanitarian grounds. So I think we need to move forward on the matters of policy and practice in order to look at how to try and tackle this humanitarian situation. Thank you.

CHAIR—Before we go to other senators, I will ask you about the point that you raised, as I understand it, about the ministerial discretion exercised by the minister, which is non-reviewable, non-compellable and non-delegable. Do you believe it is beyond the power of one person, in the sense of being able to effectively look at all the cases, assess the cases and then come to a conclusion about whether or not they do—

Mr Purcell—Senator, the sound is cutting in and out a little bit.

CHAIR—I will get a bit closer to the microphone to see if that works. You mentioned—and I will paraphrase it—section 417 or ministerial intervention. Do you agree that it is beyond the power of one person to be able to exercise a non-reviewable and non-delegable power in such a way that they can give the cases full attention to ensure that all the issues are covered?

Mr Purcell—I feel so, and I think that was the sense of the former minister's comments. The reality is that, since 1999, a fairly elaborate administrative process has been established within the department of immigration to try to assist the minister in doing this, in making the decision, so in reality it does not rely purely on him or her alone. But it is terribly onerous and, as I indicated, once you start having cases such as the East Timorese or the people on temporary protection visas—considering that they have a humanitarian case to be made and that the minister would look at their cases—it is going to be terribly time consuming, and the problem is that there is still no procedural fairness around this. If you have got an administrative system supporting the minister but it is not subject to any sort of review, that is very problematic under our system of governance.

CHAIR—Thank you.

Senator HUMPHRIES—Can I ask you, Mr Purcell: how long have you had an involvement in the migration system; particularly, how long have you been involved in the process of assisting people who have been making applications in the system?

Mr Purcell—We are not directly involved in making the applications. Quite often we are called upon to assist with writing letters of support. My agency has had a longstanding commitment to working with asylum seekers and refugees over the past six or seven years, and personally I have been involved with working with refugees with the UNHCR in Kathmandu and with refugee communities here in Melbourne.

Senator HUMPHRIES—For how long?

Mr Purcell—My personal involvement would be going over the last eight years.

Senator HUMPHRIES—In the submission that you make, there is discussion about exactly how the former minister, Minister Ruddock, exercised his discretion under 417 in particular. You cite, for example, Ms Stratton's evidence, where she suggests that the minister 'acted irresponsibly and with excessive authority'. You go on to talk about other views of how his discretion might have been exercised. What exactly is the commission saying about the minister's exercise of discretion? You have pointed out the structural problems with it in the sense of the concentration of decision making being in one person's hands, but what are you actually saying about the way that the minister has actually exercised his discretion and the probity of that process?

Mr Purcell—I think the problem lies in the lack of transparency around the exercise of this power. Because the statements to parliament arrived nine months after a decision was made, and they are extremely curt and not very informative, it is going to inevitably raise questions about the probity; so there is always going to be a question mark or an element of doubt, no matter

how much propriety the minister operates with. Because of the lack of transparency, questions are going to be asked. It is not just NGOs that are raising this concern. The Parliamentary Library, in their paper on ministerial discretion, points out that public accountability is limited and suspicions about favouritism are inevitable.

Senator HUMPHRIES—To some extent, that could be said of any minister in that situation. Are you saying that this particular minister acted irresponsibly in respect of the exercise of the discretion?

Mr Purcell—I am saying that there are doubts raised because of the lack of transparency in the system, so it is not possible to assess whether or not the former minister acted 100 per cent responsibly—because of the nature of the system that has been constructed and the way that it has been used.

Senator HUMPHRIES—So you cite Ms Stratton's view but you do not necessarily adopt it. Is that what you are saying?

Mr Purcell—I think it is a real concern, so I have cited Ms Stratton's view and, as I just said, the Parliamentary Library paper as well, which has similar concerns. The Parliamentary Library paper says that the exercise of the minister's discretion remains substantially hidden from scrutiny, and that is our concern. That should be a concern for the new minister too because similar complaints could be raised about her use of ministerial discretion in the future if the same practices and the lack of transparency around those practices continue to operate. The question then becomes: how do you introduce more transparency into the system?

Senator HUMPHRIES—On that question of transparency you make reference to the statements tabled in parliament when the minister exercises a discretion. You cite an example of a statement that Minister Ruddock has tabled and you contrast that with one that former Minister Bolkus tabled in the past.

Mr Purcell—Yes.

Senator HUMPHRIES—The committee has received evidence from the department that there is no substantial difference in the extent of information provided in those statements over the years; that is, the officers who gave evidence said that they did not perceive any decline in the amount of information being provided. What is the source of your assertion that there has been a decline in the disclosure in those statements? Have you personally examined and tried to analyse the extent of disclosure in the statements made in more recent times compared to those made in the past?

Mr Purcell—Before I answer that, was that evidence provided by the department today or was it given in a previous hearing?

Senator HUMPHRIES—No, that evidence was given some weeks ago.

Mr Purcell—I have looked at the *Hansard* for those hearings and what I noticed was that, while the Department of Immigration and Multicultural and Indigenous Affairs made that assertion, they did not provide any evidence to back it up. The difference between that and the

evidence that we have cited from Johanna Stratton's thesis is that she gives some actual quotations from different ministers. I was aware that former senator Barney Cooney had taken a strong interest in this matter when he was on the legal and constitutional affairs committee inquiry into the migration system and the asylum system in 1999-2000. So the extent of my personal investigation was that I had a lengthy conversation with him about this. His view was that the more transparency and the more detailed statements that could be provided the better it would be for the parliament, for accountability and for the minister.

Senator HUMPHRIES—Yes, I think that is a point that is reasonably well made, but the issue here is whether or not that level of transparency has in fact declined in recent years.

Mr Purcell—I would defer to Johanna Stratton's thesis because, as I said, the department made the assertion that it had not declined but they did not provide any actual evidence.

Senator HUMPHRIES—We could say, I suppose, that it is up to the people making the assertion or the claim to provide the evidence of the decline. Ms Stratton's paper did not provide any evidence either, in a sense, other than citing—as you have done in your submission—a particular statement of Minister Ruddock and a particular statement of former Minister Bolkus. I am certain that you could find illustrations of fulsome statements by Minister Ruddock and very terse and unhelpful statements by former Minister Bolkus if you looked hard enough for them.

CHAIR—I am happy for you, Senator Humphries, to provide that, because I have not seen any. If you could, it would be helpful.

Senator HUMPHRIES—Okay. The point I am making is that, given the hundreds of statements that are tabled, it is very unhelpful to cite just one example of each and say that this is typical unless there is actually evidence of that. Do you have evidence that the statement you refer to in your submission, on the part of Minister Ruddock, is typical of his statements and that earlier statements by earlier ministers were typically of the kind that you cite from former Minister Bolkus?

Mr Purcell—Again, I would defer to Ms Stratton because in her thesis she did say—and I also had an opportunity to have a discussion with her—that she had the rather onerous duty of reading through a decade's worth of ministerial statements to parliament. I come back to the fact that DIMIA made the assertion but did not provide any evidence. I think her examples were made to highlight the point that she had looked at all of those ministerial statements and noticed a decline over time.

I think the issue is about what is most helpful to the parliament—to you, the Senate and the minister—and to the general public. That would clearly be to have set guidelines about the quality of the information that is provided. I think we find ourselves in agreement that the more information provided the better the position we are going to be in the future.

Senator HUMPHRIES—I understand that the East Timorese to whom you referred earlier on are being accepted on the basis of family relationships and their connections with Australian citizens, relatives and the community. I understand that this is the same basis on which the minister appears to intervene on behalf of others who make applications of the same sort. Do you think the minister's basis for intervention is appropriate or inappropriate?

Mr Purcell—Some sort of intervention is needed, because these people have been languishing in our community for the best part of a decade. I would say that it is welcome. But, again, a problem inherent in the nature of the system is that the speed with which the claims or appeals are processed is really determined by the capacity of the ministerial intervention units—and, in this case, that of the minister. There is inevitably going to be a lapse where people have their benefits cut after they leave the RRT and are appealing. People have to pay rent, they have to buy food and they have bills to pay. So it may not be the most helpful system for people in that situation.

Senator HUMPHRIES—But do you perceive that a different approach was taken by the former minister, with respect to the basis for intervention in the case of the East Timorese, than we have seen for other particular ethnic communities or people of other nationalities?

Mr Purcell—Clearly there is a political imperative to assist the East Timorese, which, I think, is bipartisan. This is the mechanism the government has chosen to process the East Timorese. There are 1,600 cases, so, if you are looking at it comparatively between ethnic groups or nationalities, East Timorese are going to predominate in the coming year or two. But, at the end of the day, it is about where the humanitarian need is. Some have argued and recommended to governments and the parliament in the past that a special visa class for the East Timorese would have resolved the problem without having to resort to this level of micromanagement. But, for whatever reason, this path was chosen.

Senator HUMPHRIES—I turn to the options that you have put forward to improve the system. You have made a number of suggestions. In particular, you recommend that we, as a committee, should recommend the reinstatement of the humanitarian visa class. I do not know whether your background in this area goes back far enough but, of course, this visa class—or a similar visa class—was abolished about 10 years ago by the former Labor government. Do you have an understanding of why the system would have led to that decision at the time?

Mr Purcell—Yes, I do, but the principle is: what price justice? If there are people that have a basis for humanitarian claims, they should be considered in a process that is accountable and subject to review, and early on so that justice is done speedily. At the moment we have a system which in some cases requires people who have humanitarian claims as opposed, perhaps, to refugee convention based claims to have to go through two levels of assessment—by DIMIA and then the RRT—before they can put an appeal to the minister for consideration. I think commonsense would tell us that, if somebody has genuine humanitarian grounds that are accepted, there is unnecessary suffering that they have gone through.

Senator HUMPHRIES—I understand the arguments, and there is some weight in the arguments for having that kind of class. What I am asking is: can you explain why it might have been that, notwithstanding the commonsense you refer to in that position, 10 years ago the parliament abolished this visa class?

Mr Purcell—I think it was a fairly short-sighted response—a fear about people appealing through the legal system—but we do have a system of justice in Australia which protects people's rights, and I feel that, if there are people with genuine humanitarian claims, they should be allowed to proceed through a system where there are legal appeals, accountability and due

process. At the moment we have a system which is not really allowing that—under 417—and that is very regrettable.

Senator HUMPHRIES—You have no recommendations about how we should modify the regime that used to apply for humanitarian visa applications so as to avoid the sorts of reasons that the parliament might have used to abolish that class in the first place?

Mr Purcell—I note that the department of immigration on Nauru is already assessing people on humanitarian grounds against other human rights conventions that we have signed—the International Covenant on Civil and Political Rights, the Convention against Torture and possibly, although it is a bit unclear, the Convention on the Rights of the Child. It would be easy enough to allow officers to assess people at this primary stage on the mainland and keep section 417 for exceptional cases so you take the burden off the minister. It would not mean that there would not be public interest criteria that claims would also need to be assessed by. You could include the public interest criteria there. So, if the minister felt that a person, even though they might have a humanitarian claim for public interest reasons, should not be allowed to stay, that could be incorporated into it as well under existing parts of the Migration Act.

Senator HUMPHRIES—You mentioned in answer to that last question, I think, the idea of processing people onshore when making these sorts of applications and not from offshore locations. I understand you have been quoted in the media in recent weeks as talking about this issue and the idea of having a new humanitarian visa class. You have said that you believe a system like that would work effectively and that people, in particular if they were onshore, would respect the onus on them to accept the outcome of that process. I think you were actually quoted as saying that you thought 90 to 95 per cent of applicants who had gone through that system and failed would nonetheless be likely to turn up when required for deportation. Is that an accurate description of what you have been saying?

Mr Purcell—We are talking about a slightly different topic here, but I am happy to talk about an alternative process of assessing people's claims and accommodating them out of high-security detention facilities. I am not saying that there should not be adequate levels of security. An important aspect of this will be having increased compliance by the department of immigration for people within the community, and case management.

Overseas evidence shows that where asylum seekers are supported and kept within a system—and they have a strong vested interest in staying within the system because they would like to become legal—there are very high rates of compliance. In one British study the rate was 97 per cent; in an American study it was 90 per cent. I can send those to you, if you would like, so that you can look at them in more detail. Also our local experience in Melbourne of 200 asylum seekers supported with case management—some who have been released from detention by the department into the care of the Hotham Asylum Seeker Project—is that there is 100 per cent compliance.

Senator HUMPHRIES—I would be interested in seeing those studies.

Mr Purcell—I can send them up to you. I think it does offer a real prospect of getting families and vulnerable people out of what is at the moment a one size fits all detention system. We would argue that, certainly after a period of a year, many people would not need to be in that

high security facility. When they come near to the end of their processing—say, people are appealing to the High Court or the minister—it may be quite appropriate to beef up the compliance. In some cases you might assess the security risk as quite high and you might need to put them back into high security detention. But you have a multilayered system of ensuring compliance and ensuring care for people. I think we would all agree that keeping families and children in detention is not really the Australian way. It should not be.

Senator HUMPHRIES—I would be interested in seeing the evidence on compliance rates from those studies, because my understanding is that the rates have not been as high overseas as you suggest.

Mr Purcell—I will send them up to the committee.

Senator HUMPHRIES—Thank you very much. To go back to Ms Stratton's evidence, you cite her assertion about the case of one Bilal Ahad who was reportedly shot dead in Pakistan shortly after being deported when the minister failed to exercise a discretion under section 417. I am not sure if you are aware that evidence before the committee has suggested that there is not actually any evidence that Mr Ahad was shot dead as suggested. In fact, the evidence seems to be that Mr Ahad died of natural causes. You were not aware of that information?

Mr Purcell—No. I have not heard of that, but thank you for alerting me to it. I think, again, we have to come back to the principle that you want the system to operate in the most effective way possible to ensure that people who might be at some risk are protected. At the moment, because of a lack of transparency and because the system is tilted towards processing through one person who is under tremendous individual pressures and the political pressures of the day, as well as workload pressures, it does not lend itself, necessarily, towards providing the most effective protection of people possible and the prevention of any harm coming to people.

What we have seen since 1999, since the new ministerial discretion guidelines were issued, is the establishment of a system that looks at humanitarian grounds based on human rights conventions that various governments, Liberal and Labor, have signed over the years. We have the Nauru example, where, already, along with the refugee convention, at the primary level DIMIA officials are assessing applicants on other human rights grounds. It seems to indicate to me that the sheer volume of cases coming through and the movement towards the creation of an administrative system within DIMIA lend themselves to having some sort of humanitarian assessment system created early on in the assessment process which does not rely on the minister.

I think in doing that we would be following what Canada does—Canada also has a judicial appeal system, which reflects the reality that many people apply on humanitarian grounds and have eligible cases on humanitarian grounds as opposed to refugee convention grounds. We are moving in this way, so we might as well consolidate it and remove the problem for the minister—which is the problem of lack of transparency—reduce the workload, allow the minister's staff to do the job early on and have this subject to some scrutiny, to some accountable process, and to the scrutiny of parliament.

Senator BARTLETT—When you talk about bringing in some form of humanitarian visa class onshore, you are not talking about abolishing ministerial discretion alongside that. You still want to retain it in some form.

Mr Purcell—I think retaining the discretion is important and useful, but it has to be workable. The situation has arrived at this point in time where it is becoming unworkable.

Senator BARTLETT—You mentioned briefly in the submission—I think it was a quote from somebody else—the actuality of the minister relying to some extent on the views or recommendations of people outside the department. Have you had much experience of decisions on matters of discretion being influenced by outside people, either in the work you do or with organisations which you have been interconnected with?

Mr Purcell—I have not. I am on the committee of the Refugee Immigration Legal Centre, and I believe they will be providing testimony next. I think the quotation we gave is from an earlier submission of theirs. They might be able to answer that question in some detail. I come back to the point that, as long as the system continues as it is, it is going to leave the minister exposed to these sorts of accusations or concerns raised. So it is in the interests of the minister to improve at the very least the level of transparency around the statements provided to parliament. That would to some extent assist in removing some doubt as to the reasons why particular people were granted leave to remain in Australia under various visas issued by the minister. There should be some linkage in the visa issue as to why a particular visa is suitable for a particular person.

Senator BARTLETT—Thank you. I might follow that up later.

Senator WONG—You talk about two options in your submission. I presume the second is the more narrow and would simply require that a grant of a protection visa would have regard to other protection obligations under other conventions. Do I understand that correctly?

Mr Purcell—Yes, that is right.

Senator WONG—Is there any reason that no reference is made to the Convention on the Rights of the Child in the passage you have cited? I presume it is because any non-refoulement obligations there are implied rather than explicit, as they are in CAT?

Mr Purcell—Sorry. I could not hear you. Would you mind repeating the question?

Senator WONG—In the passage by Dr Taylor that you cite about how that would work—that is, that the granted protection visa would make reference to our obligations under the convention against torture or the ICCPR—I note you have made no reference to the Convention on the Rights of the Child. I presume that is because, as I understand it, any non-refoulement obligations which flow from that convention are implied rather than expressed. Would you also envisage reference to the rights of the child convention if we went down the path of option 2?

Mr Purcell—Absolutely. In terms of its language, it is probably the most advanced of all the human rights conventions. The best interests of the child principle is one which is already in general operating in our government departments. So you are quite right in that the Convention

on the Rights of the Child does need to be one of those conventions attached to the Migration Act, along with the other two.

Senator WONG—What do you say to those people who would say that if we expanded the basis on which we could grant protection visas, in the way that you have expressed, that that would open the floodgates?

Mr Purcell—I do not think it really would open the floodgates. We have other systems, policies and programs in place for tackling people smuggling. There is increased scrutiny of the operation of the migration agents, and I think that is a very welcome development.

Senator WONG—I suppose the other response to that argument is that the government's position is that the current 417 process deals with our obligations under those conventions in any event. So, if that were the case, there would actually be no net increase.

Mr Purcell—I think that, for all the reasons I have already outlined, it leaves the minister exposed to inquiries of this sort because of doubts about the way that discretion has been exercised. There is the fact that there are many people living in the community without welfare at the moment, and people in the East Timorese community and possibly in the future will have temporary protection visas. More fundamentally, we have an existing administrative system operating in the department assisting the minister in making decisions, but it is not open to any sort of accountability and scrutiny. I think this lends itself towards bad governance.

Senator WONG—You make reference to the fact that Lebanon is the No. 1 country in terms of the number of 417 grants, despite the fact that, if you look at UNHCR figures, Afghanistan and Iraq would have been higher in terms of the numbers of refugees. You describe Lebanon as a non-refugee producing country. Can you tell me the basis on which you say that? It is on page 11 of your submission.

Mr Purcell—In general, by comparison, Afghanistan and Iraq are clearly recognised as producing mass outflows of refugees. I think since the end of the conflict in Lebanon—I am not sure how many years ago it is now, but it is many—while there might still be some people obviously with humanitarian grounds and there may indeed be some people with refugee claims, it is not commonly recognised as a major source of refugees around the world.

Senator WONG—How do you explain the fact that it is the No. 1 country for 417 grants?

Mr Purcell—I really do not know why it is so highly represented. It could be useful for the committee to look through the statements provided to the parliament for those 99 cases to see whether the minister's statements shed any light on the circumstances of the people to whom visas were granted.

Senator WONG—The difficulty is that we cannot necessarily tell who they are from the tabled statements. But I will leave that for another day.

CHAIR—There being no further questions, we thank you for the oral evidence and the submission you have given today. They have been very helpful to the committee's deliberations. We appreciate your time and we are sorry about the delay in getting to you.

[12.21 p.m.]

MANNE, Mr David Thomas, Board Member, Refugee Council of Australia; Co-ordinator, Refugee and Immigration Legal Centre

CHAIR—I welcome, by teleconference, Mr David Manne of the Refugee Council of Australia. We are sorry about the delay. We have been running behind schedule all day and we appreciate your patience in that regard. The Refugee Council of Australia has lodged with the committee submission No. 12. Do you wish to make any amendments or alterations to that submission?

Mr Manne—No.

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

Mr Manne—Firstly, I thank the committee for providing both organisations—the Refugee Council of Australia and the Refugee and Immigration Legal Centre—with the opportunity to participate in this inquiry. Very briefly, the Refugee Council of Australia is the peak nongovernmental agency in Australia concerned with issues relating to refugees and asylum seekers. It also represents over 90 organisational members and a similar number of individual members. The council works to promote humane, flexible and legally defensible policies towards refugees, asylum seekers and displaced peoples by the Australian government and the Australian community.

Secondly, the Refugee and Immigration Legal Centre is a specialist legal community centre providing free legal assistance to asylum seekers, refugees and disadvantaged migrants in Australia. In the last financial year we assisted over 3,000 people. For over eight years we have represented the largest caseload of East Timorese asylum seekers in the country. That caseload numbers about 650. We are also a contractor under the IAAAS of the Department of Immigration and Multicultural and Indigenous Affairs. The powers of ministerial discretion arise often in our work, and so we have considerable practical knowledge and experience of their operation—or, indeed, at times their nonoperation—in a wide range of matters in the jurisdiction.

Very briefly as to our submissions, the council's contentions cover all four of the terms of reference as they relate to the discretionary power under section 417 of the Migration Act. We seek to deal only with those who have compelling humanitarian reasons not to return to their country of origin—that is, once rejection of refugee status has occurred—and consequent issues relating to a potential denial of fundamental human rights if the person is returned to their country of origin.

The thrust of our submission is that, while working to examine how the discretionary powers have been used, this only goes part of the way to the ultimate heart of the problem—that is, the absence of an effective administrative and reviewable determination of complementary protection needs, one which would properly meet our obligations under international instruments to which we are a signatory and guard against the risk of refoulement of people to places of persecution or of human rights abuse, in breach of our obligations. We submit that the current

application of the ministerial powers in this regard is fundamentally flawed for the reasons set out more particularly in our submissions.

Further, the Refugee and Immigration Legal Centre's submissions are generally similar and consonant with the Refugee Council's submissions. We too would urge strong consideration of a complementary protection system within our administrative decision-making processes at both the primary and review stages. We also refer the committee to the submissions that we made to the Senate Legal and Constitutional Committee in 2000 for the *A Sanctuary Under Review* report, where we dealt specifically, under heading 3, with matters concerning ministerial discretion. We repeat those submissions.

Further to that, time permitting today, there are two additional specific matters which we would like to raise. The first is in relation to East Timorese asylum seekers and the caseload that we have dealt with. The second is the excision provisions and the operation of ministerial discretion, in particular under section 46A of the Migration Act. Finally, the Refugee and Immigration Legal Centre would be pleased to provide the committee with written submissions shortly. I apologise for my voice, which is due to flu.

CHAIR—I thought you might have been cheering for the rugby.

Mr Manne—Both.

CHAIR—Given the time constraints it might be advisable, if you would not mind, to take those two additional matters on notice and make separate submissions in relation to them.

Mr Manne—Certainly.

CHAIR—In respect of the second one—the ministerial discretion under 48B—it may be an issue that is outside the terms of reference, so I would need to look at the terms of reference and consult with my colleagues in respect of that. In my opinion it is probably caught in the last one.

Mr Manne—I should clarify: in my second point I was mentioning 46A, which is the provision relating to preventing persons who enter excise places from making valid visa applications.

CHAIR—That may very well fall outside the terms of reference but we could have a look at that and go from there.

Senator HUMPHRIES—You argue for a structure of consideration of humanitarian issues under what you call a complementary protection mechanism. You argue that it should be structured in such a way that the ministerial discretion should be reserved only for exceptional cases. You make the reasonable point that there is a massively heavy workload on one individual. Under your proposal how exactly would the ministerial discretion be reserved? In particular, do you propose that in some way to achieve that the ministerial discretion should be narrowed?

Mr Manne—Perhaps the best beginning to the answer is stating what the ministerial discretion should not be reserved for, and that is matters that we have mentioned in our

submission—in particular those human rights obligations to which we are a signatory. Specifically in answer to your question, we would be referring to cases where someone who is in a particularly vulnerable situation—who has, for example, not been aware of or has inadvertently missed an opportunity to seek review of their decision—would then be able to access ministerial discretion. That is one example.

Other examples could include those which, strictly, fall outside the non-refoulement obligations that we have as a signatory to these human rights instruments but which otherwise raise, for example, issues where intervention on compassionate grounds would be applicable and appropriate.

Senator HUMPHRIES—You are saying that, where humanitarian issues that fall outside other criteria are raised, the minister's discretion should be preserved. But what about cases where it is within those matters that are laid down within a statute? Are you saying there should not be a discretion lying with the minister in such cases generally?

Mr Manne—I take your question to be: where, for example, complementary protection exists within the administrative decision-making framework, should there still be ministerial discretion to intervene? Is that the question?

Senator HUMPHRIES—Yes, it is. It sort of reflects the reality that many people would view the minister simply as being, in all cases, the last court of appeal, and they would work the system so that, if they had failed at earlier stages, he would be the person they would turn to. How would you prevent that from happening?

Mr Manne—How would we prevent the minister from being the last port of call?

Senator HUMPHRIES—Yes. You talk about reducing the number of cases that the minister would have to consider. Is your assumption that the minister would have to consider fewer cases under your model, based on more cases being picked up and more people being given visas lower down in the court system and, therefore, on not as many cases reaching him?

Mr Manne—Absolutely—without a doubt. There would be no particular need for ministerial discretion to apply per se to intervening in humanitarian cases if we had a properly functioning system to assess those humanitarian cases, if you like, within an administrative decision-making framework. What would be left is that the minister would not need to deal with those cases, because they could be dealt with at the primary and review stages and, indeed, by way of judicial review. That would leave within the minister's realm a small number of matters to do with compassionate reasons, if you like, such as medical conditions, family connections or even whether an applicant's age is relevant to their vulnerability, or other circumstances in which compassionate intervention is appropriate.

Senator HUMPHRIES—So the model you are proposing would, in a sense, be dependent on there being a much larger number of people in Australia each year being granted visas on the basis of refugee status or on some other humanitarian grounds, based on one of the conventions that Australia has signed up to?

Mr Manne—At the end of the day, in our experience, it would inevitably lead to larger numbers being granted visas, on the basis of the proposal that we have made. So, if that is your question, the answer is: yes, potentially quite a large number of people would be able to avail themselves of temporary or permanent stays through this decision-making process at the administrative level.

Senator HUMPHRIES—I do not know how long your background is in migration matters but, looking at the proposals that you and others have made for the restoration of the granting of visas on a humanitarian basis by bodies lower in the hierarchy than the minister, we come up against the reality that only 10 years ago the parliament, at the behest of the then Labor government, abolished that visa class. I understand that that decision was based partly on the fact that, because the visa class was so open-ended, a huge number of applications were being made and the system was becoming difficult to manage. I am not sure whether you are aware of that state of affairs or whether you have any experience of it but, taking that as a problem that was addressed at the time, how would you structure a humanitarian visa class to avoid those sorts of problems?

Mr Manne—My first comment is that, unfortunately, my involvement in the area does not go back that far, so in part I may take the question on notice, but I can certainly still answer the general thrust of the question. The visa class ought to be structured in such a way that it adequately captures the main elements of the obligations contained under the ICCPR, the CAT—that is, the Convention Against Torture—and also other human rights instruments to which we are a signatory; in other words, whether or not it were structured in the way that the refugee convention obligations are set out under the Migration Act or whether it were even more specific in setting out certain rights and obligations under those specific treaties. One way or other, that would be our proposal.

I should say that, although we are not necessarily in agreement about the recent amendments, which were effected by the Migration Legislation Amendment Act (No. 6), which came into effect in October 2001, there is some precedent for setting out in more particularity, if you like, the definitional elements that would be required to meet the criteria of a particular visa, were it created. In particular, I refer to the new definition of ‘persecution’ in section 91R. That is one example for which there is now a non-exhaustive list of matters which ought to be considered ‘persecution’. That is one technique which could be devised to give some certainty and consistency to decision making.

Senator HUMPHRIES—How long has the Refugee Council of Australia been in existence?

Mr Manne—I do not have the exact year, I am afraid. Instead of guessing, I will take that on notice.

Senator HUMPHRIES—You might also take on notice the question: if it existed in 1993, what was the council’s view about the legislation to abolish that humanitarian visa class?

Mr Manne—Certainly.

Senator HUMPHRIES—Thank you very much.

Senator BARTLETT—I think you have outlined in reasonable detail in your submission, as have others, some constructive suggestions for alternatives, in terms of an onshore complementary humanitarian regime. Just to double-check—obviously there are a few different ways that could be done—you would see that predominantly being tied specifically to our protection obligations under a range of international conventions, but do you have a view about exactly how broad that should be? Should it solely relate to protection or should other broader humanitarian types of aspects be tied in?

Mr Manne—To answer your question in a broad or general sense, our submission is that the scope of protection to be provided in the visa class or classes and the determination process ought to be directly referable, fundamentally, to our non-refoulement obligations under the various human rights instruments that I have mentioned and, in particular, to the human rights protections contained in those conventions. To that extent we do not seek to narrow any further, if you like, the fundamental obligations contained in those conventions and treaties.

Senator BARTLETT—I think that is an important part of what the committee is doing, but you and others have put that down in a fair bit of detail so I will not go into it further here. One of the other things which goes to the question of transparency that has come up pretty regularly are the allegations and concerns about possible abuse or favouritism in the way the minister exercises discretionary power. Given your and your organisation's involvement in, I would presume, a whole range of individual cases and circumstances, is there anything in your experience that would substantiate those sorts of perceptions of misuse or improper favouritism?

Mr Manne—My first point on this based on experience, but also based on arguments of principle, is that the fundamental problem with the current system is that it is corruptible—that is the very problem itself. I have no evidence whatsoever of the fact that that power has been used corruptly or that it has been abused in anyway. An inherent problem, as noted in the council's submission and also on behalf of RILC, I would submit, is the very nature of the system itself.

Having said that and confirming once again that I have no evidence of corruption or abuse of the process, the inherent problem of the process itself has resulted in, for example, a dynamic quite often where one of the things as an adviser that you are mindful of doing if you want a matter to get before the minister is to, if you like, find the right person to lobby on behalf of your submission or your client. This is one of the aspects of, if you like, politicisation of decisions, which is a serious problem and really undermines the credibility of the process. It really could not be said that there is any confidence to be inspired in a system where there is every sense that, because of the personal nature of the power, someone who has direct access to the minister ought to be one that you should seek out to assist you in promoting the case. There is no doubt that that dynamic does exist and I should also clarify that, once again, it is one of the very problematic parts of the system that there is a need to actually, if you like, get go-betweens to advocate on behalf of your client.

Senator BARTLETT—Just in that area of the broader types of things that people would seek to do if they have got a person they are trying to help with a protection claim, is there any aspect where you would see it would be helpful to do that with a standard claim before it gets to a ministerial discretion phase? Do you think it would be handy to know someone in the department you could contact to tell you where a claim is up to or some other aspect of it? That

sort of thing in a general sense could be a smart thing to do, if you like, if you are an advocate in any case, couldn't it?

Mr Manne—I guess theoretically it could, but I have certainly got no particular experience with needing to do it other than in the normal course of events as an adviser contacting a delegate on a client's instructions to see where a matter is at—particularly, for example, if a client is particularly anxious about how long it has taken or whether any further material could be provided.

Senator BARTLETT—Using that example, you would have done that on behalf of a client to an officer of the tribunal or someone within the tribunal, for example, just to see what the hold-up was or if they need more information and that sort of thing. That is not untoward, unusual or anything like that, is it?

Mr Manne—Certainly not, if it goes through the right channels and is asked on the basis that I suggested—and that is, merely on the client's instructions to get effectively what is an update on progress of the matter.

Senator BARTLETT—So the problem with the discretion and perceptions of corruptibility you would see as being more to do with there being no legal definition surrounding what you are trying to find out and no clarity of rationale with decision making. So it requires more and more of that type of connecting with go-betweens and developing relationships or whatever than it would with a normal application.

Mr Manne—That is the very nub of the problem: there are no legally binding criteria from which a decision is made on what often are life or death matters. That is the very heart of the problem. Also it is quite conceivable and understandable that, in our current system, a minister would indeed take advice from go-betweens who are trusted and respected and who provide accurate advice. In a sense, again it goes back to the very heart of the problem—that as a process it is inherently uneven and lacking in proper application of legal principle.

Senator BARTLETT—I missed the very start of your evidence. In your introductory comments, did you outline your own experience at all?

Mr Manne—Not particularly, other than to flag the East Timorese, which I would say is a particularly important example of a perversion of the system. For over eight years we have acted for over 650 East Timorese clients; we have had the largest caseload in Australia. Due to endemic delays, which I am sure we are all aware of, they have only recently had their claims considered by the department of immigration and the Refugee Review Tribunal. From our experience, the ministerial power is a completely inappropriate tool for dealing with this problem. We have advocated for some time that the better solution in this case would be the creation of a special humanitarian visa class to deal with a group of people who have very common humanitarian reasons for staying, rather than making them go through two administrative stages of the process, with just about every single person being rejected, and then considering them on a case-by-case basis at the ministerial level. Even from a cost point of view, it makes no sense at all.

Senator BARTLETT—All I want is to get an indication on the record of the nature and extent of your experience in this sort of area.

Mr Manne—My experience with the powers of ministerial discretion is fairly considerable. In particular, on behalf of clients, I myself have lodged numerous submissions seeking in one way or another ministerial intervention.

Senator WONG—Could you recap your response to what I think Senator Humphries was putting to you—that is, if a humanitarian visa class were created, it would open the floodgates?

Mr Manne—Is that the question?

Senator WONG—Yes.

Mr Manne—I guess one of our submissions on behalf of the council has indeed been that one of the possible undesirable outcomes of the current process is that it may have encouraged more to come or, as it says in our submission, to ‘jump the queue’ in circumstances where they avail themselves of family reunion, and that is ultimately the very heart of their problem. In other words, because there has been a clear emphasis on family reunion in terms of ministerial intervention, that has in some ways clogged up the refugee system and also resulted in a perversion of the system where people can avail themselves of family reunion type rights or otherwise through applying for refugee status. To answer your question more directly, there is no particular evidence that this would open the floodgates. I am not aware of any particular evidence on why that would occur. Indeed, Australia already has very strong measures in place. In our submission, they are far too strong on policies, for instance, of interdiction in terms of allowing people to actually enter Australia either by boat or by plane.

Senator WONG—We have had some evidence from the Catholic Commission for Justice, Development and Peace. Their primary submission is similar to yours, for a humanitarian visa class. Their secondary submission is for the grounds for granting of protection visas to be amended so as to refer to our non-refoulement obligations under the various conventions you have discussed. Do you see any merit in that path as opposed to a humanitarian visa class?

Mr Manne—As a technical measure, were it to cover all situations in which our human rights obligations arise under various human rights instruments, certainly that would be the heart of what we would seek. In other words, if a non-refoulement obligation were to cover not only refugee convention situations but also related humanitarian situations and be guided by not breaching our non-refoulement obligations, certainly that would be wholly desirable.

Senator WONG—When you use the phrase ‘humanitarian grounds’, are you referring to grounds which are wider than our specific non-refoulement obligations that specifically or by implication arise out of our ratification of the particular conventions you describe? In other words, are you using humanitarian grounds as a catch-all which includes the non-refoulement plus other matters or not?

Mr Manne—I am using it interchangeably—thank you for allowing me to clarify. In the context of the council’s submissions concerning complementary protection, humanitarian grounds are specifically referable in particular to non-refoulement obligations which would be

breached if people's human rights which are guaranteed under the international instruments to which we are a signatory are breached.

Senator WONG—You are a lawyer, aren't you?

Mr Manne—That is right.

Senator WONG—I presume you have some reasonable expertise in the law as it relates to the regulation of immigration advice and immigration representations?

Mr Manne—Yes.

Senator WONG—DIMIA's submission or answer to a question on notice from the committee regarding some allegations that people who are not migration agents have charged money for making representations to the minister was, as I recall their evidence, that they considered it to be not in breach of the act. Are you able to comment on that? I would ask you to have regard, if you are able, to sections 280 and 282 of the act.

Mr Manne—I have got the act in front of me. Would the committee allow me the indulgence of just reading those sections and refreshing my memory?

Senator WONG—Yes.

Mr Manne—In the circumstances, I ought to probably take the question on notice. I am more than happy to follow up on it.

Senator WONG—I am happy for you to do that.

Mr Manne—Given that I am a lawyer and a migration agent and have only ever written submissions myself under 417 and 351 in that capacity, the question has not particularly arisen for me. So perhaps I will take the question on notice.

Senator WONG—I am happy for you to do that.

Senator HUMPHRIES—Going back to the question about the humanitarian visa class, would you advocate as part of the regime that you propose that there should be a cap on the number of such humanitarian visa applications that might be granted in a given year?

Mr Manne—No. The fundamental reason for that is that the non-refoulement obligations which are the subject of our discussion are absolute. Let me give you an example, were it the case that there were a cap of, say, 10,000 on numbers, and the next applicant in that financial year happened to be someone who established a real risk of being tortured if returned to their home country, we would not support in any way whatsoever that person failing to be granted a visa purely by reason of the fact that they were the 10,001st person.

Senator HUMPHRIES—Given that the sort of discretion we are talking about here is quite broad and that there is a propensity on the part of the courts—I think you would agree—to

interpret them broadly, isn't there a danger that we could in fact end up with a very large number of such applications being made successfully?

Mr Manne—Hypothetically, one could never discount the possibility. But the argument seems to remain very much in the realms of the hypothetical in the sense that there is certainly no particular evidence that Australia has ever faced a mass influx. For example, were we to look at the situation of arrivals by boat in recent years, that number has never got very much beyond 4,000 per year. The numbers of entrants arriving without authorisation by boat or plane have dropped dramatically, due to a number of factors, including current government policies and, in particular, interdiction policies. There is no particular evidence that we would be beset by a mass influx. I am also not sure what one would consider to be numbers that were unmanageable—that is another question, I guess.

Senator HUMPHRIES—You do not think what numbers are manageable should be a matter of government policy?

Mr Manne—Certainly, but my submission would be that those numbers have never got to a point which would even come close to unmanageable. I guess in some respects, in answering that and putting that proposition, one has to look at the relative numbers in other countries too. It is quite clear that in terms of refugee claims and humanitarian claims Australia is well below most other western countries.

Senator HUMPHRIES—Thank you.

CHAIR—I understand you have taken a couple of questions on notice from Senator Humphries and Senator Wong. You have also indicated that you might provide two further submissions on two matters. I might get the secretariat to liaise with you on any further questions that might arise as a consequence of that. I thank you for your submission. It has been very helpful today and I appreciate your patience and the difficulties we all face with teleconferences.

Proceedings suspended from 1.00 p.m. to 2.05 p.m.

HAIGH, Mr Bruce Douglas, (Private Capacity)

CHAIR—Welcome. Would you please elaborate on the capacity in which you appear here today.

Mr Haigh—I am here as a former member of the Refugee Review Tribunal and perhaps as a former member of the foreign affairs department—I am not sure about that.

CHAIR—Thank you. I understand that you have not lodged a submission with the inquiry, but we have received comments attributed to you from the Coalition for the Protection of Asylum Seekers.

Mr Haigh—Right.

CHAIR—Have you had an opportunity to look at those?

Mr Haigh—Yes, I have.

CHAIR—Do you have any additions or amendments to make to those comments that have been provided?

Mr Haigh—No, I do not.

CHAIR—Do you wish to make an opening statement?

Mr Haigh—No. I am here to have questions asked of me, I presume.

CHAIR—Thank you. I now invite members of the committee to ask questions.

Senator BARTLETT—I see this inquiry focusing on two main issues; one is the operation of ministerial discretion and the other is whether there is a better way. You have obviously had experience of the limitations and inadequacies in the way the tribunal operates. I am somewhat aware of the criticisms you have made of the tribunal and the impingements on its independence. How do those criticisms then flow across into the operation of ministerial discretion as you see it? Does that compound the inadequacies in the earlier parts of the process?

Mr Haigh—The whole issue of ministerial discretion when you are sitting on the tribunal is a difficult one. In my experience, there were many applicants who would fall on the line or who could fall either way, if you saw it in those terms. Because of the pressure and the mentality that was abroad within the tribunal, people tended to find against borderline cases rather than for them. So the benefit of the doubt operated against rather than for the applicant. There were a lot of cases that came before the tribunal—and probably still are—where there should have been different findings. But, given that, if there had been a mechanism of review, say, by the minister—and I am talking about the best of all worlds—where he could have had a look and decided, ‘Okay, I will give the benefit of the doubt to this particular individual,’ that may have been a positive ministerial discretion. I presume that under those circumstances he would have

had to have people of good character and good mind looking at those decisions and deciding in their favour. Under those circumstances, the tribunal would then be quite a tough body, but would put aside certain decisions that were just too difficult to make a determination on. I do not think that is the way the tribunal should work, but it is the only way I can see ministerial discretion operating.

Senator BARTLETT—In your experience or from your knowledge, with some of those borderline cases or cases where there is perhaps uncertainty about some of the facts, is there a feeling that tribunal people might think, ‘It’s not cut and dried but we’ve got ministerial discretion anyway, so I can make some comments about that being a possible option’? I am not sure you would call that taking the easy way out; nonetheless, they would be leaving it for somebody else to make the last call.

Mr Haigh—Yes. That is what that particular scenario would be feeding into—a super review, if you like, of that decision that may be, as you say, too difficult. That is a cop-out, and I do not believe that people who are appointed to tribunals should do anything except their job. If that means exercising their discretion in a more liberal rather than restrictive way, so be it.

Senator BARTLETT—In terms of how you believe the system operates now, and correct me if I am wrong, your view is that members of the Refugee Review Tribunal are under a lot of informal and, to some extent, fairly strong political pressure to minimise the number of favourable decisions—favourable from the point of view of asylum seekers. Is the existence of a discretionary power then seen as a cop-out, to use your words, where people do not want to get on the wrong side of things but they can still put it back?

Mr Haigh—Yes. It is an escape route in cases where you might feel that it could go the other way, avoiding having to go to the courts or whatever.

Senator BARTLETT—In terms of better ways of doing things, do you believe that ministerial discretion should be retained in some form, or do you think it is better to abolish it and have broader criteria under existing visa categories?

Mr Haigh—My personal view is that it should be abolished. I do not think ministers should have that sort of discretionary power with respect to migration matters—and refugee matters in particular. I think that you have got to have faith in your tribunals and your courts. What probably needs to be looked at is a different way of setting up the RRT—having a different set-up in the RRT. I think it is fatally flawed the way it stands at the moment, where people are appointed on a contract and that contract is renewable. I think it should be a single contract for, say, four or five years, and that is it. Then you can make your decisions quite fearlessly because you are not getting yourself locked into mortgages, child-care facilities or whatever else that you lock in on when you get \$80,000-plus a year, plus a car, plus fuel, plus inner-city parking, plus some of your telephone calls. That becomes a very attractive option for some people, and it is also a lever which can be used.

I recall what the head of the DPP in New South Wales said when the Premier of this state said that he wanted to put the DPP onto a renewable contract. The DPP himself said, ‘That is not the way to go, because whoever is the incumbent will be open to political pressure.’ It was DPP Cowdery who said that. And that applies to the RRT as we sit here.

Senator BARTLETT—You would be aware, I am sure, of some of the allegations that have been made that, in part, were responsible for this inquiry being established—about favours being done or improper influence. In your direct experience, have you encountered anything that provides evidence to back up some of those concerns or allegations?

Mr Haigh—In relation to things that have appeared in the media?

Senator BARTLETT—Those cases or any others that you are aware of that might be seen to be of a similar type of misuse of power?

Mr Haigh—Misuse of power?

Senator BARTLETT—In the context of the direct payment of money to derive outcome or any of that type of—

Mr Haigh—No. In my time in the tribunal I do not think there was ever a suggestion that anybody had pressure applied to them from the outside by people from nationality groups, interest groups or whatever, through the payment of moneys. The tribunal did not come under that sort of pressure, in my experience. It was a fairly collegiate body, so I think you would have got a sense if that sort of thing had happened or was going on—certainly to an extent. I cannot answer for every individual, but my sense would be that that is not happening with members of the tribunal at all.

Senator BARTLETT—What about officers in the department or the minister? Obviously the focus has been on the minister in terms of that discretionary power. Have you seen any direct evidence or information about improper activities amongst that group of people?

Mr Haigh—While I was on the tribunal, evidence was led by some people claiming refugee status that they had purchased a business visa in a South-East Asian country for \$A10,000 from an Australian embassy. I do not know whether that was an Australia based officer or a locally based officer, but that is what they said. That information went into the decision and that decision, presumably, was read by the department and hopefully they took some action to look at that.

Senator BARTLETT—Are you aware of any other allegations that have been made in the lead-up to this inquiry that link to the use of ministerial discretion in particular?

Mr Haigh—No, I am not—not with respect to the duties that I performed on the RRT.

Senator BARTLETT—I understand that since you have been on the RRT, you have been something of a critic—quite a reasonable critic, if I might express a personal view—of some of the government's policies and actions in this regard. You would have a fair bit of contact with some people who are advocates for asylum seekers and others who are seeking ministerial discretion, so I was just wondering whether in all that area of activity you have come into contact with people who allege this type of wrongdoing.

Mr Haigh—Not with respect to the sorts of allegations that have been made in the media, but I have in relation to other associations—for example, the association between the Australian

Federal Police and the Department of Immigration and Multicultural and Indigenous Affairs. Some associations have not necessarily been to the greater good of this country or of asylum seekers or of women who have been brought here to work in the sex industry.

Senator BARTLETT—In terms of, particularly, the sex trafficking allegations, the disruption activities in Indonesia and those sorts of things?

Mr Haigh—Yes. Those things have been quite broadly discussed amongst people who have some knowledge of the way government works.

Senator BARTLETT—And those sorts of allegations relate not so much to misuse of the ministerial discretion power by the minister but other activities by AFP or departmental officers?

Mr Haigh—Yes.

Senator BARTLETT—That would be an interesting line of questioning, but it is possibly going outside of the terms of reference of this inquiry.

CHAIR—Thank you, Senator Bartlett—you are right about that. You need to confine yourself to the issue of ministerial discretion. If there are matters outside of the terms of reference that you wish to explore, I am sure Mr Haigh would be only too happy to contact you and provide that additional information.

Senator WONG—Mr Haigh, as I understand it, this document with your name at the top was prepared by Ms Nelson. Did you see a copy of it for proofing purposes?

Mr Haigh—Yes.

Senator WONG—And you are happy that it is all accurate?

Mr Haigh—Yes.

Senator WONG—You refer to an unwritten consensus amongst RRT members that only 20 per cent of applicants should be refugees. Can you tell me how that was communicated to you and how you came to be of the view that there was that quota?

Mr Haigh—It was communicated directly to me.

Senator WONG—By whom?

Mr Haigh—By the Principal Member, which at the time was Shun Chetty—who is since deceased—and less directly by the following Principal Member, Professor Nygh.

Senator WONG—To go back to Principal Member Shun Chetty, what was actually communicated to you?

Mr Haigh—That the minister had reviewed the decisions of the RRT and, generally, the RRT had set aside around 20 per cent; the minister seemed to feel that that was the sort of figure that the RRT should be broadly sticking with.

Senator WONG—Are you saying that Shun Chetty actually said that to you?

Mr Haigh—Yes.

Senator WONG—You then said that it was communicated to you, perhaps less directly, by Dr Nygh. What was actually said to you by Dr Nygh?

Mr Haigh—Then it was put that members had to be careful not to make sloppy decisions and to look very closely at refugee law to ensure that people were not slipping through the process.

Senator WONG—Was the 20 per cent quota—I think that is what you called it—actually part of your discussion with Shun Chetty?

Mr Haigh—Yes.

Senator WONG—Was that repeated by Dr Nygh?

Mr Haigh—Not in those terms.

Senator WONG—What was the understanding from your discussions with Dr Nygh?

Mr Haigh—Both Shun Chetty and Dr Nygh would pass on views to tribunal members that they alleged had come from the minister. So the minister's name was used to convey points about the operation of the tribunal.

Senator WONG—Can you give us details of how that occurred? Would Dr Nygh say 'the minister says this' or 'the minister thinks this' at a meeting of tribunal members? What was the content?

Mr Haigh—Yes, he would say, 'The minister believes that the productivity rate of the tribunal is too low and that members must lift the number of decisions that they are making per annum.'

Senator WONG—Was any supposed indication of the minister's view about the number of people being found to be refugees communicated to you?

Mr Haigh—Through Dr Nygh or through Chetty?

Senator WONG—Through either.

Mr Haigh—Certainly through Chetty but not through Dr Nygh. You have to recall that this was a time under Chetty when the minister and the department intervened to prevent the tribunal from considering East Timorese cases, and that went over to Nygh's administration.

Senator WONG—You also say in your statement that counselling by the principal member would occur of any member whose record of approvals for refugee visas climbed to around 35 per cent. What is the basis for that statement?

Mr Haigh—Just that. I decided that the only way I could operate was to do each case on its merits. I did not look at any 20 per cent cut-off point or whatever. I was also critical of Chetty. I had known Chetty in South Africa. In fact, I helped to get him out of the country when I was a diplomat, so there was an unusual relationship between Chetty and me. Yet, when he assumed the position of principal member of the tribunal, it became apparent to me that he was not prepared to conduct himself in the way that he had when I had known him in South Africa, so a certain tension arose between him and me, basically over the issue of the East Timorese refugees. He had more power than he was prepared to exercise with respect to that and he refused to do that. He then sought to use the powers that he had over reviewing my decision making, in the sense that he said it was sloppy and that too many people were being set aside. He sought to apply pressure like that. I went through all of those decisions and I got separate legal opinion on them, and there was nothing wrong with them.

Senator WONG—Sure. I am interested in the 35 per cent figure. Where does that come from?

Mr Haigh—That might have been the percentage that I set aside.

Senator WONG—In the matters where you found that someone was not a refugee, was it your practice to indicate—if you considered there were grounds—that the applicant should make an application for a grant of discretion under section 417?

Mr Haigh—Would I advise them to do that or would I take the decision to do that?

Senator WONG—Would you note it in the decision or would you make any reference to the applicant's opportunity to take a ministerial discretion claim?

Mr Haigh—Yes, I did that in some—not many, but a few—decisions that I had.

CHAIR—Would you independently write to the minister in respect of any matters where you thought ministerial discretion might be used?

Mr Haigh—No. I would not write. An administrative procedure inside the tribunal would refer that decision through to the minister's office if you indicated that that was what you thought should happen.

CHAIR—How would you indicate it?

Mr Haigh—In the decision itself.

CHAIR—I was curious as to what the process was—if you would not mind stepping us through it.

Mr Haigh—You put that into a decision and that would act as a trip-wire or as a mechanism to put it through into the minister's office.

CHAIR—Do you have to do anything other than that?

Mr Haigh—No.

CHAIR—How would the minister's office know that ministerial intervention was indicated in the decision? Do they read every decision?

Mr Haigh—Because it would go to the minister separately. It would be notified to the minister, and the decision would go to the minister's office that it required a review by him.

CHAIR—Thank you.

Senator WONG—I have one final issue. We have put some of these issues to the RRT and the MRT—including the 20 per cent quota allegation that is being denied. What do you say about that?

Mr Haigh—That is totally understandable. Do you want me to give you an expose on the politicisation of the Public Service? They are not going to come out and say that they are under pressure. The incredible thing about people in institutions is that they can be socialised to a point, and they do not see how far they have actually been socialised. Others of course do; they realise that there are mechanisms involved, albeit subtle. Remember that I was in Foreign Affairs for 25 years, and what goes on in the corridors can be just as powerful in socialising people as any directive that comes from a supervisor or whatever. Such lines as 'You will not get promoted if you take that line' or 'It is no good putting that up to the minister in its current form because the minister will not accept it' are not directives; they are just conversations that occur within bureaucracies. Those sorts of conversations certainly occurred. But now you have people on the RRT that have been there since 1993. They have now been in that organisation for so long that I do not think that they would need to have those conversations anymore. They know what the unwritten rules of the organisation are.

Senator WONG—You say it is 20 per cent.

Mr Haigh—I would say that they know not to transgress certain boundaries. You do not get a whole lot of Afghanis or Hazara nationality coming through where a member says, 'On the merits of the case, yes, they are refugees,' if the minister has said that he does not agree, that he thinks the situation in Afghanistan is fine and that they will be returned. It takes a very brave RRT member or it takes an RRT member who is about to leave, who has got nothing further that they want from the organisation, to then say, 'I'll make the decisions on how I see them.'

We saw, and you will see in those papers, the extent of the pressure applied by the Principal Member on Dr Ken Chan over his finding that an East Timorese was a refugee outside the category the department of immigration was trying to push—which was Portuguese nationality. That pressure then was real. It may be more subtle now but it still exists. You cannot have statements from the minister saying that he thinks the courts are wrong, that he thinks refugees have got too many rights under Australian law and that we need to remove the right for refugees

to appeal to the Federal Court and the High Court and for the tribunal to be the final body, without that having some effect both within the bureaucracy, within an organisation like the RRT and, indeed, within the courts themselves.

Senator WONG—Thank you, Mr Haigh.

Senator HUMPHRIES—Mr Haigh, could you explain again what was said to you by the respective principal members of the tribunal about the requirements to meet a certain quota with respect to set-aside decisions.

Mr Haigh—Do you mean what we have already heard?

Senator HUMPHRIES—Yes, I am looking for the direct words that were used to instruct you as to what was expected of you by the minister.

Mr Haigh—No, they are your words. I was not ‘instructed’. The words were put, and this was at a general meeting, I might add—

Senator HUMPHRIES—A general meeting of members of the tribunal—members of the RRT or members of both the RRT and the MRT?

Mr Haigh—They never met together; this was a meeting of the RRT held at the end of 1996 or the beginning of 1997. In the context of a number of issues, the minister was aware that the RRT had been setting aside about 20 per cent—

Senator HUMPHRIES—I am sorry to interrupt, but is it possible for you to quote the exact words—that is, to repeat the words that were used to you?

Mr Haigh—No, it is not. I am giving you the gist of my recollection of what occurred at that time. My recollection of what occurred at that time is that the principal member, Shun Chetty, said that the minister had noted that the tribunal had in the past been setting aside around 20 per cent of the cases that came before it and he thought that was a figure that should be maintained and looked at. He also said that the minister was concerned about the productivity levels inside the tribunal and that they needed to be raised. That became a constant issue within the tribunal, to the point that first of all Shun Chetty and then Dr Nygh actually set quotas—figures that members had to meet in order to be regarded as satisfactory decision makers.

Senator HUMPHRIES—Do you mean quotas in terms of the number of cases dealt with?

Mr Haigh—Yes, I do. I mean in terms of the number of cases dealt with.

Senator HUMPHRIES—Putting aside the productivity question and going to the question of the number of decisions appealed that were to be set aside, you cannot give us the exact words, but you say that the gist of what Principal Member Chetty said to you was that there should be a quota of 20 per cent. Was the word ‘quota’ used?

Mr Haigh—No, I cannot recall. You do not need to say ‘quota’ when you say that that is the figure that the tribunal should aim for in terms of its set-aside rate.

Senator HUMPHRIES—Did he say that the tribunal should aim for 20 per cent?

Mr Haigh—Yes, he said that it should look at maintaining this figure of 20 per cent. In other words, if circumstances changed and there were people coming in, let us say, in a large number of boats from wherever then that figure would be the sort of figure that you should maintain. So it took no account of circumstances.

Senator HUMPHRIES—Was this said at one meeting or at a succession of meetings?

Mr Haigh—It was said at at least one meeting but it was also put to me in discussion with Chetty. Whether that was in the company of one or two other people, I cannot recall, but it was put to me.

Senator HUMPHRIES—So it was said at the meeting with other members present. Do you happen to recall approximately what the date of that meeting was?

Mr Haigh—No, I do not. I would think that it was over that period of 1996-97. I think Chetty left the tribunal at the end of 1997 or thereabouts—or maybe it was early 1998.

Senator HUMPHRIES—You say that other members of the tribunal were present at the meeting where that statement was made by Principal Member Chetty.

Mr Haigh—Yes, certainly.

Senator HUMPHRIES—Do you know how many other members were present?

Mr Haigh—Whatever the number of members were in Sydney at the time who were present at that meeting on that date. Let say that it was 20 or 25 people.

Senator HUMPHRIES—So you would expect other people who were at that meeting to have recollections of those sorts of statements being made?

Mr Haigh—No, I would not, because, as I have said, many of those people are still with the tribunal. Others may recall that conversation differently. There may be other people out there who do recall, but I have not canvassed this issue with other people. I am just giving you my recollection of what occurred.

Senator HUMPHRIES—You can see the problem that the committee faces. We have had other members of the tribunal, both present and former, tell us that they are not aware of such directives or encouragements—however you want to refer to them—being conveyed to members. Therefore, the words that were used at that meeting, or to you in private conversation with Mr Chetty, carry some significance. It would be helpful to know what those words were, to ensure that your recollection is better than those of other people.

Mr Haigh—Senator, you are trying to bring into question my credibility, and I do not think you are in a position to do that. I think that the government's record in regard to refugees is such that it should be you who is looked at in terms of credibility and not me. I resent the line of your

questioning. I have said that, if you want me to swear on oath, I will do so. What I have said is said in all honesty.

CHAIR—Senator Humphries is entitled to ask questions—

Mr Haigh—Yes, he is, but I am not prepared to have him impute that other people—

CHAIR—You have been invited along to answer questions—

Mr Haigh—As a member of the public, as a taxpayer and whatever else it might be—

CHAIR—You are here because of certain comments you have made, and I think Senator Humphries is entitled to explore those with you. I am happy for you to provide an answer to him, and it would be best for all if we could keep things on an even keel.

Mr Haigh—Good, let's do that. I have made my comments—

CHAIR—We can now go back to Senator Humphries.

Mr Haigh—Chair, can I make an explanation?

CHAIR—You are not here to make an explanation. You have made a submission and you are here to answer questions from Senator Humphries. It would be a lot easier for all concerned if we could continue.

Senator HUMPHRIES—Mr Haigh, you have provided information to the committee about comments that were made to you by Mr Chetty. You have also mentioned that Dr Nygh made comments to you, or in your presence, about the expectations of the minister with respect to the targets the tribunal should aim for. Was that also conveyed in a meeting of members of the tribunal?

Mr Haigh—No, not that I recall.

Senator HUMPHRIES—Was that during a private conversation?

Mr Haigh—It was a conversation where one or two other people may have been present, but it was certainly a conversation between me and him.

Senator HUMPHRIES—Can you give us the approximate date that this conversation might have occurred?

Mr Haigh—Yes, this would have been in 1998—probably in April or May.

Senator HUMPHRIES—At that time, can you tell us the words that were used by Dr Nygh?

Mr Haigh—I can give you the implication; I cannot give you the exact words. I can tell you that Dr Nygh was concerned to convey an impression from the minister that he wanted the

tribunal to continue to operate in the way that it had been operating in the past—that is, that the number of set-asides did not balloon out. Having said that, Dr Nygh was more liberal or tolerant—whatever you want to call it—in his attitude to these issues than Mr Chetty had conveyed to us or to me.

Senator HUMPHRIES—You made certain comments about targets or expectations of the number of set-aside decisions. Is that phrase your interpretation of what was meant by Dr Nygh if he said to you that he wanted the tribunal to proceed as before, or were words to that effect actually said by Dr Nygh?

Mr Haigh—This is the impression that I gained from conversations with Dr Nygh regarding the overall operation of the tribunal.

Senator HUMPHRIES—Is it possible that you misunderstood what was being said and perhaps read too much into the words that either Dr Nygh or Mr Chetty might have used to you or in your presence?

Mr Haigh—No.

Senator HUMPHRIES—Do you think that an instruction or a strongly worded suggestion from the Principal Member to tribunal members sitting around a table like this or in a room that they should meet certain targets or expectations—

CHAIR—Could you rephrase that? You are asking him what he thinks and to put himself in the mind of someone else. That is the difficulty that I have with that question.

Senator HUMPHRIES—All right, I will rephrase my question.

CHAIR—If you would not mind.

Senator HUMPHRIES—Do you think that what was being put to you and other members on the occasion you have referred to was improper?

Mr Haigh—Improper? There were many things that I thought were improper—many. Given that we are meant to be an independent tribunal, any view passed on to us by the Principal Member about what the minister thought or did not think was, I thought, improper. It is like being a magistrate and having the minister for justice passing on certain thoughts through procedural arrangements to magistrates, let us say, to get them to find in relation to certain matters along certain lines.

Senator HUMPHRIES—So you would regard the comments made by Principal Member Chetty as being improper?

Mr Haigh—Yes, and I regard remarks made to me by Dr Nygh as improper, when he tried to stop me from speaking out on the issue of East Timor. I had an argument with him about it.

Senator HUMPHRIES—Let us not go into that for the moment.

Mr Haigh—No, I thought you wanted to know about proper and improper conduct. I had that conversation—

Senator HUMPHRIES—I want to know about this particular set of circumstances.

Senator WONG—Well, you asked the question.

CHAIR—Yes, the difficulty is—

Senator HUMPHRIES—With respect, I did not ask about comments on East Timor.

Senator WONG—You are getting a free run. Let him answer.

Senator HUMPHRIES—I was asking about—

CHAIR—We will get through this if Senator Humphries just asks the witness the question, rather than responding to Senator Wong, and if Senator Wong does not interject.

Senator HUMPHRIES—Sure. Mr Haigh, you said there was at least one occasion where Mr Chetty conveyed to members of the tribunal the view of the minister about what was an appropriate target. You said that, on the particular occasion or occasions, you considered that the suggestion—or instruction or however you want to refer to it—being made to tribunal members was improper. In those circumstances did you consider making a complaint of some sort?

Mr Haigh—I did complain—to Shun Chetty.

Senator HUMPHRIES—In the meeting or privately afterwards?

Mr Haigh—Privately.

Senator HUMPHRIES—During the meeting itself what was the reaction of other members of the meeting to the suggestion that was made?

Mr Haigh—They just accepted it; they did not see anything that was improper in it. Perhaps that is why they have forgotten it—if they have forgotten it.

Senator HUMPHRIES—So, as far as you are aware, you are the only person at the meeting who considered the suggestion being made to be improper?

Mr Haigh—Yes. I do not know if anybody else went to him, but I certainly went to him and wanted to know just how much flexibility there was in this 20 per cent figure he was talking about.

Senator HUMPHRIES—I put it to you again that it is possible that you misinterpreted what was being said to you on the basis—

Mr Haigh—It is not possible, Senator. What I am saying and what I have said publicly in the past—my reputation is on the line in relation to this matter and I do not lightly put my reputation on the line—is that this conversation took place and that this was an understanding that I quite clearly had.

Senator HUMPHRIES—You may be aware that the committee has received evidence from Mr Paul Fergus. Mr Fergus described himself as a contemporary of yours on the tribunal. Obviously, being a former member of the tribunal, he is not subject to the sorts of pressures relating to mortgages and standards of living that the statement before us suggests some people are, but he was quite adamant and clear to the committee that he was not aware of any pressure of the kind that you have referred to today. I quote him in his evidence of 22 October:

All I can say is that I never felt that I was under that sort of pressure.

That was in answer to a question from Senator Wong. Can you give any explanation as to why Mr Fergus might have escaped the pressure that, according to your testimony, was obviously being applied to you and to other members of the tribunal?

CHAIR—The difficulty with the question is that you are then asking the witness to put himself in Mr Fergus's mind. I am sure you can rephrase it in such a way that you are asking a direct question. I understand the import.

Senator HUMPHRIES—I think the question is a problem because I am putting to him that other witnesses in a similar position have not had the same experience of so-called ministerial pressure. I want him to explain why that would be the case, given that he says that this pressure was placed uniformly in public and private conversations to all the members of the tribunal.

Senator WONG—That was not his evidence.

Mr Haigh—That is your interpretation. Let me say this to you: he was under pressure, and if you look through some of the other papers that the committee may have in front of them he was placed under an awful lot of pressure to make a decision in relation to an East Timorese matter. What he does and does not recall about pressure, as has already been said, I would not have any idea about. What does Mr Fergus now do, do you know?

Senator HUMPHRIES—He works in the private sector in migration.

Mr Haigh—Exactly.

Senator HUMPHRIES—So you are suggesting Mr Fergus has reasons to forget what he had heard about—

Mr Haigh—I have just made my point. What conclusions you draw are entirely up to you. I have said that it is my understanding, and you have confirmed it, that Paul Fergus still works in the area of migration matters. That may or may not influence him—I do not know—but it could do.

Senator HUMPHRIES—You are suggesting that Mr Fergus’s evidence to the committee is wrong?

Mr Haigh—No, I am not suggesting his evidence is right or wrong. You are suggesting to me that what I am saying is in contradiction of what he put before the committee.

Senator HUMPHRIES—It clearly is.

Mr Haigh—The things that I am saying to you are absolutely truthful, and that is it as far as I am concerned—beginning and end. You can draw your own conclusions, but what I am saying to you is my recollection and it is what I feel. What Mr Fergus says to you and the committee is entirely up to him.

Senator HUMPHRIES—Given this ‘improper pressure’, as you call it, being placed on you when you served on this tribunal, why didn’t you resign from the tribunal?

Mr Haigh—You mean, do a Wilkie?

Senator HUMPHRIES—I mean that, while you were in the position of receiving the mortgage and standard of living support that came from being a member of the tribunal, why didn’t you take a stand on principle and resign because of the improper pressure being placed on you?

Mr Haigh—I could turn that around and say, ‘Why don’t people in the government resign because of what this government is doing to refugees?’

Senator HUMPHRIES—That is not the question you are being asked.

Mr Haigh—No, it is not. I took no notice whatsoever of the figure that was set. I made my decisions according to how I saw it, so why should I resign under those circumstances? I also conveyed—as strongly as I am conveying them to you—my views on what I thought Shun Chetty was doing and not doing, and the same with Dr Nygh. They were under no illusion as to where I was coming from. I might add that Dr Nygh recommended I should be reappointed to the tribunal. I was not, and I can only assume it was because I spoke out very strongly about the government’s policy in relation to East Timor—or perhaps it was because I was a really bad decision maker, but nobody ever told me that.

Senator HUMPHRIES—You have said, in this statement that you have adopted, that this insidious process was one that entrapped all the other 80 or so members of the tribunal, but none of them saw fit to react or to take action based on this sort of pressure. You alone were prepared to speak out and defy the pressure that was being placed on you.

Mr Haigh—I have not said that. If you read the papers that were submitted by Ms Milne you will see that that is not the case. Indeed, there were many people who were quite unhappy and who expressed themselves to be so.

Senator HUMPHRIES—In what way?

Mr Haigh—About the running of the tribunal.

Senator HUMPHRIES—To whom?

Mr Haigh—To Dr Nygh, to Shun Chetty and to other people on the tribunal, amongst themselves.

Senator HUMPHRIES—I assume that the sorts of comments that you have just referred to during the time that you were on the tribunal did not result in a change of policy on the part of the tribunal in terms of things like this ministerial pressure?

Mr Haigh—A change of policy on the part of the tribunal would have required a Principal Member who would stand up to the minister.

Senator HUMPHRIES—So you did not see any change of policy?

Mr Haigh—I did not see any change of policy.

Senator HUMPHRIES—So you did not feel it was necessary to resign in those circumstances?

Mr Haigh—I felt that as long as I was able to conduct myself in such a way that I could make decisions on the evidence before me there was no need to do that. But that did not mean that that sort of pressure was not being applied. It is an institutional disease and it is right throughout the bureaucracy. I do not know which world you are living in, but in Australia at the moment it is rife—whether it is Jane Halton, Max Moore-Wilton or whoever, there are people in the bureaucracy in Australia who are behaving in just that matter. It was on the RRT and that is what I am saying—and it still exists.

Senator HUMPHRIES—I put it to you that you have cast a fairly serious aspersion on the character of the other members of the tribunal with whom you served. They are highly qualified people from a variety of walks of life. I put it to you that they have reacted differently to you to this sort of pressure; they have remained compliant and quiet about improper pressure being placed on them and you alone have chosen to speak out about that kind of pressure.

Senator WONG—I raise a point of order, Chair.

Mr Haigh—I can answer that.

Senator HUMPHRIES—That sounds a strange state of affairs.

Senator WONG—I assume Senator Humphries is excluding from that question the other members of the RRT who are referred to in the supplementary submission.

Senator HUMPHRIES—I am referring to the majority of the members of the tribunal, who have made no statement publicly about this pressure that is supposed to have been placed on them and who are apparently happy to continue serving in this quite insidious arrangement in the RRT.

Mr Haigh—I can only repeat what I said to this committee earlier. In the statement that I made to Francis Milne I talk about the erratic nature of the decision-making on the tribunal. So some people will resist that pressure and have done so and continue to do so, and others do not. But in my opinion those people are in a minority. If you are trying to imply that I am damning good people and that I am somehow a bad person who has no authority with which to make these statements then I think you are sadly mistaken. I cannot answer for the people on the tribunal at the moment and their motives. But what I have set out for you is a scenario which is also supported by others who have served on the tribunal. When the inquiries as to the way the Australian Public Service operated through this period of history eventually come before the Senate the same things will be said—the same things will be said about people in the Navy and children overboard; the same things will be said about people in Immigration. So do not think that the RRT stands alone in this; it does not. It is a disease which afflicts the psyche of the Australian Public Service at the moment. If you do not believe that then, I am sorry, we are not living in the same country.

Senator HUMPHRIES—Let us put aside the other conspiracy theories for another day.

Mr Haigh—They are not conspiracy theories; they are real.

Senator HUMPHRIES—Why do you think nobody who has served on the tribunal, including you, bothered to make a submission to this inquiry?

Mr Haigh—Bothered to make a submission to this inquiry or, indeed any other inquiry?

Senator HUMPHRIES—About the matters going on in the tribunal.

Mr Haigh—I think there are a lot of people who have just about had it up to the eyebrows. You might think—

Senator HUMPHRIES—Which is a good reason to make a submission, wouldn't you say—

Mr Haigh—No, I think—

Senator HUMPHRIES—as an ex-member particularly?

CHAIR—If you would let our witness finish.

Mr Haigh—No, there are a lot of people who are very tired out there, and they are sick and tired of the sorts of attitudes that you are bringing to bear on me in this hearing. We would like to see the truth of the matters got to. Too often, what we see is hearings like the hearing on East Timor, which nothing came out of. Public pressure caused changes to East Timor policy. I am sorry to be so cynical, but I think there are a lot of Australians that are now in that position with respect to their elected representatives and the processes that they go through.

Senator HUMPHRIES—You have given reasons why you think you were not reappointed to the tribunal. You suggest it is because you spoke out—is that right?

Mr Haigh—Yes, but continue, Senator: spoke out on what issue?

Senator HUMPHRIES—You said East Timor, I think.

Mr Haigh—That is right, on East Timor.

Senator HUMPHRIES—What did you say on that subject?

Mr Haigh—I had worked in the Department of Foreign Affairs and been privy to some of the information that the department received in relation to the condition of the East Timorese. My time working in the department on the Indonesia desk was '84 to '86. I was privy to the fact that successive Australian governments chose to ignore what was happening to the East Timorese. They swept it under the carpet. I had actually seen that stuff, so I felt compelled to put it in the public domain.

Senator HUMPHRIES—Did you do that by way of a statement from the bench of your tribunal or was it a statement made by you separately?

Mr Haigh—I think that is a silly question.

Senator HUMPHRIES—I think it is a very proper question and I would ask you to answer it.

Mr Haigh—I think it is a very silly question. If you want to continue with that, I am not going to answer. Why would I use an independent tribunal to make statements from the bench?

Senator HUMPHRIES—Some people do. I thought you might have—

CHAIR—Perhaps you could ask the question again so that I can hear it, Senator Humphries.

Senator HUMPHRIES—Was your statement on the subject of East Timor—which you say led to your not being reappointed to the tribunal—made in the course of a decision you handed down in the tribunal or in a media release or in some other way?

Mr Haigh—I am sorry that you do not recall the statements I made. I actually had quite a high profile and I made many statements in the media, on radio, on television and, indeed, to anybody else who would listen.

Senator HUMPHRIES—I am sorry I did not hear them. Can you tell the committee how you made those statements? Was it by way of media release?

Mr Haigh—No, it was by way of media interview.

Senator HUMPHRIES—So presumably you contacted the media to convey these views to them?

Mr Haigh—No, they contacted me. I wrote some opinion pieces in the paper and I wrote a number of letters to the newspapers about what I knew about the situation in East Timor and, indeed, what I understood to be the situation with respect to the militia. Alexander Downer was denying, and I was saying, that they were being trained by the Indonesian army, the TNI, which proved to be the case, as you will recall.

CHAIR—Senator Humphries, I would just remind you of the terms of reference of this inquiry. I am just a little concerned. I was happy to let it run for a while in the sense that we were talking about the RRT, its operations and its use of ministerial discretion. We now, sadly, seem to have departed from that. If there are issues in relation to ministerial discretion, I would be happy to hear those questions.

Senator HUMPHRIES—On that basis, I would just ask one more question. In the statement you made about the media that was reported in the *Sun-Herald* on 29 June this year, you talked about the pressure in respect of ministerial discretion. You have been paraphrased here: ‘Mr Ruddock’s use of his ministerial discretion to intervene in cases had become more powerful over the years, Mr Haigh said.’ What do you mean by ‘become more powerful’?

Mr Haigh—I am not sure if I said ‘over the years’, but the minister has a very powerful position when it comes to deciding who will and who will not stay once those matters are referred to him. I think I mentioned to you that when I was in the RRT I referred four or six cases—I cannot remember the exact number—to him. I do not think he agreed to any of those, yet they were difficult cases and they involved issues where I thought the minister might properly make a decision—and, I hoped, a favourable decision—on the part of the applicants, because they did not exactly fit the category under the refugee convention. They were outside of it slightly, but there were very compelling humanitarian reasons for accepting these people under his discretionary powers. That is a very powerful position to be in.

Senator HUMPHRIES—But he has always had that power, hasn’t he?

Mr Haigh—Not only him but previous ministers as well.

Senator HUMPHRIES—How does the exercise of discretion ‘become more powerful over the years’? That is what you are quoted as saying.

Mr Haigh—I do not know if that quote is correct or not. Are you going to rely on the newspaper?

Senator HUMPHRIES—We seem to accept paraphrasing as being acceptable in these circumstances and in your own earlier testimony—that is why I asked you about it.

Mr Haigh—Yes, but accepting whether the press paraphrases is another thing, isn’t it? You are talking about my credibility here.

CHAIR—Perhaps, Mr Haigh, we can have your view in relation to that. Do you think that the use of ministerial discretion has made the minister more powerful over time?

Mr Haigh—Yes, I do.

CHAIR—Do you have any follow-up questions, Senator Humphries, in relation to that?

Senator HUMPHRIES—Yes, just one. With regard to the statement from Ms Milne that you have adopted, the second last paragraph contains a sentence which does not make any sense. I

thought that, since you had adopted the statement, you might be able to explain what was meant by it. It says:

Bruce Haigh noted that not RRT members have succumbed to this pressure, which means that the RRT is of variable quality in terms of decision-making.

Senator WONG—It must be ‘not all’.

Senator HUMPHRIES—Do you know what was meant by that phrase?

Senator WONG—Chair, if Mr Haigh is being questioned on the statement, perhaps he should have it before him so that he can see the context.

Mr Haigh—I have it here somewhere.

Senator HUMPHRIES—I asked him if he had it in front of him.

Mr Haigh—I have it beside me somewhere.

Senator HUMPHRIES—It is the second last paragraph, second last sentence.

Mr Haigh—I would have thought that it was quite apparent that the word ‘all’ was missing.

Senator HUMPHRIES—Okay, thank you, Mr Haigh.

Senator SANTORO—I have a couple of questions, just to follow up on some of the questions asked by Senator Humphries. Just to be clear for the public record—and particularly for those members of the media who are here—Senator Wong asked questions of Mr Fergus and, for the record, Mr Fergus in fact made it clear that he had never met nor spoken to the former minister for immigration and ethnic affairs; so there could not be any suggestion that he was personally influenced or that there were issues of friendship, acquaintance or familiarity involved in any of his dealings with the department. Mr Fergus claimed that he had quite a high success rate in terms of interventions in cases that he had put before the department and eventually before the minister but that he had never met, interacted or had anything to do with the minister. He struck me as being somebody who was quite detached from process and influence, at least when it came to the minister. Senator Wong—referring to your allegations, Mr Haigh—asked the following question of Mr Fergus:

He made a number of allegations—

referring to your allegations, Mr Haigh—

and this is on the public record, and one of them was that RRT members were subject to an informal quota system. He commented earlier this year in the paper that if you went over 20 per cent of people that you granted visas to you would be counselled. Do you have a comment on that?

That was a very direct question that was being asked of Mr Fergus about the central point of your thesis—that is, that pressure was applied. Mr Fergus also has had a career in Foreign Affairs and was a colleague of yours. He said:

All I can say is that I never felt that I was under that sort of pressure. At times, in fact, I felt that there was too little guidance given to members. As an example, I was the member who decided the Jong Kim Koe matter, which was the one of the East Timorese-Portuguese nationality cases. I was the first member to decide that East Timorese could be Portuguese nationals as well as Indonesian nationals. At the time of taking that decision, I did actually seek some guidance from the principal member in the sense of sitting down and discussing the issues as I saw them.

That would indicate to me that he was precisely aware of the pressure when he was answering that question. I do not want to sound provocative, but I would ask you whether it is really possible that so many other members of the RRT, including Mr Fergus—who strikes me as being very disciplined, well trained and not familiar with the minister or partisan political objectives or goals—all missed the pressure?

Mr Haigh—Could I answer now, Senator?

Senator SANTORO—Yes, certainly.

Mr Haigh—There were many people who were disappointed with Paul Fergus for finding that East Timorese could be Portuguese citizens, and there was a lot of pressure from the minister's office. If you want to dig out the records and find out just how much pressure was applied on the RRT, through the department of foreign affairs and the department of immigration, in relation to this whole question of Portuguese citizenship—which was an absolute and utter nonsense; and another RRT member, Ken Chan, made a different decision—then I invite you to do so. Paul Fergus I know, and I am not going to get into, as you want me to—

Senator SANTORO—No, I don't.

Mr Haigh—commenting on his character. All I will say is that a lot of people were disappointed when he made that decision—a lot of people in the East Timorese community, a lot of people in the Catholic church, and a lot of people inside and outside the RRT.

Senator SANTORO—Mr Haigh, I do not want to—

Mr Haigh—You have raised it, and I am answering your question. I am saying to you—and I am not going to speculate, as you are speculating—on how people do or do not respond to pressure, which is what you are inviting me to do—

Senator SANTORO—I am talking about the 20 per cent—

Mr Haigh—Senator, I am saying to you that there was pressure applied, and the very example that you have just given illustrates just how much pressure came onto the RRT in that Portuguese decision.

Senator SANTORO—I think that the issue that you raise in terms of Portuguese or Indonesian nationals is peripheral to the major point that Senator Humphries has been making and that I have now attempted to make. Unfortunately, you seem to get very emotional about this whole issue—and I have a question to ask you shortly about your East Timor pronouncements when you were a member of the tribunal—but I am referring to the 20 per cent issue.

Mr Haigh—Yes, and I have answered that, Senator; and I am not going to change my answer just because you keep asking the same question.

Senator SANTORO—I just want to make sure that I give you the opportunity to provide an answer—

Mr Haigh—I have provided an answer, Senator, and that is that there was a lot of pressure on the tribunal and that issue was part of it.

Senator SANTORO—It does not bear examination against the evidence.

CHAIR—Mr Haigh, I think we need to move to the next question, and hopefully it is relevant to ministerial discretion and the inquiry that we are now sitting on.

Senator SANTORO—I am just trying to test—

CHAIR—Just ask the question—

Senator SANTORO—I am just trying to test the evidence that is before us.

CHAIR—You can ask questions—

Senator SANTORO—You said that you made some statements in relation to East Timor when you were a member of the RRT. Is that correct?

Mr Haigh—That is correct.

Senator SANTORO—Do you think that that was a proper course of public action to take when you were a member of that tribunal?

Mr Haigh—What do you think, Senator?

Senator SANTORO—I am asking you the question.

Mr Haigh—No, you are a legislator: what do you think?

Senator SANTORO—Why don't you answer the questions and then, if the chair allows me, I will sum up and then tell you exactly what I think.

Mr Haigh—I know you will.

Senator SANTORO—You cannot have it both ways—

Mr Haigh—You are having it both ways, Senator. You asked me a question and the answer is that it is quite appropriate, because I am an independent member of a tribunal and somebody with knowledge—and I said this to Dr Nygh and he agreed that it was in the public interest. Once I put the point of view to him, he supported it.

Senator SANTORO—So commenting on public policy you regard as a legitimate part of the role of a member of the tribunal.

Mr Haigh—No. I regard it as a legitimate role for me with knowledge that I had as a citizen of this country.

Senator SANTORO—I am leading up to a very important point in relation to yourself. Did you think of making that submission, that contribution in the public interest, in a way other than the way that you did—very publicly?

Mr Haigh—Could you tell me which other way I could have done it?

Senator SANTORO—Could you convey your opinions to the minister through the Principal Member?

Mr Haigh—You have to be joking! Seriously, we had a minister who was saying that the TNI were not backing the militia and subsequently was found to be lying. What was the point of doing that? Can you tell me, Senator?

Senator SANTORO—Did you think that your public statement in relation to that sensitive area of government policy politicised your role as a member of the tribunal?

Mr Haigh—No, just as Justice Kirby can make statements—except with respect to the views of this government—about public policy and human rights. You have a problem; I do not have the problem. The problem is that, as Australians—and as voters—we have a right and a duty if we have knowledge—

CHAIR—I have a problem now.

Mr Haigh—Where are you taking this, Senator?

Senator SANTORO—Mr Haigh actually asked my opinion about what I thought about it. I would like to give it to him.

CHAIR—No, you are not entitled to give him your opinion.

Mr Haigh—It is not even funny.

CHAIR—If there are no further questions in relation to ministerial discretion, we will move on.

Senator SANTORO—I would be happy to make some statements outside of this place.

CHAIR—Thank you, Mr Haigh—

Mr Haigh—Do not threaten me!

Senator SANTORO—I am not.

Mr Haigh—I have been bullied by better people than you.

CHAIR—Thank you, Mr Haigh, for your evidence—

Senator SANTORO—I just think that you politicise—

CHAIR—Senator Santoro, you have had your opportunity to ask questions. Thank you, Mr Haigh, for your evidence today.

Mr Haigh—Thank you, Mr Chairman, and members of the committee.

Evidence was then taken in camera—

Committee adjourned at 4.20 p.m.