CHAPTER 8

MINISTERIAL DISCRETION

Introduction

8.1 Term of reference (b) of this inquiry requires the Committee to consider:

> The adequacy of a non-compellable, non-reviewable Ministerial discretion to ensure that no person is forcibly returned to a country where they face torture or death.

8.2 This Chapter discusses the main elements contained within term of reference (b). In particular, it explores the concept of Ministerial discretion and its implementation, the nature of a non-compellable and non-reviewable decision and forced *refoulement*, when an applicant is unable to gain refugee status under the Refugee Convention. Included within the examination of these major issues is a discussion of the particular problems associated with the use of Ministerial discretion under s417 of the *Migration Act 1958*.

8.3 The main reason for considering these aspects of the Ministerial discretion is the implicit concern in the term of reference that the existing administrative procedure is inadequate. The perceived inadequacy relates to the lack of integration of CAT, CROC and the ICCPR within the refugee determination process, prior to the triggering of Ministerial discretion under s417. It is recognised that the Guidelines for Ministerial discretion have been revised to place more emphasis on humanitarian grounds for refugee status. However, this Chapter is concerned with whether a more efficient mechanism might be introduced.

Ministerial Discretion in the *Migration Act 1958*

8.4 'Discretion' has been defined as:

> A power to exercise personal judgement in a judicial or administrative context.[1]

8.5 Ministerial discretion provides a Minister with the opportunity to use his/her discretion at a certain point during a decision-making process. Under the Act this discretion is non-compellable, non-delegable and non-reviewable. In the context of

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1 *The CCH Macquarie Concise Dictionary of Modern Law*, CCH Australia Ltd, 1988. Discretionary power is conferred by Parliament when there is a need to go beyond the established legal framework of regulation and rules provided to deal with an issue because of the: technical difficulty of the subject matter; need for flexibility in adapting policy to rapidly changing social conditions; or need for case-by-case adjudication of claims (Dr Margaret Allars, *Introduction to Australian Administrative Law*, Butterworths, 1990, para 1.19)

this Inquiry into the operation of Australia's humanitarian and refugee program, the applications of some failed asylum seekers and others seeking humanitarian protection are subject to powers contained within the Ministerial discretion provisions of the Act. The major decision-makers associated with discretionary power are the Minister for Immigration and Multicultural Affairs and in some cases, where the power can be delegated,[2] officials in the Minister's Department (DIMA). Both can be parties to the application of discretion under the Act as specified under s417 and associated judicial interpretation.[3]

8.6 The extent of Ministerial discretion is laid out in s417 of the *Migration Act* to include the following:[4]

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

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

3. If the Minister substitutes a more favourable decision he/she must inform Parliament of the reasons and the new decision reached;

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

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

6. The Minister is under no duty to consider whether to exercise this power.

8.7 The *Migration Act* implements the obligations contained in the Refugee Convention.[5] DIMA acknowledged that asylum seekers applying to stay in Australia on humanitarian grounds, under Australia's international obligations in respect of the CAT, CROC, and the ICCPR, will be considered through the Minister's power under s 417.[6]

8.8 Whilst Ministerial discretion under s417 is the central focus of attention in this Chapter, it should be noted that the Minister has other discretionary powers under the Act that are not within the terms of reference of this Inquiry.

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2 See the discussion at Paragraphs 8.107 to 8.111 below which explains that the Ministerial decision to decide not to consider whether to consider exercising the discretion can be delegated to the Department of Immigration and Multicultural Affairs

3 See Paragraphs 8.107 to 8.111 below in this Report for further detail

4 The full text of the provision under s417 may be found at Appendix 7 to this Report

5 See Chapter 2 of this Report

6 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 831

The operation of Ministerial discretion under s417 of the *Migration Act 1958*

Ministerial Guidelines established for interpreting Ministerial discretion under the Act

8.9 Ministerial Guidelines have been introduced to assist with the application of s417 of the Act.[7] The specific purposes of the Ministerial Guidelines (the Guidelines)[8] are to:

- Inform DIMA officers of the unique or exceptional circumstances in which the Minister may wish to consider exercising his/her public interest powers contained in s417;
- Set out the unique or exceptional circumstances in which the Minister may wish to consider exercising those powers;
- Inform DIMA officers of the way in which they should assess whether to refer a particular case to the Minister so that he/she can decide whether to consider such intervention; and
- Inform people, who may wish to request the Minister to exercise his/her public interest powers, of the format in which a request should be made.[9]

8.10 The current Guidelines differ substantially from earlier guidelines and take into account many of the criticisms previously made. According to the Refugee & Immigration Legal Centre (RILC), the Guidelines 'considerably alter the scope and process for seeking exercise of [Ministerial] discretion' by incorporating a definition of what is in the 'public interest' and introducing the requirement that the case must 'involve unique or exceptional circumstances'.[10]

8.11 The new Guidelines are acknowledged by the Refugee Advice and Casework Service to be an improvement because they now provide:[11]

- an indication of the administrative process by which a s417 request is to be handled; and

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7 Copies of the previous and current Guidelines are provided at Appendix 8 and Appendix 9 of this Report

8 The current Guidelines to assist in the application of Ministerial discretion in the Act, were issued on 31 March 1999 (*The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958).* A copy of the guidelines forms Attachment K of *Submission No. 69*, Department of Immigration and Multicultural Affairs, p 937)

The Department of Immigration and Multicultural Affairs commenced the training of staff on the new Ministerial Guidelines in June 1999

9 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March 1999, Guideline 1.1

10 *Submission No. 38,* Refugee and Immigration Legal Centre, p. 318

11 *Submission No. 46,* Refugee Advice and Casework Service (Australia) Inc, p. 412

- some transparency with regard to the way in which a case officer is to assess a request for s 417 intervention in relation to the Guidelines after the failure of an application at the RRT.

8.12 The Guidelines address in detail the 'unique and exceptional' circumstances which may place a case in the category to be considered under the Minister's public interest power.[12] In particular, the Guidelines contain detail of the humanitarian grounds for review of a request, to be considered under the international conventions – CAT, CROC, and ICCPR. A number of other circumstances requiring consideration are also outlined for reference.

8.13 Acknowledging the establishment in Australia of "an elaborate and sophisticated system for the consideration of individual asylum applications"[13] UNHCR notes that the Ministerial Guidelines:

> …take account of Australia's (non-refugee) obligations under the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984); and the International Covenant on Civil and Political Rights (1966). In this respect, a consideration of the exercise of ministerial discretion has a wider ambit than procedures for the determination of refugee status.
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> …UNHCR is appreciative of provisions in the Migration Act 1958 for the exercise of ministerial discretion, which are completely consistent with the humanitarian nature of Australia's refugee protection programme.[14]

8.14 However, the Refugee Council's submission was critical of the lack of transparency and accountability in the process and requested that clear criteria be established against which humanitarian claims can be assessed.[15] They criticised the arbitrary and inconsistent nature of the decision-making process and argued that:

> These guidelines are deliberately broad. They are thus open to a multitude of interpretations, yet, unlike the case with legally binding criteria, there is no way of ensuring that any principle of consistency across interventions is applied.[16]

8.15 RILC offered a number of suggestions for further improvement on the current Ministerial Guidelines.[17] They argued that the Guidelines should incorporate a proper codification of all of Australia's obligations arising under human rights treaties.

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12 This concept is discussed at greater length later in this Chapter at Paragraphs 8.34 – 8.43

13 *Submission No. 83*, United Nations High Commissioner for Refugees, p. 1433

14 *Submission No. 83*, United Nations High Commissioner for Refugees, p. 1434

15 *Submission No. 24*, Refugee Council of Australia, p. 130; and see also *Submission No. 60*, Ethnic Communities of New South Wales Inc, p. 608

16 *Submission No. 24*, Refugee Council of Australia, p. 131

17 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 319

8.16 RILC criticised the process, whereby cases are assessed under the Guidelines, as "being extremely crude and fail[ing] on any measure to provide adequate safeguarding of an individual's rights".[18] They argued that the process provided no opportunity for hearings, interviews, the right to access adverse information, or an entitlement to natural justice or other measures of procedural fairness.

> We find the Ministerial discretion process to be confusing, cumbersome and arbitrary. Its "hit and miss" nature is glaringly apparent and it is frequently only through chance that the ultimate decisions are based on merit.[19]

8.17 RILC also expressed concern that the process for requesting a s417 intervention, according to the Guidelines, did not facilitate the granting of a bridging visa and that, unless the request leads to a bridging visa being granted, the asylum seeker may be removed from Australia in the meantime. RILC suggested that a lodgement of a request to the Minister to consider the use of Ministerial discretion should clearly interrupt the removal process until a decision about the request has been reached.[20]

Recommendation

Recommendation 8.1

The Committee **recommends** that the Minister should note the concerns expressed about the s417 Guidelines and consult widely with stakeholders on a regular basis to ensure that the content of the Guidelines remains contemporary and addresses the specific purposes of Australia's obligations under the CAT, CROC and the ICCPR.

Recognition of a humanitarian program

8.18 Three international conventions are of particular importance when a discretionary decision is being considered on humanitarian grounds – CAT, CROC and the ICCPR.[21] Australia's obligation and commitment under these international conventions for the protection of human rights, supports the assumption that it is in 'the public interest'[22] to offer protection on humanitarian grounds to asylum seekers who have claims under these conventions.[23]

8.19 The discretion conferred on the Minister for Immigration and Multicultural Affairs under the *Migration Act* provides a 'safety net' for asylum seekers in Australia

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18 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 320

19 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 321

20 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 320

21 The use of Ministerial discretion to give effect to Australia's international obligations is also discussed in Chapter 2 of this Report

22 The concept of 'the public interest' is discussed further in this Chapter at Paragraph 8.27 below

23 See Chapter 2 for details of these convention-related claims

seeking a visa to remain in the country. The discretion provides a framework for granting permission to remain in Australia, under the Ministerial Guidelines, to persons who do not fit the category of refugee under the Refugee Convention, but who face a significant threat to personal security, human rights or human dignity if returned to their country of origin.[24]

8.20 A discretionary decision under s417 may be made on many grounds but for the purpose of this Chapter the Committee focuses only on humanitarian or other grounds relating to international obligations. It is also noted that, in evidence, DIMA claimed that s417:

> [was not] meant to be an all-embracing onshore humanitarian program.[25]…
>
> We do not have an onshore humanitarian program. The 417 intervention power is for the Minister to intervene in exceptional cases.[26]
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> …Many of the 417 interventions may be for non-humanitarian grounds such as marriage, for example.[27]

8.21 The Australian government has not incorporated its international humanitarian obligations into domestic law, although CROC has been appended to the *Human Rights and Equal Opportunity Commission Act 1986* as Schedule 3.[28] Consequently, there is no direct reference to the three conventions and perhaps little awareness of there being obligations.

8.22 In Chapter 2 of this Report the point is made that the provisions of CAT and the ICCPR do not prescribe or indicate what mechanisms, if any, State parties should put in place to meet their obligations.[29] However, although references are made to these humanitarian conventions in the Guidelines, a number of submissions to the Committee expressed concern that Australia had not seriously attempted to formalise the absolute requirements of the conventions.[30] Amnesty International pointed out that, in its opinion, until CAT and the ICCPR are formally incorporated into Australian domestic law, persons seeking protection under these conventions do not have recourse to enforceable rights or obligations.[31]

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24 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 831

25 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 807

26 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 807

27 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 808

28 For further details see Chapter 2 of this Report

29 See Chapter 2 of this Report

30 See Chapter 2 of this Report

31 *Submission No. 50*, Amnesty International, p. 498; and see also *Submission No. 73*, Law Council of Australia, p. 1075

8.23 The Commonwealth Attorney-General's department stated that "it is a basic principle of international law that each State has a 'margin of appreciation' as to how it gives effect to its treaty obligations".[32] The Attorney-General's department claimed in evidence that, in respect of all these conventions, had it been considered that there was a need for legislation to be enacted for Australia to comply with those obligations, this would have been done before Australia became a signatory:[33]

> None of the conventions explicitly require amendment of domestic law as one of the requirements of the convention….So, for example, many of the obligations under the International Covenant on Civil and Political Rights simply require governments to refrain from doing various things that would impede or impact upon people's enjoyment of their rights…
>
> Some obligations, by their very nature, will require legislation either to be in existence or to be passed….So legislation was enacted – the Crimes (Torture) Act – to criminalise conduct of the sort defined by the convention that occurs outside Australia.[34]

8.24 The department argued that:

> [the] particular obligation is one of the sort … where it only requires the government to do something or refrain from doing something; namely, the government undertakes not to *refoul[e]* a person to a place where their life or freedom will be threatened. The government does not need to legislate to regulate its own behaviour. The government can simply undertake not to, and in fact not *refoul[e]* people….
>
> Internationally, what compels Australia to carry out its obligations is the fundamental principle of international law that treaties are to be honoured in good faith and their provisions are to be carried out.[35]

8.25 In the context of those seeking asylum, the Ministerial Guidelines outline the main criteria to be considered in relation to the three international conventions – CAT; CROC; and the ICCPR.[36] However, some aspects of the Ministerial discretion under s417 appear to run contrary to the principles within these Conventions. While the *non-refoulement* obligation under the CAT is an absolute commitment, under s417 the Minister may *choose* not to exercise Ministerial discretion to grant protection.[37]

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32 *Submission No. 75*, Attorney-General's department, p. 1139; see also *Submission No. 29*, Mr Stephen Tully, p. 170

33 *Transcript of evidence*, Attorney-General's department, p. 222 (7 December 1999)

34 *Transcript of evidence*, Attorney-General's department, pp. 221-222 (7 December 1999)

35 *Transcript of evidence*, Attorney-General's department, pp. 224-225 (7 December 1999)

36 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 4.2.2-4

37 See below, Paragraphs 8.105 to 8.106

8.26 The Attorney-General's Department represents one view on the need for domestic legislation to support Australia's international commitments. Although, as the Attorney-General's Department argued, conventions do not explicitly require amendment of domestic law, it is the Committee's view that Australia's international obligations, under these conventions, would require a change in law if there is no other means to ensure that they are honoured.

The power to decide based on 'the public interest'

8.27 The *Migration Act* and Guidelines determine the scope and process that will be used to assess an individual s 417 request. The term 'public interest' in s417(1) of the Act directs the attention of either the Minister or the Minister's delegate[38] to requests from asylum seekers who have reasons for granting refugee status which would evoke the sympathy and support of the Australian public. The 'public interest' may be served through the Australian Government responding with care and compassion to the plight of certain individuals in particular circumstances.[39]

8.28 In general, the concept of 'the public interest' is seen to embrace matters acknowledged to be for the good order of civil society and the well being of its members.

8.29 However, emphasis on the public interest, a notion that considers the broader community, may detract from the circumstances of any individual case.[40] In its submission, the Law Council of Australia was mindful of the fact that there are special issues to be considered when addressing individual refugee and humanitarian requests for protection visas which do not equate with the more general assessment undertaken in the public interest for normal immigration applications. The Council expressed concerns that:

> [The use of the 'public interest'] is based on the assumption that the refugee and humanitarian intake can be equated with normal immigration streams where the benefits to Australia are assessed in the grant of visas. This is wrong.[41]

8.30 This leads to the concern amongst interested parties that an imprecise notion, such as 'the public interest', does not provide a clear guide when trying to assess the appropriateness of the use of the Ministerial discretion.

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38 See the discussion at Paragraphs 8.107 to 8.111 below which explains that the Ministerial decision to decide not to consider whether to consider exercising the discretion can be delegated to the Department of Immigration and Multicultural Affairs

39 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March 1999, Guideline 4.1

40 *Submission No. 97,* Law Society of New South Wales, p. 1596

41 *Submission No. 73,* Law Council of Australia, p. 1078

8.31 If the appropriateness of the use of the Ministerial discretion under s417 is to be assessed directly in terms of Australia's international humanitarian obligations, then a more precise notion than 'the public interest' would need to be incorporated into the Ministerial Guidelines. If appropriateness is to be assessed indirectly, through transparency and accountability processes, then these need to be established and closely monitored.

8.32 The Committee concludes that the indirect approach to ensuring appropriateness is the preferable mechanism. In other words, it is accepted that the Minister and his delegates will use Ministerial discretion in the best interests of both protection visa seekers and the community. This means that public interest should continue to be a key criterion in the consideration of Ministerial discretion and this discretion must be exercised through a transparent accountability process.

8.33 The Committee agrees that the public interest should remain a critical component in the decision-making process embodied in s417 of the Act.

8.34 In an attempt to provide an indication of the type of circumstances which may be considered to be in the public interest, the Guidelines include the requirement that any case to be considered by the Minister on these grounds must involve 'unique or exceptional' circumstances.[42] Guideline 4.2 explains that:

> Cases may fall within this category of cases where it is in the public interest to intervene if a case officer is satisfied that they involve unique or exceptional circumstances. Whether this is so will depend on various factors and must be assessed by reference to the circumstances of the particular case.

8.35 The Guidelines outline factors which may be relevant, individually or cumulatively, in assessing whether a case involves 'unique or exceptional circumstances'.[43]According to the Guidelines, particular circumstances or personal characteristics that provide a sound basis for assessment of a significant threat to a person's personal security, human rights or human dignity on return to their country of origin, include:

> persons who may have been refugees at time of departure from their country of origin, but due to changes in their country, are not now refugees; and it would be inhumane to return them to their country of origin because of their subjective fear. For example, a person who has experienced torture or trauma and who is likely to experience further trauma if returned to their country; or

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42 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March 1999, Guideline 1.1

43 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March 1999, Guideline 4.2.1

> persons who have been individually subject to a systematic program of harassment or denial of basic rights available to others in their country, but this treatment does not constitute Refugee Convention persecution as it is not sufficiently serious to amount to persecution or has not occurred for a Convention reason.[44]

8.36 Under the Guidelines, the 'unique or exceptional circumstances' that may bring Australia's obligations as a signatory to international conventions into consideration under Ministerial discretion, in the case of an applicant for a protection visa, include those found in CAT (Article 3.1); Refugee Convention (Article 3); and ICCPR (in particular 23.1).[45]

8.37 The Guidelines note other unique or exceptional circumstances to be considered in a request for Ministerial intervention which include:

- [Those] that legislation could not have anticipated;[46]
- Clearly unintended consequences of legislation;[47]
- Intended, but in the particular circumstances, particularly unfair or unreasonable consequences of legislation;[48]
- Strong compassionate circumstances such that failure to recognise them would result in irreparable harm and continuing hardship to an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident) or an Australian citizen;[49]
- Exceptional economic, scientific, cultural or other benefit to Australia;[50]

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44 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guidelines 4.2.1

45 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guidelines 4.2.2 – 4.2.4

46 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 4.2.5

47 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 4.2.6

48 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 4.2.7

49 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 4.2.8

50 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 4.2.9

- The length of time a person has been present in Australia (including the time spent in detention) and their level of integration into the Australian community;[51]
- The age of the person;[52] or
- The health and psychological state of the person.[53]

8.38 A DIMA case officer considering any request for exercise of Ministerial discretion is also required to draw the Minister's attention to countervailing issues, some of which are outlined in the Guidelines. These may include:

- Whether the presence or continued presence of the person in Australia would pose a threat to an individual in Australia, Australian society or security or may prejudice Australia's international relations (having regard to Australia's international obligations);[54]
- Whether there are character concerns in relation to the individual, particularly in relation to criminal conduct;[55]
- Whether the person need not return to the country in which a significant threat to their personal security, human rights or human dignity has occurred or is likely to occur, because they have rights of entry and stay in another country;[56]
- Whether the person is likely to face a significant threat to their personal security, human rights or human dignity only if they return to a particular area in their country of origin and they could reasonably locate themselves safely, elsewhere within that country;[57] [and]

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51 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 4.2.10

52 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 4.2.11

53 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 4.2.12

54 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 5.1.1

55 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 5.1.2

56 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 5.1.3

57 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 5.1.4

- The degree to which the person co-operated with the Department and complied with any reporting or other conditions of a visa.[58]

8.39 These countervailing issues need careful consideration on the part of a DIMA case officer because they introduce circumstances which may produce conflicting resolutions, in terms of the international humanitarian obligations adopted elsewhere in the Guidelines for exercise of Ministerial discretion.

8.40 The nature of the circumstances and issues to be considered under the Guidelines highlight the need for confidentiality, rather than transparency, where privacy is required to maintain the safety of an individual. They also raise the question of whether any individual's set of circumstances is unique or exceptional.

8.41 A set of contingent circumstances must be examined for each s417 request.[59] This approach would require that contemporary data be available about the full range of contingent circumstances to be examined, and experts on hand to interpret recent available information regarding different situations under consideration. Information about circumstances and policies in overseas countries is available from the Protection Visa application documents, from the review process, and through DIMA's Country Information Service (CIS).[60]

8.42 The Guidelines address a range of matters, including points for officers on how to deal with applications that fall within Australia's obligations under international humanitarian conventions. There is a risk of DIMA officers finding the Guidelines difficult to interpret and work with, especially because the officer is dealing with a request which was originally presented, at the beginning of the refugee decision-making process, as an application for refugee status under the grounds of the Refugee Convention.

8.43 The Committee notes that it is important that the DIMA case officer is fully briefed by the Department on all contingent circumstances of each individual case. Up to date information sources and services must be available to the case officer during the decision-making process.

Requesting consideration of Ministerial intervention under s417

8.44 The Minister's discretionary power under s417 is only available to Protection Visa applicants after a review decision by the RRT has been made. Applicants who do not apply for review by the RRT do not have access to the Minister's discretionary

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58 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 5.1.5

59 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 4

60 Further commentary on the issues associated with the provision of the Country Information Service is provided Chapters 4 and 5 of this Report

power. When a decision is quashed or set aside by a Court, and the matter is remitted to the decision-maker to be considered again, the case is no longer recognised as a review decision. Therefore, Ministerial discretion under s417 is not available at this stage.[61]

8.45 Two questions raised are whether individuals are aware of the opportunity to request s417 consideration, and whether the actual s417 process is appropriate. To assess awareness of the opportunity for s417 intervention, and the appropriateness of this discretionary process for the consideration of humanitarian cases, it is necessary to understand how the process works. Section 417 interventions are classed by DIMA as *requests* rather than applications.[62] However, under the Guidelines, there need not be a formal request before the Minister can choose to exercise the power.

8.46 Individual cases can be brought to the attention of the Minister for exercise of discretionary power, after a negative RRT decision, in any one of three ways, by:

- The DIMA case officer;
- The RRT as a case informally referred to the Minister's attention, through the DIMA case officer, for possible s417 consideration; or
- A request made directly by a failed asylum seeker, or by a representative of that person.

8.47 Each of these three means of gaining consideration under s 417 is discussed below:

Cases considered by a DIMA case officer

8.48 When a negative decision is handed down by the RRT, a DIMA case officer is required to consider the case in the light of the Minister's Guidelines. The officer will either bring the case to the Minister's attention or make a file note to the effect that the case does not fall within the ambit of the Guidelines.[63] This is an automatic, internal consideration initiated by DIMA which does not require any request.[64]

8.49 Cases which appear to be within the Guidelines are forwarded to the Minister with a full submission for consideration. Ineligible cases are put on a schedule with a shorter summary. According to DIMA:

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61 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March 1999, Guideline 3.2

62 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 810

63 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March 1999, Guideline 6.2

64 In the case of Ms Z, the Department of Immigration and Multicultural Affairs case officer recorded (on 3 May 1995) that her case had been considered under the Ministerial discretion and was found not to meet the Ministerial Guidelines for intervention under s417

> The Minister looks at both and regularly says, 'I want to have a bit more of a look at this one on the schedule; come back with a full submission.' [65]

8.50 There is concern that this later stage of the decision-making process is only based on information and claims provided in the original application for a Protection Visa. Such information has been put forward to the primary decision-maker as grounds for refugee status under the Refugee Convention. The officer assessing a request under s417 is not provided with an application made on humanitarian grounds under CAT, CROC and the ICCPR which are pertinent to his decision-making under the Ministerial Guidelines.[66]

8.51 No external review is available for assessment of cases for Ministerial intervention. Concerns have been raised in relation to issues of transparency in this aspect of decision-making and the arbitrary nature of this process.[67] DIMA is under no obligation to inform applicants that their case does not meet the Guidelines or that the DIMA official has not referred the case to the Minister. It also follows that there is no provision for an asylum seeker to find out whether the DIMA case officer has chosen to put a case before the Minister.

8.52 In this context the Australian Catholic Migrant and Refugee Office submit that a more formal process, with a clearer timeframe, for a s 417 request should exist to advise an asylum seeker when an individual's case has been referred by DIMA to the Minister for review.[68]

Cases referred by the RRT

8.53 RRT members can informally refer cases to the Minister, through the DIMA case officer, for s417 consideration. The Minister has made it clear that this procedure should not be undertaken in the context of an RRT judgement:

> Tribunal members have an important role to play in identifying cases in which the consideration of the exercise of my public interest power may be appropriate. However, the most appropriate way to draw this to my attention is not through making recommendations in the tribunal decision that I should consider the use of my public interest intervention power. Consideration of this issue falls outside the jurisdiction of the tribunal and is therefore best addressed outside the decision record through my department. Tribunal members are welcome to inform me of such cases by notifying the

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65 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 806

66 *Submission No. 61*, South Brisbane Immigration & Community Legal Service, p. 641

67 *Submission No. 58A*, Australian Catholic Migrant and Refugee Office, p. 670; see also *Transcript of evidence*, Ethnic Communities Council of New South Wales Inc, p. 156; and *Transcript of evidence*, Law Council of Australia, p. 184

68 *Submission No. 58*, Australian Catholic Migrant and Refugee Office, p. 585; and see also *Submission No. 58A*, Australian Catholic Migrant and Refugee Office, p. 670; and *Transcript of evidence*, Legal Aid Western Australia, p. 252 (3 February 2000)

> department of their particular concerns and identifying the relevant paragraphs of the Guidelines applying in the individual case.[69]

8.54 It is noted that, during the review process, the RRT may have collected valuable additional information about the circumstances of an applicant seeking refugee status that was not presented, or not presented clearly, by the applicant. The Tribunal clearly has a role to play by identifying these circumstances and referring appropriate cases for consideration under s417. As the RRT member is not making a determination on these considerations, it is appropriate that the referral mechanism to the Minister, through the DIMA case officer, continue to be informal.

Recommendation

Recommendation 8.2

The Committee **recommends** that the RRT continue the current practice whereby members informally advise the Minister of cases where it is considered that there may be humanitarian grounds for protection under international conventions, as opposed to grounds under the Refugee Convention.

Requests by an individual or his/her representative

8.55 An individual who receives an unfavourable decision from the RRT may personally request the Minister to exercise his/her Ministerial discretion.[70]

8.56 When asked how requests for s 417 intervention were made, DIMA replied that:

> …anybody – because it is just a piece of correspondence, not an application – has the capacity at any time to bring to the Minister's attention a case where they think the Minister might want to consider intervening in the public interest.[71]

8.57 DIMA added:

> …irrespective of how information came before [DIMA], if there was a prospect of returning somebody to their country of origin where they may face persecution – where that had not been properly considered in a previous

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69 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 6.2-6.3. Minister for Immigration and Multicultural Affairs, The Hon Phillip Ruddock, Speech to open the Migration Review Tribunal, 4 June 1999 quoted in *Submission No. 46*, Refugee Advice and Casework Service, p. 413

70 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 6.4

71 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 811

> decision making process - then the obligation [to consider] is very clear irrespective of whether it is raised verbally or in writing.[72]

8.58 DIMA confirmed that a request for a s417 intervention does not have to be 'triggered' by quoting the section of the Act and that:

> If somebody beseeched the Minister to let them stay, without quoting the section of the Act, that would be treated as a request.[73]

8.59 Again, confirming the process by which a request is recognised or interpreted as being a request for Ministerial intervention under s417, DIMA explained that if the asylum seeker verbally requests to 'ask the Minister to let them stay' because:

> …[there] were new [reasons] that had not been raised before … they would be asked to put it in writing; if it was in their own language, it would be translated; then it would go in and trigger consideration against the Guidelines and submission, either in a full submission or on the schedule, for the Minister either to consider or to consider whether he was going to consider…
>
> ….it is clear that when people are facing removal it is very common for them to say they do not want to go home; but that does not necessarily constitute a request that could be construed under 417. And, very often it does not raise any issue that has not been before decision-makers and before the Minister already.[74]

8.60 It is clear from the above comments that a person seeking protection does not have to specifically indicate that a request for Ministerial intervention under s417 is being made.[75] Similarly, there is no mechanism to recognise cases that could have been considered for s417 intervention (but were not) when a verbal request is made (the asylum seeker may have been returned with no request being recognised or formally recorded). It could be suggested, whenever a general plea is made, that might invoke s417, that a standard formal recognition should be given (ie a record should be made). If concerns raised were noted on a report, the matter would be more efficiently expedited.

8.61 The Refugee Advice and Casework Service (RACS) added:

> Our concerns relate to the process as well as the results. In our experience, the same factual situation [ie in the same case] has to be put a number of times to the minister's office before the matter is taken seriously.[76]

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72 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 812

73 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 811

74 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 817

75 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 811

76 *Transcript of evidence*, Refugee Advice and Casework Service, p. 114

8.62 It is also noted that the above comment by RACS highlights the issue that the avenue for s417 consideration allows a person to make any number of requests for Ministerial discretion.[77] Although, in practice, this may not be common, the Committee is concerned that the process should not be abused and that consideration of the imposition of some formal limitation should be placed on the number of s417 requests accepted unless new information can be provided. Any limitation should only occur after wide consultation with interested organisations.

8.63 Other factors which might contribute to deficiencies in the process for a request under s 417 include:

- insufficient attention to cultural and language problems for some asylum seekers, causing a lack of awareness of possible procedures about claiming refugee status; and
- limited advice available to the applicant about the administrative process, rather than lack of legal advice.

8.64 The case of the Ms Z is considered in this context. Ms Z's experience with s417 is discussed in full in Chapter 9 of this Report.[78] Her case may be considered here as an illustration of the potential for problems to arise from the informal nature of the process of requesting s417 intervention.

8.65 Legal Aid Western Australia (LAWA) was closely involved in the application and review procedures of Ms Z's claims for refugee status. Their representation is said to have ceased some time after the second application was ruled to be invalid.[79] It is not clear why LAWA did not advise Ms Z to proceed with a s417 request at that stage as they had made a request for Ministerial intervention in respect of another pregnant woman who was returned to the PRC on the same flight as Ms Z. This request was made on the grounds that the woman feared a forcible abortion.[80] Although material available suggests that Ms Z expressed fear about returning to the PRC while pregnant with a second child as early as 30 April 1997,[81] her pleas were not recognised as, or taken to be a request for, Ministerial intervention under s417.

8.66 It was noted in evidence to the Committee that, had Ms Z made a written request under s 417, the request would have been immediately faxed from the Centre

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77 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March 1999, Guideline 6.6

78 The Guidelines for stay in Australia on humanitarian grounds, current when Ms Z was presenting her case in Australia, are provided at Appendix 8 of this Report

79 *Transcript of evidence*, Legal Aid Western Australia, pp. 252-254 (3 February 2000)

80 Department of Immigration and Multicultural Affairs, Folder 23/8/99, Section 3, Item 1, para 11, Minute to the Acting Minister, 10/7/99

81 Department of Immigration and Multicultural Affairs Folder 23/8/99, Section 5, p. 77/107

in Port Hedland to Canberra for a response.[82] However, it appears that Ms Z was not advised to put her concerns in writing. No evidence has been given to the Committee that Ms Z understood, or that she was aware of, the procedure involved in making a request for consideration under s 417 and she was never advised to put her request in writing.

8.67 Prior to the departure of the planeload of removees on 14 July 1997, of which Ms Z and her daughter were a part, a statement was made by the Acting Minister, Senator Vanstone, in respect of the persons being returned: that the Acting Minister would not consider exercising her power to intervene under section 48B (to make another Protection Visa application) or s417. The intention of this statement seems to have been to forestall any attempts to delay the removal operation by a last-minute request by any member of the group.[83]

8.68 This statement was issued following a DIMA briefing given to the Acting Minister on 12 July 1997, on the details of the removal of a number of unauthorised non-citizens, including Ms Z, to the PRC on a charter aircraft on 14 July 1997. The Acting Minister was not told that a returnee on that flight, Ms Z, was in the late stages of pregnancy.[84]

8.69 The effectiveness of the Ministerial discretion appears to rely on a premise that an applicant has the knowledge and resources to make the required written submission to the Minister under s417.[85] However, the level of knowledge and understanding among applicants, their advisers, their representatives and DIMA staff about a s417 request, and the procedure involved in making that request, have been questioned.[86] In practice, detainees rely on resources, technical and other expertise available to them at the detention centres and informal information from other detainees. The question raised is whether failed asylum seekers and others should be provided systematically with the requisite information and resources by DIMA to seek Ministerial intervention.

8.70 There is mixed evidence about whether individuals have adequate knowledge of the procedure for requesting a s417 intervention. Statistics for the two year period - 1997/8 and 1998/9, reveal that almost two-thirds of the failed RRT applications led to s417 requests.

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82 Ayers File (1999), p. 33

83 See Department of Immigration and Multicultural Affairs Folder 23/8/99, Section 3; and also Section 5 for the signed copy of the statement

84 See Ayers Report (1999), Paragraphs 33 and 35

85 *Submission No 73*, Law Council of Australia, pp. 1072 and 1079; and *Submission No. 97*, The Law Society of New South Wales, p. 1596

86 A Department of Immigration and Multicultural Affairs officer working in the Department during the mid 1990's commented on the lack of material available to staff, including guidelines and information on procedure for processes such as a s417 request (*Transcript of evidence* [In camera], p. 172). The Committee was advised that it was necessary to make direct contact with the Department of Immigration and Multicultural Affairs staff in Canberra to clarify details of these policies and procedures

TABLE 8.1: Statistics relating to s417 intervention power[87]

Year	Number of requests for s417 intervention	Visas granted under s417	S417 requests as a % of all failed RRT applications
1993/94	N/A	42	N/A
1994/95	N/A	63	N/A
1995/96	N/A	68	N/A
1996/97	N/A	67	N/A
1997/98	4072	55	64.3%
1998/99	4236	154	62.0%

Data on the number of requests for s417 were not maintained prior to 1997/8 and some 'repeat' requests may be included in the 1997-98 figure.

8.71 Notwithstanding the above statistics, there is also evidence to suggest that procedures are not well understood by individual asylum seekers.[88]

8.72 The Committee found evidence that certain DIMA staff involved in the case of Ms Z lacked awareness of the procedure for a s417 request. The DIMA central office in Canberra did not provide clear instructions and adequate response to queries in regard to procedure and policy from DIMA centres and offices elsewhere.

8.73 The Committee also identified a lack of communication between DIMA officers and asylum seekers at Port Hedland and there was evidence that the officers did not always recognise a verbal statement to be a s417 request when it should have been apparent.[89]

8.74 Problems faced by individual asylum seekers are related to the requirement that, although the issue may be raised orally, a request must then be put in writing by the person seeking the Minister's intervention, his/her agents or his/her supporters.[90] Because a s417 request takes the form of correspondence, rather than an official

87 *Submission No 69E*, Department of Immigration and Multicultural Affairs, pp. 1678-1679; and *Submission No. 69H*, Department of Immigration and Multicultural Affairs, p. 1958

88 The Ministerial discretion process has been described as "confusing, cumbersome and arbitrary" by the Refugee and Immigration Legal Centre(*Submission No. 38*, p. 321

89 For example, see Chapter 9 of this report

90 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 6.4

request made on a form, there is no limit to the number of occasions an asylum seeker may make such a request, or of the timing of the requests for Ministerial intervention after the RRT review.[91]

8.75 Repeat requests that do not contain new information, need not be brought to the Minister's attention. The case officer can respond on behalf of the Minister by stating that the Minister does not wish to consider exercising his/her power.[92]

8.76 When asked about any s417 briefing that might be provided to the Australasian Correctional Management (ACM) staff at detention centres, DIMA stated that these matters were the responsibility of the DIMA Business Managers located at each detention facility.[93] No written detail is provided by DIMA to ACM about the s417 mechanism.[94] If a detainee were to raise any immigration processing matter (including a s417 matter) with an ACM officer he/she would be referred to the DIMA Business Manager.

8.77 The present lack of formal process creates problems for the individual who may wish to present additional supporting information to DIMA. The South Brisbane Immigration & Community Legal Service pointed out that:

> This process is of concern in that it has the potential to prejudicing applicants in failing to allow them to explicitly outline to the Minister their suitability for humanitarian protection. The refugee determination process does not operate according to the same criteria as the humanitarian discretion, and applicants should be permitted to explicitly address humanitarian provisions, rather than the Minister's office inferring this from the RDP process.[95]

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91 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March 1999, Guideline 6.6. *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 804 and 811.

92 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March 1999, Guideline 6.6

93 *Submission No. 69H*, Department of Immigration and Multicultural Affairs, p. 1957

94 Similarly, a handbook, published by Australasian Correctional Management and supplied to detainees, provided information about how the detention facility operates but no information about refugee processing procedures such as s 417. The Department of Immigration and Multicultural Affairs pointed out that this document is not an immigration publication and hence does not deal with processing issues in general, or the s 417 mechanism in particular (*Submission No. 69H*, Department of Immigration and Multicultural Affairs, p. 1958

95 *Submission No. 61*, South Brisbane Immigration & Community Legal Service Inc, p. 641

Recommendation

Recommendation 8.3

The Committee **recommends** that an information sheet be produced to explain the provisions of s417 and the accompanying Ministerial Guidelines. The literature should also include information on the procedure for any subsequent application under s48B. This should be widely available in appropriate languages.

Recommendation 8.4

The Committee **recommends** that the s417 process should be completed quickly and the result of the request advised to the relevant person.

Recommendation 8.5

The Committee **recommends** that the subject of the request should not be removed from Australia before the initial or first s417 process is finalised.

Refining the process of applications for protection

8.78 The *Migration Act* does not provide for requests for protection on humanitarian grounds to be undertaken at the primary stage of application. A person seeking protection on humanitarian grounds has to go through the traditional 'refugee status' channels under the Act, and be rejected at RRT review, before being able to request intervention on humanitarian grounds under s417. Australia makes no provision for those who fall outside the Convention definition of refugee, other than the procedure available under s417.

8.79 A revision of the process whereby a person seeking asylum on humanitarian grounds is required to be processed through an administrative decision-making system focussing on refugee related grounds would remove the sometimes lengthy delays incurred in a number of genuine cases. It should also lead to what would be considerable saving in time and resources associated with unsuccessful RRT processing. The Committee has received a number of submissions arguing for the introduction of a separate humanitarian (compassionate) visa, with clear definitions, for this category of visa.[96]

8.80 In the light of the above comments the Committee has considered how the current process could be refined to identify, at an earlier stage in the refugee determination process, persons in need of protection on humanitarian grounds. However, the Committee is mindful not to suggest the creation of another class of visa that would require further DIMA resources for administration and review.

96 *Submission No. 73*, Law Council of Australia, p. 1080; *Transcript of evidence*, Springvale Community Aid and Advice Bureau, p. 289; *Submission No. 61*, South Brisbane Immigration & Community Legal Service Inc, p. 642; *Submission No 42*, Victorian Synod Uniting Church in Australia, p. 383; *Transcript of evidence*, Mr John Young, p. 296; and *Transcript of evidence*, Refugee and Immigration Legal Centre, p. 376

Limited availability of resources

8.81 The adequacy of application advice provided to asylum seekers is discussed in detail in Chapters 3 and 4 of this Report but the following matters add substance to the conclusions reached in them.

8.82 Limited resources for the s417 process apply to both the asylum seekers requesting Ministerial intervention and to the Minister and his Department.

8.83 The Refugee Council of Australia pointed out that:

- those with genuine non-Convention claims to protection are forced to wait many months, even years, before their cases can be considered against appropriate guidelines; [and]
- those with genuine claims to Convention status suffer because the large number of non-Convention cases being considered cause unnecessary delays in the processing of claims of *de jure* refugees.[97]

8.84 The South Brisbane Immigration & Community Legal Service noted that the present system for requesting protection under s417 forces people with no claim to Refugee Convention status to engage in a lengthy and sometimes expensive process in order to have their humanitarian claims for protection assessed under s417.[98]

8.85 It has been noted above that LAWA made comment, in relation to the case of Ms Z, that there is no funding available to provide assistance to an asylum seeker once the RRT decision is handed down.[99] The organisation had made a request for Ministerial intervention under s417 in respect of another pregnant woman who was returned to the PRC on the same flight as Ms Z on the grounds that the woman feared a forcible abortion.[100]

8.86 For the Minister, availability and management of time are critical. The Refugee Council of Australia suggested that:

- the determination process becomes cumbersome and more expensive to maintain as its channels become bloated with pro-forma claims; and
- given the many responsibilities that the Minister is charged with and the demands on his time, the present system does not appear to be the most efficient way in which to deal with such matters….[101]

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97 *Submission No. 24,* Refugee Council of Australia, p. 130

98 *Submission No. 61,* South Brisbane Immigration & Community Legal Service Inc, pp. 628 and following

99 *Transcript of evidence,* Legal Aid Western Australia, p. 252 (3 February 2000)

100 Department of Immigration and Multicultural Affairs Folder 23/8/99, Section 3, Item 1, para 11, Minute to the Acting Minister, 10/7/99

101 *Submission No. 24,* Refugee Council of Australia, p. 130

8.87 Ideally, the Ministerial discretion, and associated resources, should be reserved to deal with a small number of cases which are the exception to the rule. Increased recognition of humanitarian criteria, if implemented in the primary stages of an asylum seeker's application, would relieve some of the pressure on the use of the Ministerial discretion under s417. These cases could be immediately referred to the Minister for consideration. Failure of the Minister to grant a favourable decision at this stage should not limit the ability of the applicant to continue with a review application, if appropriate, and to later make a s417 request.

Assessment and decision-making in a s417 request

8.88 The processes for assessment and response by DIMA are set out in the Guidelines. The Guidelines are not legally binding.

8.89 The Minister is not obliged to consider whether to exercise his discretion, or even consider whether to, and he/she may make a decision on any grounds. Thus, while those making a s 417 request are limited to making claims on humanitarian grounds, the Minister may make a more favourable decision for any reason.

8.90 When intervention is requested by the individual, the DIMA case officer is required to assess it against the Guidelines. If the case falls within the Guidelines, the case officer shall write a submission to the Minister recommending consideration. The case officer will make recommendations on a request to the Minister where unique or exceptional circumstances are involved which were not recognised as providing appropriate grounds for refugee status under the Refugee Convention. Alternatively, the DIMA officer will write a short summary of the case recommending against consideration. The case officer will reply on the Minister's behalf to cases which remain outside the scope of the Guidelines, that is those cases that fail to warrant Ministerial intervention.

8.91 No hearing takes place in the intervention process under the Ministerial discretion, but the Minister, or his delegate, will have regard to material on file and any submissions that the applicant may have made. The Minister can seek further information in order to consider whether to exercise discretion.[102]

8.92 If the Minister does decide to consider exercising discretion, then further processing steps may be taken such as health and character checks, or an assurance of support or other surety may be sought before making a final decision.[103] If the

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102 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March, 1999 Guideline 6.8

103 *Submission No 38,* Refugee and Immigration Legal Centre, p 320. See also *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March 1999, Guideline 5.2

Minister does decide to substitute a more favourable decision, the most appropriate visa is granted.[104]

8.93 The case of Ms Z illustrates the standard mechanism used when a case fails at the RRT. There appear to have been no formal requests made by, or in respect of, Ms Z and her first child to remain in Australia under s417.[105] On 3 May 1995, following the RRT review, which confirmed the DIMA decision to refuse her first application for a protection visa, DIMA automatically assessed the case to decide if the case was eligible for consideration under s417. The Department decided that it was not.

8.94 RILC were responsible for the s417 request submitted to the Minister on behalf of Mr SE, a case discussed in detail elsewhere in this Report.[106] RILC described the case as being a "glaring example" of the deficiency of the process.[107]

8.95 Following rejection of Mr SE's case by the RRT, on 23 June 1998, RILC put forward a request referring to the s417 Guidelines current at that time and referred to those "persons facing serious mistreatment closely approximating persecution" and "facing serious mistreatment which, while not Convention related, constitutes persecution".[108] RILC also referred to the ICCPR and provided fresh country information to support the claim.

8.96 On 29 June 1998 a DIMA officer assessed the request. The Minister responded on 22 July 1998 that he had "decided not to consider exercising" his power having found that it did not fall within the Minister's Guidelines for discretion.[109] The decision appears to have been made on the basis of the RRT findings and not on the humanitarian claims. Significantly, the Ministerial Guidelines require consideration of humanitarian issues.

8.97 A further request for Ministerial intervention under s48B was submitted by the RILC on behalf on Mr SE on 29 October 1998, following an attempted removal of

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104 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, 31 March 1999, Guideline 5.4

105 Ms Z's legal representatives did write on her behalf in 1995 to request that she be allowed to remain in Australia until after the first child had been born. It is unlikely that this request would have been met, but various factors prevented the return of the Cockatoo passengers for another two years from the date of the letter. This letter was not regarded as a s417 request by Legal Aid Western Australia which specifically noted that it made no s417 application on behalf of Ms Z: Department of Immigration and Multicultural Affairs Folder 1/9/99, Folder 1, Item 4, Correspondence between Legal Aid Western Australia and Department of Immigration and Multicultural Affairs October 1995; and *Submission No. 40*, Legal Aid Western Australia, p. 375

106 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 322; see also Chapter 7 of this Report

107 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 322

108 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 322

109 *Submission No. 38*, Refugee and Immigration Legal Centre, pp. 322 and 337-338

Mr SE from Australia by DIMA. The Minister responded immediately that he would not be prepared to consider the case under either s48B or s417.

8.98 Subsequently, RILC obtained documents under Freedom of Information which they claimed "reveal[ed] the very crude vetting process that occurs with the Ministerial discretion process".[110] They found that the recommendation from the case officer was put on a standard form and that the Minister had 'signed off' on the standard letter rejecting the request to consider the case under his discretion.

8.99 The National Director of Amnesty International then wrote to the Minister, on several occasions, urging him to use his discretion to intervene as the organisation believed that Mr SE "may face serious human rights violations if forcibly returned to Somalia at this time."[111] The Minister refused to consider exercising his discretion on each occasion.

8.100 On 28 May 1999, RILC again wrote to the Minister requesting intervention under s417 on behalf of Mr SE, following unsuccessful applications to the High Court, Full Federal Court and a communication to the Minister from UNCAT, in support of Mr SE's claim. RILC argued that this request meets the new Guidelines introduced in March 1999.[112]

8.101 RILC commented that "without any checks or balances and without any mechanism for review of the case officer's assessment" there was no acceptable way to establish that Australia has addressed the humanitarian obligations accepted under CAT and other international conventions.[113]

8.102 Considerable concern has also been expressed that this procedure may lead to a conflict of interest in which the same DIMA officer, who assessed an individual's primary application, has control over the subsequent review process under s417 with no external check or accountability.[114] DIMA acknowledged that this may happen:

> Sometimes but not always. Sometimes there is a very substantial timelag between them [the primary application and subsequent request under s 417].[115]

8.103 DIMA commented that:

> There are obviously advantages in the initial case officer, who knows the case and who has assessed the claims and understands the particular

110 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 322

111 *Submission No. 38*, Refugee and Immigration Legal Centre, p 322

112 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 322

113 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 323

114 *Submission No. 36*, Kingsford Legal Centre, p. 307

115 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 805

> individual's circumstances, doing both considerations – the protection visa against the refugee convention and the humanitarian intervention.
>
> …[The] two possible avenues for allowing the person to remain in Australia are not in conflict at all. They have got different tests.[116]

8.104 The Refugee Advice & Casework Service pointed out that it seemed inappropriate that 'the same case officer who refused a Protection Visa application at the primary stage should then re-evaluate the case [under the s417] Guidelines'.[117] Although the case officer will be considering the s417 request on different, 'humanitarian', grounds under the Guidelines, rather than the grounds under the Refugee Convention, there appears to be a sound argument that an individual officer should not be involved more than once in any case and that the s417 request should be considered by a different officer. Responsibility for this stage of the process should be undertaken by experienced specialist staff.

Recommendation

Recommendation 8.6

The Committee **recommends** that appropriately trained DIMA staff consider all s417 requests and referrals against CROC, ICCPR and CAT.

The non-compellable, non-delegable and non-reviewable power provided under s417

- The Minister's power is non-compellable and non-delegable

8.105 In each of the sections of the *Migration Act*, which provide for Ministerial discretion, the provisions stipulate that the Minister is under no duty to exercise the discretion so conferred. The Minister's decision is non-compellable and under the Act there is no obligation for the Minister to give reasons for not considering intervening in a case.[118]

8.106 The Full Federal Court has considered the exercise of the Ministerial discretion and found that the Minister is under no duty to exercise the discretion conferred by the legislation.[119] In *MIMA v Ozmanian* the Court found that:

> …the Minister is not under a duty to consider whether to exercise the power under s 417(1) in respect of any decision, whether or not the Minister is

116 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 805

117 *Submission No. 46*, Refugee Advice and Casework Service Inc, p. 413

118 For example, *Migration Act 1958* (C'th), s417(7)

119 *Morato v MILGEA* [1992] 111 ALR 417; and *Minister for Immigration and Multicultural Affairs v Ozmanian* [1996] 141 ALR 322

> requested to do so by the applicant or any other person, or in any other circumstances.[120]

8.107 Apart from being non-compellable, according to s417(3) of the Act, Ministerial discretion to grant a visa may only be exercised by the Minister personally. It is non-delegable. However, the Ministerial decision to decide not to consider whether to consider exercising the discretion can be delegated to DIMA staff.[121] This decision can be delegated because it is not covered by s417(3), and s496 allows the Minister to delegate his power to refuse a visa.

8.108 A series of decisions in the Full Federal Court[122] has found that the Minister can choose to have guidelines in relation to his public interest powers. DIMA officials can assess cases against those guidelines and need not draw to the Minister's attention cases which fall outside those guidelines.[123] However, DIMA reassured the Committee that:

> …it has long been and currently is the practice that the Minister personally sees *all requests* whether they fall within the guidelines or not – those that fall outside the guidelines are seen by him in summary form in schedules.[124]

8.109 In *Ozmanian* consideration was given to whether a decision not to consider exercising the discretionary power under s417 was one that could be made only by the Minister personally, or could be delegated to the Minister's Senior Adviser.[125] The court found that it had no jurisdiction to review conduct undertaken for the purpose of making the decision, and concluded that decisions authorised by s417 are not included in the scope of judicial review, except where the original jurisdiction of the High Court extends to the review of those decisions. Sackville J stated that:

> The special character of the Minister's discretionary power is shown by the requirement that any decision made in the exercise of the power must be laid before Parliament; s 417(4). It is also shown by the express provision relieving the Minister from any duty to consider whether or not to exercise the power: s 417(7). Parliament has clearly treated the Minister's discretionary power under s 417 (and equivalent powers conferred by other provisions in the Migration Act, such as ss 351, 391 and 454, referred to in s475(2)) as a special case.[126]

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120 *Minister for Immigration and Multicultural Affairs v Ozmanian* [1996] 141 ALR 322 at 336

121 Merkel J in *Minister for Immigration, Local Government and Ethnic Affairs v Ozmanian* [1996] 141 ALR 322

122 *Morato v Milgea* [1992] 111 ALR 417; *Minister for Immigration and Multicultural Affairs v Ozmanian* [1996] 141 ALR 322; and *Bedlington v Chong* [1998] 157 ALR 436

123 *Submission No. 69H*, Department of Immigration and Multicultural Affairs, Attachment B, p. 1965

124 *Submission No. 69H*, Department of Immigration and Multicultural Affairs, Attachment B, p. 1965

125 *Minister for Immigration and Multicultural Affairs v Ozmanian* [1996] 141 ALR 322

126 *Minister for Immigration and Multicultural Affairs v Ozmanian* [1996] 141 ALR 322 at 345

8.110 Another significant case in which the Minister's discretionary power was tested is that of *Re Bedlington and Another: Ex parte Chong.*[127]

8.111 The issues raised here are: should the non-compellable nature of the discretion be removed so that all s417 requests must be considered by the Minister; and should the Act be changed to eliminate the opportunity to delegate the decision whether the Minister will consider a case.

- The Minister's power is non-reviewable

8.112 The exercise or non-exercise of the discretionary power of the Minister under the Act is not 'judicially-reviewable' by the Federal Court.[128]

8.113 The Law Council of Australia pointed out that: "[T]here are no proper mechanisms to review the operation of Section 417 discretion"[129] and that the discretion is not capable of being monitored adequately.[130] A number of submissions to the inquiry have suggested that the Minister's discretionary power under the *Migration Act* does not sit comfortably with the legal concepts of the separation of powers, the rule of law and s75(5) in the Australian Constitution.[131]

8.114 LAWA submitted that: "a non-reviewable exercise of discretion goes against the general principles of our legal and constitutional system that executive action should be subject to the law".[132] The LCA also commented that: "Delegated decisions are also shielded from review because the discretion is non-compellable and no reasons have to be given for not exercising the discretion".[133] The High Court also found that the Federal Court has no jurisdiction to review antecedent conduct of DIMA officers in s417 matters.[134]

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127 (1998) 157 ALR 436. The case concerned s48B of the Act which permits the Minister to allow applicants to make a second or further application for a protection visa where it is in the public interest to do so. The Full Federal Court found that the 'no duty to consider' provision in s48B(6) was intended to excuse the Minister from any obligation of considering whether to exercise the s48B power, and that there was no duty under s48B which requires any matter to be drawn to the attention of the Minister (*Submission No.* 69H, Department of Immigration and Multicultural Affairs, Attachment B, p. 1965). In addition, the Department points out that: '…the Full Federal Court found that it was open to the Minister to lay down guidelines for determining whether any possible exercise of the 48B power should be referred to him '

128 *Migration Act 1958* (C'th), s475(2)(e)

129 *Submission No. 73,* Law Council of Australia, p. 1078

130 *Transcript of evidence*, Law Council of Australia, p. 186

131 *Submission No. 9,* Ms Kim Rubenstein, p. 42; see also *Submission No. 40,* Legal Aid Western Australia, p. 371

132 *Submission No. 40,* Legal Aid Western Australia, p. 371

133 *Submission No. 73,* Law Council of Australia, p. 1079; and see also *Submission No. 97,* Law Society of New South Wales, p. 1597

134 *Minister for Immigration and Multicultural Affairs v Ozmanian* [1996] 141 ALR 322

8.115 Technically, the High Court can review this discretion under s75(v) of the *Constitution*. However, the Law Council of Australia pointed out that in practice this review is ineffective.[135] As the Minister is only obliged to give reasons when substituting a more favourable decision under s417(4) it is difficult to access the reasoning for decision making in the other cases. Any remedy that could be sought to seek review would not force the Minister to reconsider his/her position in respect of the exercise of the discretion.

8.116 When the Minister exercises the discretion under s417 in favour of a person seeking protection, the only check on the exercise of power is the requirement in s417(4) that the Minister table in Parliament the reasons for exercising this discretion to make a new decision. The Minister is required to provide to each House of Parliament a statement containing:

- the original decision of the review officer or the Tribunal;
- the decision substituted by the Minister;
- the reasons for the Minister's decision; and
- the Minister's reasons for believing the decision to be in the public interest.

8.117 The Minister is not required to table reasons in Parliament for refusing or not considering certain cases. The effect of only tabling favourable cases means that no public information is available for unfavourable cases, or cases in which the Minister has chosen not to intervene.[136]

8.118 The tabled statements are made in a standard form that gives no detailed information about the nature of the case decided upon, or why the Minister chose to exercise the discretion in that particular case. The only information that can be gleaned from them is the number of times the discretion has been used, and the type of visa class granted.

8.119 Other concerns have been raised in regard to the limitations of the s417 process. There is no Parliamentary review of specific cases that are reported by the Minister. The Law Society of New South Wales suggested that domestic political and foreign policy concerns may on occasion cause the Minister to be reluctant to be seen to exercise this discretion in certain cases.

8.120 Several organisations drew the Committee's attention to this problem. According to the Refugee Council of Australia:

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135 *Submission No. 73*, Law Council of Australia, p. 1078, Footnote 36

136 *Submission No. 73*, Law Council of Australia, p. 1078

> Although there is no suggestion of this being the case with the present Minister, there exists no "built-in" protection against political influence or interference.[137]

8.121 RILC pointed out that this may already be a problem:

> Defects in the process are apparent given the Minister's reliance upon informal recommendations by persons known and respected by the Minister outside the Department, who contact or are contacted by the Minister on an informal basis to discuss individual cases. The "politicisation" of these decisions is a serious problem and undermines the credibility of the process.[138]

8.122 The Law Council of Australia also alerted the Committee to the danger that decisions will be made in the light of government's wider policy considerations rather than the merits of an individual's case:

> The fact that the Minister is a politician has the potential to compromise his or her ability to act as a safety net. Domestic political concerns and foreign policy concerns may make the Minister reluctant to exercise this discretion.[139]

8.123 This point was taken up by the Jesuit Refugee Service:

> For example, in cases involving persons claiming that they fear forcible abortion or sterilisation pursuant to China's one-child policy, it is possible that the Minister will feel constrained in the exercise of his humanitarian discretion by concern regarding the potential number of applicants.[140]

8.124 According to the Kingsford Legal Centre:

> Ministerial discretion is not open to scrutiny or debate. Nor does it address how wider issues of administrative error can be dealt with. At best it can provide a final opportunity to stop people genuinely facing torture or death from being forcibly returned but its discretionary nature does nothing to satisfy the need for legal certainty, fairness and judicial scrutiny of executive decisions.[141]

Conclusion

8.125 Under s417 of the Migration Act, the Minister has a discretion to substitute a more favourable decision if the Minister thinks it is in the public interest to do so.

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137 *Submission No. 24*, Refugee Council of Australia, p. 131

138 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 321

139 *Submission No. 73*, Law Council of Australia, p. 1077

140 *Submission No. 54A*, Jesuit Refugee Service, p. 561

141 *Submission No. 36*, Kingsford Legal Centre, p. 306

8.126 This discretion is a valuable mechanism for a Minister to have. It allows the Minister on the aforesaid basis, to substitute an adverse decision against an applicant with a more favourable decision. The Committee believes that the exercise of the discretion in accordance with administrative guidelines is not only acceptable but is in fact essential to ensure the proper use of the discretion.

8.127 Australia does not have a separate or distinct onshore process for dealing with asylum seekers on humanitarian grounds. The *Migration Act* implements only the obligations contained in the Refugee Convention.

8.128 However, Australia is able to meet its obligations under the CAT, ICCPR and the CROC by the s417 Ministerial discretion. By exercising that discretion, the Minister can address the situation of individual asylum seekers applying to stay in Australia on humanitarian grounds in fulfilment of Australia's international obligations under those conventions.

8.129 The Committee is of the view that the s417 Ministerial discretion should be retained and that the Guidelines should be more widely disseminated.

8.130 The question of whether Australia should address the humanitarian issue by some other means is discussed further in Chapters 1 and 2.