QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(1) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

When a 417 application is received, does it go to the DIMIA officer who made the initial primary decision for review and comment? If so, does this officer give a recommendation to the Ministerial intervention unit?

1) Please describe the way in which an application is processed through the Ministerial interventions unit.
2) What level of detail does the Minister see?
3) How much time on average does she spend on each application?
4) What level of recommendation does the unit give the Minister?
5) Why are s417 applications that are rejected given no reasoning as to why the application was rejected? If this were to happen, how many extra person hours would it take per application?
6) Why do s417s often take so long to process?

Answer:

Requests for section 417 ministerial intervention are not passed to the original departmental decision maker on the case for review and comment. These requests are handled in separate Ministerial Intervention Units in Sydney Melbourne and Perth offices, and in the National office for persons in detention.

Refugee Review Tribunal (RRT) decisions are referred to the Onshore Protection area and preferably to the original departmental decision maker for analysis. This enables protection visa decision-makers in the department to obtain the benefit of any feedback from the tribunal in reviewing their decisions. The Onshore Protection officers are tasked to automatically refer any case which they assess meets the Minister's guidelines for referral to the Ministerial Intervention Unit. This automatic assessment of returning RRT cases against the Minister's guidelines is completely separate from the arrangements for handling requests for intervention made by the individual concerned or their supporters.

1. The attached Migration Series Instruction (MSI 387) outlines the way in which requests for ministerial intervention under section 417 of the Act are handled in the Ministerial Intervention Units.

2. The level of detail on a case which the Minister sees will depend on whether the case meets the guidelines set by the Minister. The guidelines identify the circumstances in which she wishes to have cases brought to her attention, and any specific requests from the Minister for additional information.

All cases where the RRT upholds the department's refusal decision are automatically assessed as

a matter of course by the department against the Minister's intervention guidelines. This process is generally completed within 28 days of the referral of the case files back to the department. Where cases are assessed as meeting the guidelines, a submission is prepared to draw the matter to the Minister's attention.

A first request for ministerial intervention is always referred to the Minister in a submission if the case is assessed as meeting the guidelines, taking into account any information provided with the request. Cases go to the Minister on a schedule which gives an abbreviated summary of the case in circumstances where it is assessed that the case does not meet the ministerial guidelines.

Subsequent to this, cases are referred to the Minister for possible intervention whenever it is assessed that they meet the guidelines for referral. This could occur, for example, where a subsequent request provides significant new information on the case, or where the department becomes aware through its own research or other avenues of such significant new information.

3. The department has no information on the amount of time spent by the Minister on requests for ministerial intervention

4. The department does not make recommendations to the Minister that she use, or not to use, her section 417 intervention powers.

5. The section 417 power is a personal non-compellable power of the Minister to act where she considers this to be in the public interest. The Minister is under no statutory obligation to provide reasons to an individual where she does not use her power. The Department is not aware of the reasons why the Minister uses, or declines to use, her section 417 intervention power. It is not possible to assess the resource implications for the department if the Minister were to give reasons.

6. As set out above, the automatic assessment by the department of all RRT affirmed decisions is generally completed within 28 days of the case files being returned to the department. Where requests for intervention are subsequently made by individuals, the time taken to resolve the matter can vary significantly depending on the complexity of the issues raised, the completeness of the information and argument provided in support of the intervention, and the number and spacing of submissions and correspondence being provided in support of the case. Where a case has been referred to the Minister, the issue of possible Ministerial intervention remains open until such time as the Minister considers whether or not to uses her power in a particular case.

MSI 387: MINISTER'S PUBLIC INTEREST POWERS

MIGRATION SERIES INSTRUCTION

Instructions in this **Migration Series (MSI)** relate to: the ***Migration Act 1958***; the ***Migration Regulations 1994*** and other related legislation [as amended from time to time]. For information on the status of this MSI see the latest **Instructions and Legislation Update** or contact Instructions and LEGEND Section (ILS).

Title:	**MINISTER'S PUBLIC INTEREST POWERS**
MSI no.:	**387** **File no:** **No. of pages:** **32**
Date of issue:	**14/8/03** [Refers to date of registration of the signed original instruction by Instructions and LEGEND Section (ILS)].
Author Section:	**Special Residence / Protection Services**
Effect on other MSIs:	This instruction is intended to assist Departmental staff in the application of the Guidelines on Ministerial Powers under sections 345, 351, 391, 417, 454 and 501J of the Migration Act 1958

CONTENTS

1 INTRODUCTION

1.0.1

Under the *Migration Act 1958* (the Act), both the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) and the Minister for Citizenship and Multicultural Affairs have non-compellable, non-delegable powers that enable them to substitute a more favourable decision for a decision of a review authority, if they consider it in the public interest to do so.

Separate instructions will be circulated identifying any areas where matters are to be referred to the Minister for Citizenship and Multicultural Affairs. In the absence of such instructions, references to the Minister should be read as being to the Minister for Immigration and Multicultural and Indigenous Affairs.

1.0.2

The generic term **'review authority'** refers to decisions by the:

- Former Migration Internal Review Office (MIRO);
- Former Immigration Review Tribunal (IRT);
- Migration Review Tribunal (MRT);
- Refugee Review Tribunal (RRT); or
- Administrative Appeals Tribunal (AAT) on referral from the MRT or RRT or in respect of a protection visa decision within the AAT's jurisdiction.

1.0.3

The Minister has issued a set of Ministerial Guidelines for the identification of cases involving unique or exceptional circumstances where it may be in the public interest to substitute a more favourable decision under s 345, s 351, s

391, s 417, s 454 or s 501J of the Act (the Guidelines). These Guidelines are embodied in Migration Series Instruction (MSI) 386.

1.0.4

The instructions contained in this MSI are intended to assist departmental staff in the application of the Guidelines.

2 THE LEGISLATIVE FRAMEWORK

2.0.1

The relevant provisions in the Act are:

- Minister may substitute a decision of a review officer for another decision in terms to which the applicant agrees whether or not the review officer (MIRO) had the power to make that other decision (prior to 1 June 1999) (s 345);
- Minister may substitute a more favourable decision for a decision of the IRT (prior to 1 June 1999) or the MRT (from 1 June 1999) (s 351);
- Minister may substitute a more favourable decision for a decision of the AAT in relation to an MRT-reviewable decision (s 391);
- Minister may substitute a more favourable decision for a decision of the RRT (s 417); and
- Minister may substitute a more favourable decision for a decision of the AAT in relation to an RRT-reviewable decision (s 454);
- Minister may set aside an AAT protection visa decision and substitute another decision that is more favourable to the applicant in the review (s 501J).

2.0.2

The provisions of the six sections are similar except in their reference to the relevant decision of the review authority for which the Minister may substitute a more favourable decision.

2.0.3

The public interest powers are *non-compellable*: that is, the Minister does not have a duty to consider the exercise of the powers (see, for example s 351(7) and s 417(7)).

3 INTERPRETING THE LEGISLATION

3.0.1

The Act provides a power for the Minister to substitute a more favourable decision for that of a review authority if the Minister considers it to be in the public interest to do so.

3.0.2

Requests relating to review authority decisions prior to 1 September 1994, however, are outside the Minister's power (apart from the limited exception referred to in 3.1 below).

3.1 Minister's power only available in certain circumstances

3.1.1

The Minister's power to substitute a more favourable decision for that of a review authority is only available if:

- a relevant review authority has made a decision:
  - when a review authority is in receipt of an application but has not yet made a decision the Minister cannot exercise his public interest powers;
  - the Minister can only exercise his public interest powers once the review authority makes a decision;
  - however, where an application has been reviewed by MIRO, the Minister has the power under s 345 to substitute a more favourable decision, but if review by the MRT has been sought following the MIRO decision, and the case is as yet undecided, the Minister generally considers it inappropriate to consider using his public interest powers.
- the relevant review authority's decision was made under the appropriate section of the Act. For example, a decision under s 349 (which provides the MRT the power to make decisions) is necessary to trigger the power in s 351.
  - a decision of the relevant review authority made prior to 1 September 1994 is outside the operation of the current provisions of the Act;
    - while unlikely to arise, the only exception to this is if action had commenced to 'enliven' the power before 1 September 1994, that is, a request had been made in respect of the power before that date. In these cases the doctrine of 'accrued rights' allows the Minister to exercise his public interest power after that date;
- the relevant review authority has made a decision under the required section of the Act in respect of the particular person:

- a member of a family unit who was not included in a review authority decision, is not the subject of a review authority decision and therefore the Minister cannot substitute a more favourable decision for that person. (It does not matter what the reason, if the review authority has not made a decision on an application, then there would be no decision for which the Minister could substitute a more favourable decision. The Minister does not have the power under the legislation to exercise discretion in such cases);

- If the Minister decides to substitute a more favourable decision, and there are family members (including new born children) that have not been the subject of a decision of a review authority, case officers should contact Special Residence Section for non-humanitarian cases and Protection Services Section for humanitarian cases.

• the relevant review authority decision continues to exist:

- Where a Court quashes or sets aside a decision of a review authority and the matter is remitted to the review authority to be decided again, the Minister is unable to use his public interest power as there is no longer a review decision to be substituted.

- The Minister may exercise his public interest power irrespective of a review authority decision to affirm, set aside or remit the decision in question. In some cases, for example, a decision to set aside and substitute a decision to grant would be a more favourable decision than a decision to set aside and remit for health and character processing and reconsideration. The Minister has the power to exercise his public interest powers in such a case should the Minister wish to do so. In general, however, the Minister would consider such cases inappropriate to consider (see 5.5.6).

When the Minister has no power

3.1.2

The Minister's power is not available if:

• No review authority decision has been made, or

• If the review authority has made a decision to remit the matter to DIMIA and a departmental decision-maker has made a subsequent decision on the case (there is no longer a review authority decision available for the Minister to substitute a more favourable decision), or

- If a decision set aside by a Court and the case is remitted to the review authority. This is because there is no longer a review authority decision in existence for which the Minister can substitute a more favourable decision.

3.1.3

The Minister does not have the power to substitute a more favourable decision in respect of the following decisions:

- a ‘no jurisdiction’ decision (eg a finding that the Department’s decision is not ‘MRT-reviewable’);
- an 'invalid application' decision (eg because an application is not made to the review authority within the required timeframe);
- a decision of the AAT that is NOT in respect of an MRT reviewable decision, or a protection visa decision.

3.2 Public interest

3.2.1

Whether or not it would be in the public interest to exercise the power is for the Minister to decide.

3.2.2

Case officers cannot determine whether or not it may or may not be in the public interest for the Minister to exercise his public interest powers. They should, however, provide all relevant information to allow the Minister to make such a determination.

3.2.3

Cases that are identified as involving unique or exceptional circumstances will sometimes also raise other issues relevant to the Minister’s consideration of whether or not it may be in the public interest to exercise his power in that case.

3.2.4

Relevant factors may include, for example, whether the person is a risk to security and may jeopardise the wellbeing of Australians if allowed to remain in Australia, or the cost of required medical treatment to the Australian community.

3.2.5

The Minister may also wish to consider the balance between Australia’s international obligations (depending on the nature of those obligations), the integrity of Australia’s migration program and the State’s sovereign right to determine who enters and remains inside its borders, when making a decision to exercise his public interest powers.

3.2.6

International obligations that are general in nature can at times be outweighed by countervailing considerations specific to an individual, or vice versa. Section 5 of the Guidelines provides a non-exhaustive listing of relevant countervailing issues that a case officer should draw to the Minister's attention.

3.2.7

The role of a case officer is to assess cases against the Guidelines for the identification of unique or exceptional circumstances, and to identify any countervailing issues which should be brought to the Minister's attention.

3.3 Unique or exceptional circumstances

3.3.1

The case officer is required to fully inform the Minister of any information relevant to his consideration of this matter.

3.3.2

It is then for the Minister to decide whether or not to exercise his public interest power.

3.3.3

Sections 3 and 4 of the Guidelines contain examples of the items that the Minister considers may characterise a case in which it may be in the public interest to substitute a more favourable decision.

3.3.4

The Guidelines are not exhaustive, nor do they establish precedents. Each case is considered in isolation and on its merits.

3.3.5

Cases are assessed on a case by case basis and previous decisions of the Minister have no impact on the assessment of each case against the Guidelines.

3.3.6

There is a range of factors outlined in the Guidelines which also need to be considered such as the obligations under the Convention on the Rights of the Child ("CROC"), the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment ("CAT") and the International Covenant on Civil and Political Rights ('ICCPR').

Convention on the Rights of the Child (CROC)

3.3.7

There are circumstances that may bring Australia's obligations under the CROC into consideration. The circumstances of any children in Australia under the age of 18 must be assessed in the light of those obligations.

3.3.8

Particular attention should be given to the obligation at Article 3 of the CROC that requires that the 'best interests' of the child be 'a primary consideration'.

3.3.9

What those best interests are depends on the circumstances of each case. It should be noted that each case involving a child will not necessarily meet the requirements of section 4.2 of the Guidelines.

3.3.10

When the best interests of the child are considered it may be found that there is nothing to suggest the best interests of the child will be served by remaining in Australia. Such a case, unless there were other issues raised, may be neither unique nor exceptional.

3.3.11

The CROC also includes implicit obligations that require that a child not be returned to a country where there is a real risk that they would subject to cruel, inhuman or degrading treatment.

Convention Against Torture (CAT)

3.3.12

There are circumstances that may bring Australia's obligations under the CAT into consideration. When assessing a case against the Guidelines for CAT issues, certain elements must be determined.

3.3.13

The key element is an assessment of whether or not there are substantial grounds for believing that the person would be in danger of being subjected to torture in the State to which they would be returned.

3.3.14

In assessing this element regard should be had to the definition of “torture” as defined in article 1 of the CAT:

> *“(1)… any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain and suffering arising only from, inherent in or incidental to lawful sanctions.”*

Also see section 4.2 of the Guidelines.

3.3.15

An assessment involving CAT issues must take into account any past experiences of torture or similar acts and how the primary and review authority decision-makers explored these issues.

3.3.16

The current situation in the State to which the person would be returned is also relevant.

3.3.17

In addition, any distinguishing or particular features of the person or their circumstances/claims that may indicate that torture is more likely because of these features, such as gender, religion, or political activism, must be addressed.

3.3.18

Under the CAT there are no exceptions in relation to the character of the person concerned – the obligation not to *refoule* exists irrespective of whether or not the person is of bad character.

3.3.19

Where character issues are involved, this information is to be brought to the Minister's attention to enable him to decide if the public interest were to be served in exercising his powers.

International Covenant on Civil and Political Rights (ICCPR)

3.3.20

There are circumstances that may bring Australia's obligations under the ICCPR into consideration. When assessing a case against the Guidelines in relation to the *non-refoulement* obligation under ICCPR certain elements must be determined.

3.3.21

The key element is an assessment of whether there is a real risk the person would be subjected to treatment contrary to article 6 or article 7 of the ICCPR, taking into account the circumstances of the case and all relevant considerations.

3.3.22

Article 6(1)of the ICCPR provides:

> *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

3.3.23

Article 7 of the ICCPR provides:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one*

shall be subjected without his free consent to medical or scientific experimentation.

3.3.24

Australia's adherence to the Second Optional Protocol to the ICCPR, which abolishes the death penalty, means that to refoule a person to a country where there is a real risk that they will face the death penalty is likely to amount to a breach of Australia's obligations under the ICCPR.

3.3.25

The position of the Australian Government is that the implicit non-*refoulement* obligation applies to all of the rights contained in Article 6 (right to life) and Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) of the ICCPR.

3.3.26

A flagrant breach of other rights in the ICCPR may give rise to the obligation especially where the alleged violation could result in severe or irreparable harm to the person concerned.

3.3.27

There is a range of other obligations under the ICCPR that must also be considered, in particular those provisions relating to family unity and the rights of all persons to be free from arbitrary interference with the family).

3.3.28

Article 17 of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

3.3.29

Article 23 of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right of men and women of marriageable age to marry and to found a family shall be recognized. No marriage shall be entered into without the free and full consent of the intending spouses. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

3.3.30

Article 24 of the ICCPR provides:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his

family, society and the State. Every child shall be registered immediately after birth and shall have a name. Every child has the right to acquire a nationality.

3.3.31

In circumstances where removal may result in separation of a family, particular consideration must be made to these provisions.

3.4 A more favourable decision

What is a more favourable decision?

3.4.1

The primary requirement for the Minister to exercise his public interest powers to substitute a decision of the relevant review authority is that the decision must be one that is more favourable to the applicant than the decision of the review authority (see 3.1.1).

3.4.2

For example, if the decision of the review authority is to affirm the primary decision to refuse the grant of a visa, then a decision of the Minister to grant a visa would clearly be more favourable to the subject of the request than the review authority's decision.

3.4.3

This would be so whether or not the subject of the request agreed with the grant decision or whether or not the visa granted was the same as that originally applied for.

3.4.4

However, under the public interest power in the former s 345, the requirement in this regard is different.

> The Minister can only substitute a decision, where the decision would be that originally sought by the subject of the request or another decision in terms to which the subject of the request agreed.

(Note: there are transitional provisions relating to the continued use of s 345 in certain circumstances.)

3.4.5

Review authorities are bound by all of the provisions of the Act and the *Migration Regulations 1994* (the Regulations).

3.5 Minister is not bound by Subdivision AA or AC of Division 3 of Part 2 of the Act or by the Regulations

3.5.1

When substituting a more favourable decision for that of a review authority the Minister is not bound by the Regulations or by Subdivision AA or AC of Division 3 of Part 2 of the Act.

3.5.2

The Minister may exercise his powers even where the review authority did not have the power (jurisdiction) to make the decision.

3.5.3

In practical terms this means that the Minister may substitute a more favourable decision irrespective of the usual requirements for application and the grant of visas under the Act and Regulations:

- it is not necessary for the person to meet the criteria for the visa in question eg qualifications, English language, sponsorship, age, Assurance of Support (AOS), health etc;
- various bars under the Act on the making of valid applications do not apply; and
- none of the other requirements of Subdivision AA or AC of Division 3 of Part 2 of the Act applies.

3.5.4

Although the Minister is not bound by certain requirements of the Act or by the Regulations, when considering whether or not exercise his public interest power the Minister may seek information similar to that required for grant under the Regulations.

3.5.5

Accordingly, the Minister may wish to know:

- the outcome of a health and character assessment;
- how much a person may cost the Australian taxpayer for health treatment if granted a visa; or
- whether or not an Assurance of Support could be paid.

3.5.6

This type of information may assist the Minister to determine whether or not it is in the public interest to exercise the public interest power in a particular case.

3.5.7

It is important to note that the absence of an Assurance of Support, or the fact of a person failing to pass a health assessment etc does not mean that the Minister cannot, or will not, decide to exercise his public interest power.

3.5.8

A case officer should provide this information to the Minister in a Stage Two Submission (see from 5.3.20). If, however, the information is already known then it should be provided in the Stage One submission (see from 5.3.1).

If a Health Assessment is still valid, this should be pointed out in a Stage One Submission. If it has expired at Stage Two Submission, this should also be pointed out.

3.6 Minister's power cannot be delegated

3.6.1

The power to substitute a more favourable decision for that of a review authority can only be exercised by the Minister personally and the Minister cannot delegate that power to any other person.

3.6.2

However, all other aspects of identifying review authority decisions or examination and referrals of requests where it may be in the public interest for the Minister to exercise his public interest power, may be carried out by others at the Minister's direction.

3.6.3

Justices Black, Keifel and Emmett in a joint judgement in the Full Federal Court case of *Jennifer J. Bedlington & Anor v Ana Cecilia Enciso Chong (1998) 157 ALR 436* which looked at s 48B of the Act (which is similar to s 417 etc in key respects) stated:

> "The Guidelines constitute the Minister's determination, in advance, of the circumstances in which he would consider exercising his power under s 48B;
>
> There is no reason why the Minister should not lay down guidelines for the assistance and guidance of Departmental staff, such as the Secretary, indicating the circumstances in which he was prepared to consider the exercise of the power conferred at s 48B(1); and
>
> So long as the Secretary was acting in accordance with the Guidelines, she had no duty to refer Ms Chong's application to the Minister."

3.6.4

The Minister has issued Guidelines for the identification of cases in relation to which he may think that it is in the public interest to substitute a more favourable decision. However, this does not mean that the Minister has delegated his power to substitute a more favourable decision, only that the Minister has identified the characteristics that may indicate the type of case where he may consider it in the public interest to substitute a more favourable decision.

3.7 Minister does not have a duty to consider

3.7.1

The Minister's power is 'non-compellable'. The Minister does not have a legal obligation to consider substituting a more favourable decision in a case, whether it is brought to his attention or not.

3.7.2

If a case is brought to the Minister's attention, the Minister may first consider whether or not he wishes to consider substituting a more favourable decision in the case.

3.7.3

Cases referred to the Minister in a Schedule (5.3.24) or a Stage One Submission (see 5.3.1) where the Minister declines to consider fall under this category.

4 ROLES AND RESPONSIBILITIES OF RELEVANT WORK AREAS

The following paragraphs refer to the roles and responsibilities of relevant work areas in relation to the Minister's public interest powers under sections 345, 351, 391, 417, 454 or 501J of the Act.

4.1 Protection Services Section and Special Residence Section

4.1.1

Special Residence Section and Protection Services Section provide policy advice in relation to review of decisions made under portfolio legislation and maintain liaison with the review authorities.

4.1.2

These sections are also responsible for managing the administration of the Minister's public interest powers, including policy, monitoring and reporting.

4.1.3

Special Residence Section and Protection Services Section are responsible for consistency of administration of requests and the policy of the Minister exercising his public interest powers through liaison with the Minister, State, Territory, Regional Offices and review authorities.

4.2 Parliamentary and Ministerial Services Section (PARMS)

4.2.1

The Parliamentary and Ministerial Services Section (PARMS) facilitates coordination of Departmental,

Ministerial and Parliamentary correspondence and documentation.

4.2.2

All letters sent to the Minister requesting the exercise of his public interest powers are processed as ministerial correspondence without a due date.

4.2.3

Requests for the Minister to exercise his public interest powers may originate from the person who is the subject of the review authority decision, the person's legal representative or migration agent, an MP, or any other interested party.

4.2.4

PARMS places the correspondence in an easily recognisable 'orange' folder clearly labelled "Ministerial Intervention". The correspondence remains in this folder until finalisation of the case.

4.2.5

The Special Correspondence Unit (SCU) of PARMS prepares standard interim responses for requests for the Minister to exercise his public interest powers. The SCU replies to letters supporting the request for the Minister to exercise his public interest powers for the signature of the Minister for Citizenship and Multicultural Affairs (with the exception of requests emanating from the Minister's constituents and Members of Parliament which are drafted for the Minister's signature and are always signed by the Minister before any letters in regards to the case are sent).

4.2.6

Once the interim reply has been sent the request is forwarded to the Ministerial Intervention Unit (MIU), together with a copy of the signed interim response.

4.2.7

The SCU does not prepare interim responses to repeat requests, cases where the person is detained or where the Minister has no public interest power to exercise. These cases are forwarded to the relevant MIU for acknowledgment or response on receipt.

4.2.8

PARMS is also responsible for coordinating the Tabling Statement requirements of the Act. That is, PARMS takes central responsibility for collecting and tabling the original copies of Tabling Statements where the Minister has decided to substitute a more favourable decision using his public interest powers.

4.2.9

PARMS will retrieve the original copy of the Tabling Statement at the time the relevant orange folder returns to their Section from the Minister's office and will ensure that a photocopy is placed with the other paperwork so that the relevant MIU retains a full copy on file.

4.2.10

PARMS also provides the RRT with a copy of file references of cases where the Minister has decided to exercise his public interest powers under s 417.

4.2.11

This information is forwarded after the statements have been tabled in Parliament.

4.3 Departmental Liaison Officers

4.3.1

The Departmental Liaison Officers (DLOs) provide a coordinating, guiding and liaising role for all requests for the Minister's public interest powers. Their role is to ensure that all requests for the Minister's public interest flow in and out of the Minister's office smoothly.

4.3.2

Documentation for requests that the Minister exercise his public interest power (such as schedules and submissions) is reviewed by a DLO before being forwarded on to the Minister.

4.3.3

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

4.4 Minister for Citizenship and Multicultural Affairs

4.4.1

The Minister for Citizenship and Multicultural Affairs is the appropriate signatory for:

- interim responses and replies to letters of support;
- acknowledgment letters for withdrawn requests;
- cases where the Minister has decided not to consider the exercise of his power;
- cases where the Minister has no public interest power to exercise; and
- cases that are inappropriate to consider,

other than letters from the Minister's constituents or Members of Parliament.

4.5 Litigation Officers

4.5.1

As litigation officers have first hand knowledge of comments made by the Courts in respect of the Minister's public interest powers, they should advise or liaise with the relevant Policy Section and with Special Residence Section for non-humanitarian cases and Protection Services Section for humanitarian cases when any such comments are made.

4.5.2

Litigation officers should ensure, where possible, that litigation case notes contain comments on matters that either raise issues relevant to the Guidelines or contain comments by the Courts in relation to the Minister's public interest powers.

4.6 Operational Areas

4.6.1

As at the date of this instruction the operational areas responsible for requests under the Minister's public interest powers are as follows:

- ACT Regional Office – s 345/351 and s 391;
- Onshore Protection NSW – s 417, s 454 and s 501J (where primary decision was made in NSW) and detention cases for NSW, Queensland and Northern Territory;
- Onshore Protection VIC – s 417, s 454 and s 501J (where primary decision was made in Victoria) and detention cases for Victoria, Tasmania and South Australia;
- Onshore Protection WA – s 417, s 454 and s 501J (where primary decision was made in WA) and detention cases for WA including non-boat people at Port Hedland; and
- Protection Services Section, Central Office – some s 417, s 454 and s 501J as appropriate.

5 ADMINISTRATIVE GUIDELINES

(A) Assessment of Review Authority Decisions

5.1 Action following receipt of affirmed decision from a Review Authority (or Court)

5.1.1

In all cases where a review authority affirms a decision on a protection visa application, an assessment against the Guidelines must be undertaken. This is irrespective of whether or not a request has been made. If a review authority affirms a non-protection visa decision, an assessment under the Guidelines may be undertaken.

5.1.2

If the case falls within the Guidelines, a submission to the Minister is to be prepared to enable the Minister to decide whether he wishes to consider the case.

5.1.3

If the case does not fall within the Guidelines, a file note to that effect signed and dated by the assessing officer, is to be placed on file (a print-out of the relevant computer record noting that the case has been examined and found not to meet the Guidelines is acceptable), ICSE records are to be updated to show the outcome of the assessment, and no further action is to be taken.

5.1.4

For onshore decisions, the Minister has an expectation that the above exercise, whether a referral or a file notation outcome, if done, will be completed before the cessation of any BV where applicable – usually within 28 days of notification of a review/court decision.

5.2 Actions on referral of a decision of a Review Authority or the Courts

5.2.1

Where a review authority or the courts refer cases to the Department and identify circumstances that may come within the Guidelines, an assessment is to be made against the Guidelines. These referrals are not considered ‘requests’, but they are brought to the Minister’s attention as directed in the Guidelines.

5.2.2

If the case meets the Guidelines, it is to be referred to the Minister in a Stage One Submission or on a Schedule if it is assessed that the case does not meet the Guidelines.

5.3 Preparation of a submission for the Minister's consideration

Stage One Submission

5.3.1

If it is considered that a case falls within the Guidelines or the Minister requests further information on a case, the relevant MIU prepares a Stage One Submission for the Minister outlining the circumstances of the case.

5.3.2

The purpose of the Stage One Submission is to provide the Minister with sufficient information about the subject of the request for the Minister to consider whether he wishes to consider the exercise of his public interest power in the case. The case officer does not make a recommendation to the Minister, rather provides relevant information so that the Minister can consider whether he wishes to consider the exercise of his public interest power.

5.3.3

The submission should include reasons why the case may come within the Guidelines and any countervailing considerations.

5.3.4

The Stage One Submission also flags issues where more information may need to be sought before the Minister makes a final decision on whether to exercise his public interest powers.

5.3.5

These issues may include recommending further assessment of:

- new claims made by the subject of the request or the person making the request;
- the bona fides elements of a spouse case (where relevant); and
- health, character, AOS, or other concerns.

5.3.6

A Stage One Submission may contain the following types of information and recommendations:

- details of who is making the representation;
- case details and history of visa applications;
- the assessment against the Guidelines (includes international obligations);
- claims raised by the subject of the review authority decision (or their representative) as to why the Minister should exercise his public interest powers and reasons

the case officer considers the Minister may wish to do so;

- where relevant, views of members of a review authority, the courts;
- the visa class or classes that may be most appropriate if the Minister decides to substitute a more favourable decision (although often this may be more extensively discussed in a Stage Two submission);
- the relevant financial status of the subject of the request to enable the Minister to make a decision regarding AOS;
- whether the relevant visa class recommended usually requires a sponsor eg. Spouse cases and whether there are any issues relating to the sponsor such as concerns about whether they may have difficulty meeting obligations under Regulation 1.20 or would come under sponsorship limitations of Regulation 1.20J;
- should inform the Minister that grant of a protection visa may imply a recognition of refugee status in any instance;
- submissions recommending grant of a temporary visa, including a temporary protection visa or a safe haven visa, should fully inform the Minister that grant of such a visa may exhaust his intervention power and preclude the person from pursuing other future migration outcomes;
- should inform the Minister that the recommended visa subclass may prevent the person from accessing benefits and, where applicable, Medicare;
- whether or not the subject of the request has current medical clearances/information;
- current physical location of the subject(s) of the request (include if in detention);
- details of members of the family unit if appropriate;
- whether the person's name appears on the Movement Alert List (MAL) as a match and/or if it relates only to the $1400 post review RRT fee;
- whether the subject of the request has debts to the Commonwealth (detention/litigation debts) recorded or if they relate only to the $1400 post review RRT fee;
- relevant legal or policy advice; and
- any countervailing considerations.

5.3.7

On receipt of a Stage One Submission the Minister may:

- choose not to consider;
- decide to substitute a more favourable decision;
- decide not to exercise his power;
- or request further information;

before reaching a final decision.

5.3.8

If the Minister requires further information (for example, health and character assessment, or further assessment of spouse relationship bona fides), the relevant MIU may forward the relevant case file to the appropriate post or Regional Office with an instruction that the subject, (and family members if relevant), undergo the appropriate steps to provide the information required by the Minister. The ACT Regional Office is the relevant MIU for non-humanitarian cases where the Minister requests further information about health and character. The relevant MIU for humanitarian cases is the MIU where the case is processed.

5.3.9

When the Minister has begun considering the exercise of his power under s 345 or s 351 of the Act, and the subject of the request is offshore, the relevant post is advised.

Assurance of Support (AOS)

5.3.10

The Minister may require an AOS as part of deciding whether it is in the public interest to exercise a public interest power.

5.3.11

This is the case regardless of whether an AOS is required by the Regulations for the class of visa for which the subject of the request originally applied, or for the visa that the Minister is considering granting.

5.3.12

If a case officer gives the Minister an option to request an AOS, the type of AOS must be specified. Generally, it would be appropriate to recommend a ‘required AOS’.

5.3.13

If the Minister requests an AOS and it cannot be met by the subject of the request within six months, this should be drawn to the Minister’s attention in a Stage Two Submission.

5.3.14

When processing AOS case officers should refer to *PAM3: Div 2.7*.

Health and Character

5.3.15

Health and Character assessments are often requested by the Minister when considering the exercise of his public interest power.

These assessments are undertaken by the Operational Area and are independent of provision of an AOS. However, the Minister is not bound by the outcome of the health and character assessments.

5.3.16

If there are serious health or character concerns relating to the subject of the request, this should be brought to the Minister's attention in either the Stage One (if an assessment was made at the primary stage) or Stage Two Submission.

Health Issues

5.3.17

Whenever health is an issue the Minister should always be informed as to the costing of the case in either a Stage One or Stage Two Submission.

5.3.18

If not previously assessed, a health costing can be obtained from Health Services Australia.

5.3.19

When all requested information has been provided the case file must be returned to the relevant MIU which then prepares a further brief to the Minister, known as the Stage Two Submission.

Stage Two Submission

5.3.20

The Stage Two Submission advises the Minister of the outcome of the further information gathering and discusses potential visa subclasses the Minister may wish to consider if these were not discussed in the Stage One submission.

5.3.21

If it has been found, for example, that the subject of the request would not meet the usual health criteria for grant of a particular visa, the Stage Two Submission will provide the Minister with the reasons.

5.3.22

The Minister may still decide to exercise his public interest powers and substitute a more favourable decision notwithstanding the subject's failure to meet usual health requirements, because, as indicated earlier in 5.3.10, the Minister is not bound by the Regulations.

5.3.23

On receipt of a Stage Two Submission the Minister may either substitute a more favourable decision or seek further information or decide not to exercise his power.

Schedule

5.3.24

If it is considered that a case does not fall within the Guidelines, the relevant MIU prepares a Schedule for the Minister briefly outlining similar information contained in a Stage One submission.

5.4 Debt recovery

5.4.1

All Stage One Submissions to the Minister must contain advice about whether or not the relevant people have debts to the Commonwealth.

5.4.2

The Minister may seek information about whether or not such debts have been paid, or whether arrangements for payment could be or have been entered into, before deciding whether or not to exercise his public interest powers.

5.4.3

Where it is likely that there are debts to the Commonwealth and none are shown on MAL (or those shown on MAL are less than would be expected) it may be prudent to investigate other databases.

5.4.4

For instance, if it is known that the subject of the request was a detainee and MAL shows either no debts or a debt that does not appear commensurate with the length of detention, the case officer should contact Financial Operations Section in Resource Management Branch where up-to-date records of detention costs are kept.

5.4.5

Similarly, if a subject of the request is known to have been involved in litigation which went against them and no costs are shown on MAL, the case officer should approach Legal Services and Litigation Branch in Central Office for an up-to-date account of costs (if any) currently owed by the subject of the request.

5.4.6

As noted in section 3.5 above, the Minister is not bound by Public Interest Criteria (Schedule 4 of the Regulations) when considering whether to exercise his public interest powers and, therefore, is able to grant a visa even if a debt to the

Commonwealth exists and appropriate arrangements for payment of the debt are not in place.

5.4.7

Under section 34(1) of the *Financial Management Act 1997*, the Finance Minister is the only person authorised to waive debts to the Commonwealth.

5.4.8

If the Minister exercises his public interest power in these circumstances he is not 'waiving' or 'writing off' the debt. The debt continues to exist and usual recovery procedures apply.

5.4.9

The delegate (refer to appropriate Chief Executive Instructions for the recovery of debts) may think it reasonable to make an application to waive the debt where:

- the non-citizen, being a person who was reasonably suspected of being an unlawful non-citizen, was detained, but cooperated with compliance officers and was later found to be lawfully present in Australia; or
- a s 200 (criminal or security) deportee, who is also a lawful non-citizen, was detained, but the deportation order was revoked; or
- the detainee is later granted refugee status; or
- a court has quashed a deportee's conviction; or
- the Minister has exercised his powers under sections 345, 351, 391, 417, 454 or 501J of the Act; or
- it is otherwise inappropriate.

5.4.10

A waiver is unnecessary in respect of the $1400 RRT review fee.

5.4.11

If the Minister decides to exercise his public interest power and grant a visa under s 417, the person is no longer liable for the $1000 post RRT decision fee (Regulation 4.31C refers).

(B) **Assessment of Requests for the Minister to exercise his public interest power**

5.5 Process to be followed by Operational Areas

Consideration of NO POWER

5.5.1

On receipt of a letter requesting the Minister to exercise his public interest powers, the relevant MIU is to carry out an immediate check to ensure that the Minister is able to exercise his public interest powers.

5.5.2

The request is then recorded in the Integrated Client Service Environment (ICSE) system as soon as possible.

5.5.3

If the Minister has no public interest power to exercise, the request is to be finalised immediately with ICSE records updated to reflect this action (section 6.6).

5.5.4

If there is an incorrect request for the Minister to exercise his public interest powers, for example a request under s 48B of the Act, it is to be processed as if the Minister has no power to consider the request under his public interest powers (s 345 or s 351 or s 391, s 417, s 454 or s 501J of the Act). The request should then be forwarded to the relevant MIU (for example Sydney, Melbourne or Perth for s 48B requests).

- This is despite the person being eligible for consideration under one of the public interest powers.
- This is to ensure that 'first-time' requests have the best possible chance to present their case.
- Requests that refer to sections *other than* s 345 or s 351 or s 391, s 417, s 454 or s 501J of the Act should be differentiated from instances where the request simply refers to the incorrect power for example to s 351 rather than s 417.

Inappropriate to consider
Inappropriate to consider

5.5.5

Once it is determined that the request is within power, the question of "appropriateness" for the Minister to consider the exercise his public interest power is to be addressed.

5.5.6

Cases that the Minister may consider "inappropriate to consider":

- Cases where there is migration related litigation that has not been finalised;
- Cases where there is another visa application concerning the subject of the review authority decision ongoing with the Department;
- Cases where there is an ongoing Ministerial request under a different public interest power;
- Cases where there has been a remittal or a set aside from a review authority; and
- Cases which were decided by MIRO and are now at the MRT.

5.5.7

"Inappropriate to consider" cases not involving litigation should be finalised quickly. Such cases should not be stockpiled pending later outcomes.

5.5.8

For cases involved in litigation, refer to section 6.3.

Consideration against Guidelines

5.5.9

Having determined that the request is within power and that it is appropriate to consider at the outset, and ensuring that the request is entered on ICSE, the officer is then required to make an assessment against the Guidelines.

5.5.10

The Minister has issued these Guidelines to assist officers to identify the types of cases where the Minister may consider it to be in the public interest to substitute a more favourable decision for that of a review authority.

5.5.11

The Minister has directed that all initial requests be brought to his attention. Cases assessed as one the Minister may which to consider are to be forwarded in a submission format in accordance with his Guidelines so that the Minister may consider the exercise of his public interest power in the case.

5.5.12

Those that do not appear to meet the Guidelines are to be forwarded in a Schedule so that the Minister may consider whether or not he wishes to consider exercising his power.

5.5.13

Where the Minister decides not to consider exercising his public interest powers for the cases appearing on the Schedule the subject of the request is notified.

5.5.14

For a case forwarded on a Schedule, the Minister may:

- seek additional information to allow consideration of his power to occur. The Minister will identify the case(s) concerned and seek additional information on that case(s) whilst deciding he does not wish to consider the exercise of his power in the remaining cases on the Schedule.
- decide to substitute a more favourable decision, or
- decide not to consider the exercise of his power.

5.5.15

If the Minister seeks a brief on a case on a Schedule, a Stage One Submission to the Minister is prepared when the information is available.

5.6 Preparation of a schedule for the Minister's consideration

5.6.1

A Schedule is to contain the following types of information:

- a summary of the request and the reasons for the request being made;
- the relevant history the subject of the request has with the Department;
- details on who has made the representation;
- where relevant, views of review authority members, the courts; and
- an assessment against the Guidelines (includes international obligations).

5.6.2

On receipt of a Schedule, which may contain any number of case entries, the Minister may want more information about a particular case (see above).

6 PROCESSING ISSUES

6.1 Priorities

6.1.1

In general, requests for the Minister to exercise his public interest power should be processed in the following order:

- cases where the Minister has sought early advice;
- initial and repeat requests from minors or persons in detention (but priority should be given to obtaining the relevant file/s and papers, and the request should be processed immediately these are received);
- requests where the Minister has no power to exercise public interest powers;
- requests which are "inappropriate to consider";
- cases where the Minister has considered whether to consider the exercise of a different public interest power (for example cases that the Minister has seen on a Schedule under a s 417 request and now have made a s 351 request);
- cases where the person (and their family members) have been in receipt of ASA payments;
- repeat requests,
- withdrawn requests; and
- the remainder of cases, in order of receipt.

6.1.2

Note that finalisation of repeat requests should be prioritised if removal is imminent.

6.2 Requests from unaccompanied minors

6.2.1

All advice to the Minister (in either a Submission or a Schedule) needs to highlight any case of an unaccompanied minor.

6.2.2

The reasons why they do not have immediate family with them and reference to the social support that is available to them should also be noted.

6.2.3

In all cases where there is a child under 18 years of age and that child is in Australia (no matter what the child's

immigration status), Australia's international obligations under the CROC are to be considered (see 3.3.7).

6.2.4

A case involving an unaccompanied minor may not necessarily require a submission to the Minister. For example, on assessment against the Guidelines the case may not present any unique or exceptional circumstances, notwithstanding any obligations under the CROC, such that it would be in the public interest for the Minister to exercise his public interest powers, and it may in some cases be in the best interests of the child to be reunited with their family or returned to their home country.

6.2.5

If further information is required please refer to the Protection Services Section or Special Residence Section in the first instance.

6.3 Requests where the subject is involved in litigation

6.3.1

The Minister's general view is that cases where a request for him to exercise his public interest power has been made but the relevant persons are currently engaged in litigation in relation to Migration matters, are 'inappropriate to consider' at that time, but may make a request once litigation has been concluded.

6.3.2

However, there may be cases where it is appropriate to make an exception, such as, where the case is urgent for a reason unrelated to the litigation, for example, the subject of the request may be expecting a baby in the near future; be near death; have a medical condition requiring an urgent, major operation; be subject to other serious and credible health or life threatening situations; be in danger of missing a substantial business opportunity; or otherwise may be seriously compromised in some way.

6.3.3

Such circumstances will require close liaison with legal officers and Departmental Liaison Officers in relation to the Minister's requirements for each case.

6.3.4

There may also be cases where the Minister requests a submission on a case and may or may not be aware that litigation is in process at the time he makes that request.

6.3.5

If a case is to be brought to the Minister's attention, and litigation is in process, it is essential that the Minister is

made aware of the litigation and its nature and that the Litigation Sections of the Department are also aware of the submission to the Minister.

6.3.6

There may be cases where the Court asks that the Minister be made aware of an outstanding request for him to exercise his public interest power.

6.3.7

This can occur either during the litigation proceedings or at the completion of proceedings. On these occasions, the legal officer will contact the Ministerial Intervention Unit and inform the case officer of the Court's comments.

6.3.8

The circumstances of the particular case should be considered in consultation between the legal officer and the case officer to identify an appropriate method of referral to the Minister.

6.3.9

To identify whether the subject of the request is involved in litigation, and who the relevant legal officer is, it is necessary to contact the Legal Service Section in Central Office (Tel. (02) 6264 3042 and fax (02) 6264 1401).

6.3.10

The method for keeping the Litigation area informed is to liaise with the legal officer responsible for the case in question and to send a copy of the relevant submission to either the legal officer concerned or the Assistant Secretary Legal Services and Litigation Branch.

6.3.11

It is appropriate for the relevant case officer to also contact one of the Departmental Liaison Officers at the Minister's office to discuss such a case in the first instance.

6.3.12

If a submission is prepared it should very clearly spell out the fact of the litigation and its nature so that the Minister is fully informed when considering the case.

6.4 Ministerial visa grants with which the subject of the request disagrees

6.4.1

The Minister's powers under s 345 or s 351 or s 391, s 417, s 454 or s 501J of the Act are not dependent on the subject of the request agreeing to the terms of any more favourable decision the Minister may choose to make.

6.4.2

Even if a subject of the request disagrees with the Minister's decision to substitute a more favourable decision under these powers, the decision is still valid.

6.4.3

The Minister cannot re-exercise his power in respect of a particular Review authority decision once he has substituted a more favourable decision as the power has been spent. The visa will remain valid until it ceases, according to the normal rules relating to visa cessation.

6.4.4

There are special rules (and transitional provisions) relating to the Minister's power to grant visas under the former s 345 (MIRO).

6.4.5

Under the former s 345 unless the decision was that originally sought by the applicant, this power could only be used to grant a visa in terms to which the subject of the request agreed.

6.4.6

Given the special rules and transitional provisions, advice should be sought from Special Residence Section for non-humanitarian cases where there is an issue with former s 345, and there is no review by the MRT pending, before the case is finalised.

6.5 Repeat requests

6.5.1

The Act does not impose limitations as to time and number of requests.

6.5.2

Repeat requests for the Minister to exercise his public interest powers are those that are received after the Minister has previously had the case brought to his attention under the same public interest power (in either the submission or schedule format):

- where the Minister has decided not to consider the exercise of his power in the case; or
- the Minister has considered the case and has decided not to exercise his power.

6.5.3

If the Minister can exercise his power under more than one public interest power, then a request under one public interest power will not make a request for the other public interest power a repeat request. For example, a subsequent request under s 351, after a request under s 417 has been

considered by the Minister will be considered a ‘first time request’ but will be processed with priority if there is no new information that brings the case within the Guidelines.

6.5.4

PARMS coordinates the initial receipt of repeat requests for redirection to the relevant MIU along with the acknowledgment replies for letters of support.

6.5.5

Repeat requests do not receive an interim reply as they are given priority processing.

6.5.6

The Minister has directed that repeat requests should not be brought to his attention unless they contain additional information that potentially brings the case within the ambit of the Guidelines.

6.5.7

If, on assessment of the repeat request, additional information is provided and the case now appears to fall within the Guidelines a submission is to be prepared.

6.5.8

In some cases it may be appropriate to expedite the Minister’s personal consideration. This could be done by sending via facsimile a summary of the facts of the case to the Minister’s office (see section 8).

- The fax is then followed by either a Submission or a Schedule to the Minister.

6.5.9

The submissions should always make it clear that the case has previously been brought to the Minister’s attention and should identify the changes in the information that suggest that the case may now fall within the ambit of the Guidelines.

6.5.10

If the relevant person is engaged in litigation, the Minister considers this case ‘inappropriate to consider’ and the person should be advised accordingly and may submit another request once the litigation is concluded.

6.5.11

If, on assessment of the repeat request, it is found that no additional information is provided and that the case remains outside the ambit of the Guidelines, a file note should be made to that effect and a Departmental reply sent from the MIU to the person making the request. This reply should be signed by Departmental Staff. This procedure applies irrespective of whether or not the person is involved in litigation.

6.5.12

The Minister will reply to requests from his constituents and Members of Parliament. The Minister's reply does not delay finalisation of the repeat requests.

6.5.13

If the person has no other basis for remaining lawfully in Australia, Border Control and Compliance Division is then notified by the MIU of the need to consider the person for removal action.

6.6 Requests where the Minister has no power to exercise his public interest powers

6.6.1

Requests assessed as 'no power' requests are those where a request is made but the Minister's public interest powers are not available.

6.6.2

These requests are to be prioritised for immediate action (section 6.1). A person is not to be granted a Bridging E (Class WE) Visa on the basis that they meet 050.212(6) until an assessment of whether or not the Minister has power has been made.

6.6.3

All replies stating that the Minister has no power are prepared by the Operational Area and signed by the Minister for Citizenship and Multicultural Affairs (other than those emanating from the Minister's constituents or Members of Parliament which are signed prior to the letters signed by the Minister for Citizenship and Multicultural Affairs being sent).

6.6.4

If the person has no other basis for remaining lawfully in Australia, Border Control and Compliance Division is then notified by the relevant MIU.

6.7 Requests which are inappropriate to consider

6.7.1

Requests assessed as "inappropriate to consider" are listed at 5.5.6. In respect of "inappropriate to consider" cases decided by MIRO but pending MRT consideration, MIUs should not initiate consideration of these cases for the exercise of the Minister's public interest power and should not stockpile them pending later outcomes.

6.7.2

These requests are to be prioritised for immediate action.

6.7.3

All replies are prepared by the relevant MIU. A letter stating that "No further action is taken on this request" is sent to the person/their representative.

6.7.4

These letters are to be prepared for signature by the Minister for Citizenship and Multicultural Affairs (other than those emanating from the Minister's constituents or Members of Parliament which are signed prior to the letters signed by the Minister for Citizenship and Multicultural Affairs being sent).

6.8 Withdrawn requests

6.8.1

A request for the exercise of a public interest power is considered to be withdrawn when the person informs the Department in writing that they withdraw their request that the Minister exercise his public interest power.

6.8.2

Withdrawn requests are also to be given processing priority. A record is to be attached to the person's file detailing the correspondence regarding the withdrawal.

6.8.3

All replies are prepared by the relevant MIU. An 'acknowledgment of the withdrawal' letter is sent to the person or their representative.

6.8.4

These letters are to be prepared for signature by the Minister for Citizenship and Multicultural Affairs (other than those emanating from the Minister's constituents or Members of Parliament which are signed prior to the letters signed by the Minister for Citizenship and Multicultural Affairs being sent).

6.8.5

If the person has no other basis for remaining lawfully in Australia, Border Control and Compliance Division is then notified by the relevant MIU.

6.9 Interaction between s 48B, s 417, s 454 and s 501J

6.9.1

A person may make a request under s 48B (Minister may determine that s 48A does not apply to non-citizen). These requests may be made within the same letter as a request under s 345 or s 351 or s 391, s 417, s 454 or s 501J of the Act, in separate but contemporaneous letters or consecutively.

6.9.2

It is important to note that requests under s 48B and sections s 345 or s 351 or s 391, s 417, s 454 or s 501J of the Act are not the same and involve completely different issues (refer to 'Purported Further Applications' in the Protection Visa Protection Manual for purported further applications for a protection visa subject to s 48A and requests under s 48B).

6.9.3

Details of these differing requests must be recorded separately in ICSE.

6.9.4

Stage One Submissions and Schedules may both address s 345 or s 351 or s 417, and s 48B issues.

6.9.5

Letters advising persons of the outcome of their requests may address s 417, s 454, s 501J and s 48B requests.

6.9.6

It is important to note that a request for the Minister to exercise his public interest power under s 345, s 351, s 391, s 417, s 454 or s 501J of the Act, following a s 48B request, is not a repeat request but should be treated as an initial request in respect of which the Minister may substitute a more favourable decision.

6.9.7

Similarly, a request under s 48B that follows a request under s 417, s 454 or s 501J is not a repeat request but should be treated as an initial request under s 48B.

6.10 Delayed considerations of requests

6.10.1

Delayed considerations are defined as those cases where the Minister has commenced considering whether the exercise his public interest power and has asked for further information, and a period of six months or greater has elapsed without the requested information being made available.

6.10.2

Examples of delayed processing include, failing to report to an interview, or where requested AOS has not been provided.

6.10.3

In these instances a Stage Two Submission should be sent to the Minister including any information as to why there is delay in processing.

6.10.4

The Submission should include options and request an indication as to whether the Minister would prefer to wait for the information requested, or whether he wishes to make a decision on the available information.

7 VISA ISSUES AND THE MINISTER'S PUBLIC INTEREST POWERS

7.0.1

Following consideration of a particular case, the Minister may or may not decide to substitute a more favourable decision for that of a review authority.

7.0.2

If the Minister does decide to substitute a more favourable decision for that of a review authority, the visa granted would be what the Minister considers, in the circumstances, to be the most appropriate visa.

7.0.3

As the Minister is not bound by Subdivision AA (Applications for visas) or AC (Grant of visas) of Division 3 of Part 2 of the Act or Regulations, the Minister can grant any class of visa. He is not limited to the visa class for which the person applied.

7.0.4

Additionally, the Minister may grant a visa irrespective of whether or not the circumstances of the individual bear some relation to the usual criteria for that class of visa.

7.0.5

The use of the Minister's public interest powers impacts on the Migration Program as all visa grants generated by post-1 September 1994 applications are counted against the program allocation for that particular visa class.

7.0.6

Additionally, the Minister can only use his public interest power to substitute a more favourable decision once in respect of each relevant review authority decision.

7.0.7

These factors have implications for the recommendation to the Minister of the most appropriate visa classes.

7.1 What visa class to recommend?

7.1.1

The Minister is not bound by the Regulations in respect of which subclass of visa he can grant.

7.1.2

Generally it is not appropriate to recommend visa options to the Minister that are constrained by availability of places under a Program even where the particular visa class appears to be the 'closest fit' to the person's circumstances. This is for a number of reasons:

- A person does not need to meet Schedule 2 criteria for the grant of a visa under a public interest power so a 'closest fit' should not be seen as limiting the visa options available;
- It may not be appropriate that a person wait for new places to become available under a program given their circumstances.

7.1.3

If a subject of a request falls within the Minister's Guidelines, it is appropriate for case officers to recommend onshore visa subclasses if the person is onshore and offshore visa subclasses if the person is offshore.

7.1.4

There may be times when, for policy reasons, it is more appropriate for an offshore visa to be recommended for persons applying onshore (for example in the case of the East Timorese).

7.1.5

In such cases, case officers should consult with Special Residence Section or Protection Services Section as appropriate.

7.1.6

Due to the nature of Bridging Visas, case officers should not recommend to the Minister the grant of a Bridging Visa.

7.1.7

Case managers should also take care when considering recommending a temporary visa subclass, including a temporary protection visa or a safe haven visa, as the grant of such a visa may exhaust the Minister's intervention power and preclude the person from pursuing other future migration outcomes.

7.1.8

The grant of a temporary visa subclass may also prevent the person from accessing benefits and, where applicable, Medicare.

7.1.9

For a request under s 417, 454 and 501J of the Act, visa options in addition to Protection Visas should be put to the Minister for his consideration.

7.1.10

In some circumstances, case officers may use discretion in recommending a temporary visa. For example, if the person were in Australia caring for an Australian Citizen but there is no genuine and continuing relationship, then it would be open to the case officer to recommend that the Minister grant a temporary visa.

7.1.11

Requests under s 345 or s 351 of the Act where a person has previously unsuccessfully made an application for a particular class of visa, it may be that the visa applied for is the most appropriate one to be suggested to the Minister.

7.1.12

On the other hand, if the person's circumstances have changed, consideration may need to be given to the grant of a different class of visa.

7.2 Partner (Temporary) visa

7.2.1

Where the Minister exercises his public interest powers to grant a Partner (Temporary) visa, the subject of the request is notified of the Minister's decision and advised of details for the evidence of that visa.

7.2.2

The Partner (Temporary) visa should be evidenced in ICSE.

7.2.3

Generally, an application for a Partner (Temporary) and Partner (Residence) visa are made on the same application form. However, it is important to note that in circumstances where the Minister has exercised his public interest powers to grant a Partner (Temporary) visa, there will be no application for the Partner (Residence) visa.

7.2.4

In order to obtain a permanent visa, the visa holder must therefore apply for a Partner (Residence) visa by completing an application form and paying the appropriate Visa Application Charge.

7.2.5

The letter informing the subject of the request that the Minister has granted the Partner (Temporary) visa advises them of this requirement and encourages the visa holder to apply as soon as possible.

7.2.6

The visa holder would normally have to wait two years from the time the Minister exercised his public interest powers to

grant the Partner (Temporary) visa before being eligible for the grant of the Partner (Residence) visa.

7.2.7

One exception to this is where persons are in a long-term spouse relationship which is defined in reg 1.03 as one where the parties have been in that relationship for 5 years or 2 years if there is a child of the relationship.

7.2.8

If a case officer presents to the Minister a Contributory Parent Visa subclass as an option for grant, the case officer should recommend a "visa holder contributory payment" that aligns with what other Contributory Parent Visa holders might have to pay.

7.2.9

If the Minister requests a "visa holder contributory payment" then the payment is recorded on ICSE and receipted in SAP to go to the Consolidated Revenue Fund.

7.2.10

The local CPM (Collector of Public Monies) is notified of this so they can make arrangements for the payment. A note will be recorded in ICSE as part of the event such as "...payment is recorded...".

7.2.11

If the Minister is considering requesting an equivalent contribution, the local Finance section or Financial Operations should be consulted.

7.2.12

When the purpose of the charge is determined, the case officer will send a request to Melbourne Accounts Receivable, who will produce an invoice for the applicant (with respect to the appropriate general ledger account).

7.2.13

The case officer may send the invoice to the applicant with the request for health and character checks etc.

7.2.14

A CPM in any DIMIA office would be able to accept the payment accompanied by the invoice. Once the payment has been banked, the CPM would inform the case officer, who would note that the payment has been made.

7.3 Caps and the queuing policy

7.3.1

The Government sets planning levels for the various categories of the Migration Program for each financial year.

In some cases, the level of demand is greater than the number of places available.

7.3.2

The Minister's power under s 85 of the Act provides for the determination of the number of visas that may be granted in a particular class or classes in a financial year, that is, a cap.

7.3.3

Section 86 provides that if there is a cap and the number of visas of the class or classes granted in the financial year reached that maximum number, no more visas of the class or classes may be granted in the financial year.

7.3.4

When recommending to the Minister that he grant a visa of a particular subclass, it is necessary to first be satisfied that the grant of a visa in that subclass would not result in the limitation on the number of visas to be granted being breached.

7.3.5

The capped subclasses are managed on the basis of a queue whereby applicants who have met certain visa requirements are given a queue date which determines their position in the order of precedence for places under the Program.

7.3.6

In the period 1996-97 to 2002-03 the Parent and Preferential Family subclasses (103, 104, 114, 115, 116, 835, 836 and 838) have at various times been capped and queued.

7.3.7

In the interests of fairness and equity, the Minister has made Directions under s 499 of the *Migration Act 1958* (the Act).

7.3.8

Direction 27 governs the way in which Program places are allocated in respect of a subclass, that has been or is capped.

7.3.9

While cases where the Minister has exercised his public interest power are given high priority in the allocation of Program places under this General Direction, a point will be reached where all places for a particular subclass under the Program have been committed.

7.3.10

When this occurs, it is not appropriate to recommend to the Minister that he grant a visa of that subclass as to do so would result in the number of places determined by the Minister being unlawfully exceeded.

7.3.11

It is essential that, where a submission to the Minister relates to a visa subclass which is (or has been) capped, officers should check with Migration Program Section (through the Migration Program Mailbox) before they make the recommendation.

7.3.12

This is because the visa is granted when the Minister signs the Decision Document provided as an attachment to the Stage 1 or Stage 2 Submission.

7.3.13

In the event that no program place can be made available at that point in time, the officer should consider the following options:

- delay forwarding the submission to the Minister's office - this is only a suitable option if the case is not urgent and/or it is relatively close to the end of the program year. The Stage Two Submission can then be sent to the Minister, at a time appropriate to ensure that, if the Minister exercises his public interest power and grants a visa, the grant will occur in the new program year (as cases where the Minister has exercised his public interest power are given priority);
- alternatively, recommend another visa subclass advising the Minister that there are no places available in the most appropriate visa subclass.

7.3.14

The limitations in the Migration Program, however, should not influence whether a permanent or temporary visa is recommended.

8 GRANTING A BRIDGING VISA ON THE BASIS OF A REQUEST FOR THE MINISTER TO EXERCISE THE PUBLIC INTEREST POWER

8.1 Grounds for the grant of a Bridging E visa

8.1.1

Detailed advice concerning the criteria to be met for the grant of a BVE on grounds that a request has been made for the Minister to exercise his public interest power is provided in MSI *Bridging E Visa (subclass 050) – Legislative framework and further guidelines*.

8.1.2

The Regulations provide that the making of a request for the Minister to exercise his public interest power under s 345 or s 351 or s 391 or s 417, and s 454 is grounds for the grant of a Bridging E (Class WE) visa (hereafter BVE).

8.1.3

In summary, the criteria to be met for the grant of a BVE under this ground require that the subject of the request:

- is not an eligible non-citizen (see reg 1305(3)(ba) of the Regulations, and s 72 of the Act);
- is an unlawful non-citizen, the holder of a BVE, or the holder of a BVD (041) (see reg 050.211);
- is the subject of a decision for which the Minister may exercise his public interest power under s 345 or s 351 or s 391, s 417, or s 454 of the Act (see reg 050.212(6) of the Regulations) and has not previously requested the Minister exercise his public interest powers;
- is the subject of a request to the Minister to exercise the power to substitute a more favourable decision (see reg 050.212(6));
- unless an exemption applies, has been interviewed by a Compliance officer (see reg 050.222 of the Regulations);
- satisfies the decision-maker that they will abide by the conditions that will be imposed on the BVE (see reg 050.223); and
- if requested, has lodged a security for compliance with conditions (see reg 050.224).

8.1.4

If a person makes a request for the Minister to exercise his public interest power in respect of a particular review authority decision, and there has been no previous request in relation to that decision, the subject of the request may be eligible for a BVE during the assessment of the request by a decision maker.

8.1.5

If, however, a request has previously been made in relation to that particular review authority decision, a subject of the request will only become eligible for a BVE if:

- the Minister is personally considering whether to exercise, or to consider the exercise of, his powers to substitute a more favourable decision for a decision under section 345, 351, 391, 417 or 454 of the Act in relation to the subject of the request

- the Minister has decided, under section 345, 351, 391, 417 or 454 of the Act, to substitute a more favourable decision for the decision of a review authority but the applicant cannot, for the time being, be granted a substantive visa because of a determination under s 85 of the Act (see reg 050.212(6)).

8.1.6

The circumstances, therefore, where a request should be regarded as being under the Minister's personal consideration include where:

- a request is included on a schedule, or is the subject of a submission, which has been referred to the Minister for his consideration;
- the Minister is awaiting further information, or the preparation of a submission, regarding a request that was originally referred either by way of a schedule or submission; or
- an OIC of an MIU has made an assessment that a request falls within the Guidelines and, prior to the preparation of a submission, provides preliminary details of the case to the Minister's office by fax.

8.2 Consideration of BVE application by compliance

8.2.1

Any application for grant of a BVE while a request for the Minister to exercise his public interest power is being finalised should be referred to the relevant Compliance office for a decision on the application.

8.2.2

To ensure that subjects of requests to the Minister to exercise his public interest power are not unnecessarily/inappropriately detained or removed from Australia, the compliance officers should ascertain whether or not the request has been referred to the Minister.

8.2.3

Case officers should make appropriate entries in ICSE as soon as possible.

8.3 Visa period validity

8.3.1

A BVE granted on the basis of an outstanding request for the Minister to exercise his public interest power is granted for a specified period (see reg 050.517).

8.3.2

The period for which a BVE is granted should be sufficient to allow for the finalisation of the request.

8.3.3

In order to determine this period, the decision-maker should seek advice as to the status of the request from the relevant MIU that is responsible for advising the Compliance officer of the likely processing time.

8.4 Permission to work

8.4.1

A non-citizen granted a BVE on the basis of an outstanding request for the Minister to exercise his public interest power may only obtain permission to work

- where the request for the Minister to exercise his public interest power has been referred to the Minister's office for the Minister's personal consideration after assessment by a case officer; or
- the Minister has decided to exercise his public interest power but cannot, for the time being, because of a determination under section 85 to cap the number of grants of visas of a particular class. (See reg 050.212(6A) of the Regulations.)

8.4.2

In addition, an applicant for permission to work must already hold a BVE granted on the basis that the Minister is considering the exercise of his public interest power, and must demonstrate a "compelling need to work".

8.4.3

Regulation 1.08 provides that an applicant is to be taken to have a compelling need to work if he or she is in "financial hardship".

9 NOTIFICATION OF THE MINISTER'S DECISION

9.0.1

If the Minister considers a request put to him in a submission and either grants a visa or decides not to exercise his public interest power, the subject of the request is notified of the Minister's decision by post or fax as appropriate. This letter is prepared for the Minister's signature by the relevant MIU and sent in accordance with s 494D of the Act.

9.0.2

The person is also advised of any subsequent requirements of the particular visa class granted and where the visa can be evidenced.

9.0.3

If the subject of the request has been brought to the Minister's attention in a Schedule and the Minister decides not to consider the exercise of his power in the case, the subject of the request is notified in a letter prepared for the signature of the Minister for Citizenship and Multicultural Affairs.

9.0.4

MIUs should liaise with Compliance case managers concerning persons in detention.

9.0.5

If the Minister decides not to consider the exercise of the public interest power in a case or the Minister considers a case and decides not to substitute a more favourable decision and the subject of the request is in immigration detention, the detainee will receive notification from an Immigration Detention Centre (IDC) staff member rather than by post or fax.

9.0.6

If a detainee is represented by another person, that person is to be notified of the outcome of the Minister's consideration of the case after advice from IDC staff confirms the delivery of the letter to the detainee.

9.0.7

Replies to repeat requests not brought to the Minister's attention are prepared and signed by Departmental staff except for responses to the Minister's constituents and Members of Parliament which are to be prepared for the Minister's signature. These letters are to be signed by the Minister before letters signed by Departmental staff are sent.

9.0.8

If a third party makes a request on behalf of a person that is the subject of a review authority decision, but there is no express consent by the person subject of the review decision, the person making the request is not to be notified of the progress of the request. This does not apply where there is implied consent.

9.0.9

Implied consent exists for solicitors acting on behalf of their clients, doctors acting on behalf of their patients, and MPs who request information about their constituents. If the subject of the request has seen the MP to discuss their situation then there can be full disclosure of the progress of the request to the MP.

9.0.10

If, however, the MP's constituent is the sponsor or a family member of the subject of the request, then the MP may only be notified in a way that the subject of the request may reasonably be expected to tell the sponsor/family member.

9.0.11

It would therefore be reasonable to provide (orally or in writing) general information as to the progress of an application and whether or not the Minister has decided not to exercise his public interest power. It would not be appropriate to reveal sensitive personal information which may have contributed to the Minister's decision, unless the case officer can be satisfied by a written authority from the subject of the request that they are not opposed to that course.

9.0.12

Express consent is where the subject of the review decision makes a written representation that the third party is acting on their behalf or that the case officer is authorised to release information about the request to the third party.

9.1 Decision Document

9.1.1

The decision document is attached to a Submission and confirms the outcome of the Minister's consideration of the exercise of the public interest powers. However, if the Minister decides to grant a visa, then the visa is granted when the Minister signs the Submission (as the Minister will usually sign the Submission first).

9.1.2

Officers should make appropriate entries in ICSE in a timely manner.

9.2 Tabling Statements

9.2.1

The legislation provides that where the Minister exercises his public interest powers in a case to substitute a more favourable decision, a statement is to be laid before each House of the Parliament.

9.2.2

This statement provides the details of the subject of the request, the original and substituted decision, and the reason/s for the substitution of that decision, including why it is in the public interest to do so.

9.2.3

The name and any other identifying details of the person, and any family members, are not to be included in the statement.

9.2.4

Refer to section 4.2 above for PARMS responsibility re Tabling Statements.

9.3 Removal policy

9.3.1

Broadly speaking Section 198 of the Act requires the removal of unlawful non-citizens (whether or not they are also detainees) who are not either holding or applying for a visa.

9.3.2

As noted in the Guidelines, a request for the Minister to exercise one of the public interest powers under s 345, 351, 391, 417, or 454 or 501J is not an application for a visa and unless the request leads to the grant of a visa, such a request has no effect on the removal provisions.

9.3.3

However, note that the making of a request for the exercise of the Minister's powers may provide grounds for the grant of a bridging visa (see section 8).

10 OTHER ISSUES

10.1 Freedom of Information and the submission process

10.1.1

There are no specific exemptions or provisions in the FOI Act concerning treatment of submissions sent to, being considered by the Minister, or returned from the Minister.

It is possible that the part of a submission which provides advice, opinion, analysis or recommendations might be exempted under s 36 Internal Working Documents, as it may not be in the public interest for high level considerations by the Minister to be released prematurely, or at all.

10.1.2

If a person or their authorised agent wants to access documents, they may have to lodge more than one request, or wait till the process is finished, and then ask for all documents.

10.1.3

Where an FOI request is received which seeks documents addressed to the Minister, such as submissions or documents created in his office, the FOI decision-maker should immediately advise OPFOI, and in consultation with OPFOI, advise the Minister's office of any potentially sensitive documents, and details of any documents to be released.

OPFOI Section in Central Office can provide assistance on processing an FOI request and should also be consulted where there are any potentially sensitive documents.

10.2 Complaints

10.2.1

If an MIU case officer is the subject of a complaint, the relevant MIU should forward a copy of the letter to the relevant Section Head for their attention and information.

10.2.2

If criticism is directed at a review authority member, a copy of the letter should be referred to the Registrar of the relevant Authority.

10.2.3

Clients who express concerns about the service provided by migration agents should be advised of the formal complaints mechanism operated by the Migration Agents Registration Authority (MARA).

10.2.4

Clients could be provided with the “Fact Sheet 72 – Regulating Migration Agents”, available on Lotus Notes Bulletin Board and a MARA Complaint Form.

10.2.5

Any Departmental staff wishing to make a complaint about a registered migration agent must consult the MARA Liaison Officer in the Migration Agents and Assistance Section before making the complaint.

10.2.6

Any complaint must be treated with high levels of confidentiality and must be submitted through the MARA Liaison Officer.

10.2.7

The Administrative Circular on *Instructions for DIMA employees on making complaints about registered migration agents and unregistered persons operating as agents* also provides advice to Departmental staff who may wish to make complaints about migration agents.

10.2.8

Complaints about unregistered migration agents should be directed to the relevant Investigations Section for the State.

10.2.9

Migration Agents Policy and Liaison Section (MAPL) is the policy area responsible for monitoring conduct of Migration Agents.

10.2.10

When MIU officers receive a request where the Minister has no public interest power to exercise, a copy of the letter returned from the Minister's office is forwarded to the Assistant Director, MAPL, Central Office.

10.2.11

MAPL will arrange for these cases to be referred to the Migration Agents Registration Authority (MARA). Where the MARA begins an investigation the client files will be requested from DIMIA. MAPL will arrange to forward the files to the MARA.

10.2.12

Further information is available from the Migration Agents Policy and Liaison Section, telephone 02 6264 3019.

Abul Rizvi	Peter Hughes
First Assistant Secretary	First Assistant Secretary
Migration and Temporary Entry Division	Refugee and Humanitarian Division

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(2) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

Many of the submissions have recommended that a system of complementary protection should be instituted as a separate but parallel stream of protection visa, rather than relying on ministerial intervention as a safety net. They have said that it would reduce the case load, particularly on the RRT and courts if those who have a valid claim for protection, but fall outside the definition of a refugee in our legislation are processed from the start under more suitable criteria.

1) Has DIMIA conducted any studies into the feasibility of introducing a system of complementary protection? If not, why not? If so, what were the conclusions and was a recommendation forwarded to the Minster?
2) Has DIMIA assessed the financial implications of introducing a system of complementary protection? If not, why not? If so, what areas of the protection visa application process did DIMIA identified cost savings could be achieved by introducing a system of complementary protection?
3) Has DIMIA done an assessment of whether the introduction of a complementary protection process would reduce the amount of immigration litigation that DIMIA was involved in? If not, why not? If so, has DIMIA costed the final implications of introducing a system of complementary protection by assessing any anticipated reduction in legal costs for DIMIA? If not why not? If so, what level of cost savings were identified?
4) Has DIMIA investigated the Canadian model of broadening the definition of a refugee to include those with protection claims that are complementary to the refugee convention?

Answer:

1. No. The Migration Act and Regulations applied by the department do not incorporate provisions labelled "complementary protection", however the Ministerial intervention powers, certain visa classes and the ability to introduce new visa class as required allows the Australian Government to achieve similar outcomes.

The department monitors developments in a range of comparison countries and has noted the various arrangements in place, or planned, in some countries to provide for some form of complementary protection. Such arrangements are not uniform between countries, and in particular differing approaches are taken in the extent to which issues of providing protection against refoulement under international instruments are differentiated from arrangements which provide continued residence for broader public interest or personal interest grounds such as family links to the country. There is no consistent international approach on these issues. The various forms of complementary protection/humanitarian stay, contemplated in some countries do not necessarily deliver the same residence entitlements and benefits as are conferred on persons found to be refugees. A DIMIA article on "Complementary Protection and Australian Practices", published in No.2 2005 edition of the Refugee Newsletter of the UNHCR Regional

Office for Australia, New Zealand, Papua New Guinea and the South Pacific, is attached.

2. No. It is not clear why it is expected that the introduction of some form of complementary protection in Australia would deliver cost savings. A parallel visa system for complementary protection with full merits and judicial review available and with broad eligibility criteria, is likely to attract a wider class of applicant and therefore larger numbers of applicants, most of whom may not be eligible, with corresponding increased costs.

3. No. As noted in 2 above, a parallel visa system for complementary protection with full merits and judicial review available has the potential to increase litigation and legal costs.

4. The department monitors developments in relation to protection issues in a range of comparison countries, including Canada. As noted above, countries which are contemplating, or have introduced, some form of complementary protection tend to take different approaches. A significant area of divergence occurs in the degree to which the arrangements identify and differentiate between providing protection against refoulement under international treaty obligations – for example non-refoulement obligations under the Convention Against Torture, and providing humanitarian stay - for example because of general instability in the home country.

Complementary Protection and Australian Practice

The 1951 United Nations Convention Relating to the Status of Refugees is the cornerstone of the international protection of refugees. A full and inclusive application of the Refugees Convention ensures that persons who meet its requirements are recognized as refugees and are protected.

The Refugees Convention does not provide for protection of people who do not meet the Convention definition of a refugee. Practices which have come to be known as "complementary protection" are used by some European countries to provide temporary or permanent residence to people who are not owed refugee protection. The concept has been developed in individual countries through domestic legislation and is not defined or specified in any international treaty.

The nature and application of complementary protection differs between countries. It can include permanent or temporary residence on various grounds based on humanitarian concerns, obligations under international human rights treaties, or judgement by a State as to whether it is unsafe, inappropriate or not practicable to effect return to the country of origin. In general, the practice in those countries which offer complementary protection is that it affords fewer benefits and entitlements than those provided to refugees.

For example, in the UK, a person granted 'humanitarian protection' is initially given a three-year residence permit, access to social security and health care and limited travel rights, but is not eligible for family reunion. They may apply at the end of the three-year period for indefinite leave to remain. Applications for indefinite leave to remain are assessed to determine whether the applicant still qualifies for humanitarian protection. It may be refused if protection is no longer required. Many other European countries (such as Denmark, Finland, France, Germany, the Netherlands) provide temporary residence initially to persons with complementary protection status with varying standards of access to benefits. Family reunion may be available in some countries (eg Denmark) but not in others (eg Germany).

Countries providing some form of complementary protection often have lower refugee status approval rates than is the case in Australia for applicants of a given nationality. In Europe, there is a tendency for complementary protection status to be granted more often than refugee status. For example, in 2002, the UK granted only 10% of asylum applications from asylum seekers on Refugee Convention grounds, but over 21% were given some status on humanitarian or other grounds. Sweden granted only 1.1% of asylum applications from asylum seekers on Convention grounds, but over 20% were granted some status on humanitarian or other grounds[1]. By comparison, Australia provided protection under the Refugees Convention to 29.4% of asylum seekers in 2001/02.[2]

[1] Data from UNHCR Statistical Yearbook 2002.
[2] Data from DIMIA source.

Whilst other countries continue to have quite different practices with regards to complementary protection, it appears the European Commission is moving towards harmonising the approach to complementary protection (termed 'subsidiary protection') in European Union countries. The Council Directive on '*Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection'* was adopted in April 2004. This Directive provides a framework for an international protection regime based on existing international refugee and human rights instruments obligations, which emphasises the primacy of refugee status. Member States are required to have implementing national legislation in place by October 2006.

The EC Council Directive sets out minimum standards, with flexibility for States to give lesser benefits to holders of complementary protection (subsidiary protection) reflecting the potentially more temporary nature of this category. For example, the Directive dictates that persons with subsidiary protection status are provided with an initial one year residence permit, automatically renewed until protection is no longer required. Member states need only issue travel documents to persons with complementary protection status when they are unable to obtain a national passport from their consular authorities. Access to social security is immediate and access to employment is available after six months of subsidiary protection status.

Australia's commitment to assisting refugees and others in humanitarian need is reflected in its Humanitarian Program. Under this program Australia resettles some of the refugees in greatest need of protection and others of humanitarian concern and provides protection to refugees who arrived in Australia who engage our protection obligations under the Refugees Convention. Australia has resettled over 645 000 people fleeing persecution since World War Two. In 2003-04, more than 2 000 people already in Australia received protection under the Humanitarian Program, a significant proportion of the total of more than 13 800 people who received protection in Australia that year.

Australia provides appropriate temporary or permanent solutions to those in humanitarian need, although it has not in the past sought to label such responses as forms of "complementary protection". For example, the Minister for Immigration and Multicultural and Indigenous Affairs' public interest powers to intervene and grant a visa is one means by which Australia meets the needs of those people in Australia whose circumstances do not fit the criteria of the Refugees Convention, but to whom Australia may owe protection under other international treaties. Included in this group is a small number of cases relating to Australia's obligations under the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment (CAT), the International Covenant on Civil and Political Rights (ICCPR), or the Convention on the Rights of the Child (CROC).

These arrangements allow protection claims to be tested first against the Refugees Convention definition which confers higher levels of entitlements to

refugees than required under these other instruments. There is no indication that there are significant numbers of persons entitled to CAT, ICCPR or CROC protection against return who do not also meet the Refugees Convention definition of a refugee.

Australia also has classes of visas which have been used to provide temporary haven for certain prescribed groups. For example, in 1999 Temporary Safe Haven visas were used to provide temporary residence to some 4 000 Kosovars who were brought to Australia for temporary protection because they could not return home due to conflict. An equivalent 'Safe Haven Visa' was used to provide temporary protection to some 1 900 East Timorese evacuated by Australia from Dili in 1999. Similarly, the offshore humanitarian visa classes provide protection to persons on grounds broader than those set out under the Refugees Convention.

There have been other occasions in the past where groups in humanitarian need have benefited from Australian Government protection. In 1990 some 6 900 people were granted visas under a new visa category to allow certain people who were in Australia illegally prior to 19 December 1989 to apply to regularise their status. In November 1993, over 42 700 people from the People's Republic of China, the former Yugoslavia, Sri Lanka and other countries were accommodated under three special visa categories. A further group of 7 200 people who did not meet the criteria for the November 1993 visas benefited from a further special initiative known as 'Resolution of Status' in June 1997.

The Australian Government's willingness to provide flexible arrangements for those with particular differentiating circumstances can also be demonstrated through the Government's legislative initiative in August 2004 to introduce the Return Pending Visa for those people who were formerly recognised as refugees and who are no longer in need of Refugee Convention protection. The Return Pending Visa could also be seen as providing a form of complementary protection, as it provides 18 months of lawful stay in Australia with continued access to the same benefits and visa conditions as the Temporary Protection Visa, while the holder makes arrangements to depart Australia or to access other stay options. The Removal Pending Bridging Visa is a more recent initiative that could also be used as a form of complementary protection in certain circumstances where conditions in a country of origin made returns impracticable.

The above visa arrangements provide a range of mechanisms to provide continued lawful stay in Australia on general humanitarian grounds with considerable flexibility to respond appropriately to individual circumstances. It is not possible to anticipate and codify all human circumstances. Accordingly, the Ministerial intervention power plays a significant additional role in providing the capacity to flexibly and compassionately respond to other exceptional individual circumstances where there are public interest grounds in providing some form of continued stay in Australia. At the same time the migration framework allows the Government to develop regulations as

necessary tailored to the particular circumstances of new groups as the need arises.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(3) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

Has DIMIA investigated the statement regarding chemical sedation by the ACM guard in the **Deported to Danger** Report (pages 49-50), if so what is the Department's response?

Answer:

The department believes it has identified the detainee referred to in the alleged incident described in pages 49-50 of the *Deported to Danger Report*. In 1999 a medical practitioner instructed an ACM nurse to administer Valium orally and intramuscularly to this person. This instruction was given because the first attempt to remove the detainee had been cancelled because of his violent behaviour and he had threatened to severely disrupt any further attempt to remove him. The medical practitioner's opinion was that the medication administered was not excessive.

Since that time the department has introduced a clear policy that medication (including sedatives) must not be used for the purpose of restraint.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(4) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

The inquiry has received many submissions concerned with the use of section 501 to cancel the visas of long-term Australian residents and the consequences of these cancellations on the person and their family and friends. What is DIMIA's response to claims that section 501 was not originally meant to target long-term visa holders?

Answer:

Section 501 applies to all non-citizens, including those who are permanent residents of Australia. A resident's visa may be cancelled if it is found that they fail the "character test", but a decision to cancel a visa is not made lightly and is only made following a detailed assessment against the considerations set out in *Ministerial Direction No. 21 – Visa Refusal and Cancellation under Section 501*.

The Ministerial Direction requires delegates to consider issues that relate to the non-citizen's length of residence in Australia, including:

- The extent of disruption to family, business or other ties to Australia that visa cancellation would cause;
- Whether a genuine marriage (including de facto or interdependent relationship) with an Australian citizen exists;
- The degree of hardship that would be caused to immediate family members lawfully resident in Australia;
- The purpose and intended duration of the non-citizen's stay in Australia (including any relevant compassionate circumstances).

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(8) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

What is the ratio of occasions on which DIMIA has decided to cancel a visa under section 501 of the Act to when DIMIA has made decisions not to cancel a visa?

Answer:

Statistics reporting the ratio of occasions on which DIMIA has decided to cancel a visa under section 501 of the Act to when DIMIA has decided not to cancel a visa are not readily available.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(9) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

One of the submissions received noted that the use of section 501 was increasing while the use of section 200 was decreasing. What is the Department's explanation for why this is occurring? Has there been any Departmental decision to apply section 501 of the Act to cases where section 201 could also be applied?

Answer:

Part 2, Division 9 of the Act authorises the deportation of certain non-citizens, including (pursuant to sections 200 and 201) non-citizens who have been convicted in Australia of a criminal offence that:

- was committed within 10 years of them becoming a permanent resident; and
- resulted in a sentence of imprisonment of one year or more.

Section 501 authorises the cancellation of a visa if its holder is found not to pass the 'character test'. Any non-citizen who comes within the scope of section 201 because of their criminal convictions also comes within the scope of section 501.

Section 501 achieved its current form in 1999, when Parliament approved amendments to strengthen the provisions relating to character and conduct. In his Second Reading Speech, the then Minister indicated that the amendments were designed "to ensure that persons who are found to be of character concern can be removed". Unlike the deportation power, the exercise of the character power is not subject to restrictions based on a non-citizen's length of residence in Australia.

The deportation provisions of section 200 are not used now as the department's view is that they were effectively superseded in 1999 by the strengthened character provisions in section 501.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(11) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

How many permanent residents have been detained under section 501 in the past three years?

Answer:

In 2002-03, 106 permanent residents had their visas cancelled under section 501 and were subsequently detained. In 2003-04, 26 permanent visas were cancelled under section 501 and holders subsequently detained and in 2004-05, 49 permanent residents had their visas cancelled under section 501 and were subsequently detained.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(12) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

How many permanent residents have been deported under section 501 in the past three years?

Answer:

The number of former permanent residents departing Australia after their visa was cancelled under section 501 is:

- in 2002-03, a total of 115 permanent residents departed Australia;
- in 2003-04, a total of 44 permanent residents departed Australia; and
- in 2004-05, a total of 74 permanent residents departed Australia.

Departmental records indicate that most of these departures were removals of unlawful non-citizens.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(13) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

One of the submissions to the inquiry mentioned a system of detention delegates. Does this system still exist? And if not, why was it abandoned?

Answer:

Yes, the system still exists. Detainee Delegates meetings are held at all Immigration Detention Facilities on a regular basis.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(14) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

Submission No 65 raises the issue of detainees being released in a different state to where their relatives are and in circumstances where DIMIA is aware of the presence of family members in another state. Could you explain what DIMIA's processes are in relation to this? I know that prisoners can request a transfer to another facility so that they are closer to their family in order to facilitate familial visits. Is such a system available for detainees?

Answer:

Submission No 65 probably refers to procedures for Unauthorised Boat Arrivals. In these cases DIMIA's approach has been that a detainee who is granted a visa and released from detention will usually simply be released into the immediate community. If a detainee is held in a regional area, such as at Baxter IDF or on Christmas Island, he or she will be given assistance to reach a major metropolitan centre. Non-citizens who are granted a Protection Visa are also entitled to have access to a range of settlement services, and immediate access to social security and Medicare.

If a person is placed in the community under residence determination arrangements, they are consulted on the city in which they wish to live. A number of factors are taken into account in finalising residence determination arrangements, including the person's preferences, whether they have family or other networks for support, and where they were initially detained.

In cases where people have been detained in the community and later transferred to a centre in another state, if they are to be released DIMIA generally returns them to the state in which they were originally located.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE:
11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(15) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

What measures has DIMIA put in place to ensure that overseas students know the requirements of their students visa (specifically hours of work and academic requirements) and the consequences of not meeting such requirements?

Answer:

DIMIA has a range of measures in place to ensure that international students are aware of the requirements of their student visa, and that they understand the implications of not meeting these requirements.

All overseas international students who are granted a student visa are provided with an approval letter, usually sent to them by mail or e-mail. This letter provides students with information about their visa, such as its type and duration. The letter also sets out the conditions that have been imposed on the visa, and the meaning and effect of each condition.

DIMIA's state and territory offices undertake regular outreach activities at the local level, visiting universities and other institutions during student orientation periods and conducting information sessions for international students. Visa conditions, particularly those relating to study and work, are a central focus of these sessions. Migration officers based in Australian missions overseas also provide training locally to education agents, to assist them in advising their clients about student visa requirements when considering Australia as a destination for study.

In addition, information about visa conditions is made publicly available on the Department's website.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(16) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

What is the timeframe for making internet access available in Immigration Detention Facilities?

Answer:

The Department is currently developing policy governing internet use by detainees including access, security, monitoring and privacy. The Department has also begun investigating the infrastructure and technology necessary to provide a reliable low-maintenance internet service at each Immigration Detention Facility (IDF). The solution and timeframe for delivery is likely to vary from centre to centre depending on the capability and capacity of existing infrastructure, availability of communications technologies (such as broadband), and the capacity of the market to respond to requirements in a timely way. The department is currently exploring options and does not yet have firm timeframes.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(17) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked

Does the Commonwealth monitor in any way the actions of DIMIA in court to determine whether they are consistent with the Commonwealth's commitment to act as a model litigant?

Answer:

The Office of Legal Services Coordination (OLSC) was established within the Attorney-General's Department to develop and administer the Government's legal services policy. The OLSC's responsibilities include assisting the Attorney-General in the performance of his role as First Law Officer of the Commonwealth, especially in the administration of the Legal Services Directions issued by the Attorney-General under the *Judiciary Act 1903*, including monitoring their operation, promoting an awareness of their requirements and advising the Attorney-General on the need for any directions in relation to specific matters.

Commonwealth agencies are required to act as model litigants under paragraph 4.2 and Appendix B of the Legal Services Directions. In essence, this requires that the Commonwealth, as a party to litigation act fairly and honestly, with complete propriety, but does not prevent the Commonwealth from acting firmly and properly to protect its interests. To give some examples – it requires that Commonwealth agencies deal with claims promptly, endeavour to avoid litigation where possible, not rely on technical defences unless the agency's interests would be prejudiced and not undertaking or pursuing appeals unless there are reasonable prospects for success or the appeal is otherwise justified in the public interest.

The OLSC monitors for possible breaches of the Legal Services Directions, including the model litigant obligations, in a number of ways. The OLSC searches reports of case law and tribunal decisions, receives reports from agencies, and from courts and tribunals, and receives complaints from other parties to litigation involving the Commonwealth.

The OLSC investigates all possible breaches of the Legal Services Directions, including the model litigant obligations, which come to its attention.

Furthermore the Department is required to remedy or report any breach of the Legal Services Directions to the OLSC. In turn each of our contracted legal service providers is required to report in writing to the Department any breach of the Legal Services Directions.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(19) Inquiry into the Administration of the Migration Act 1958

Refugee Review Tribunal

Senator Nettle asked:

Julian Burnside QC in his evidence gave an example of a case he was involved in which the RRT member had made a negative decision without asking for and checking documents available from DIMIA. Are RRT members required to validate claims by applicants by requesting DIMIA documents when these claims have a substantial impact on the case?

Answer:

The Tribunal has an obligation to investigate and assess the applicant's claims as part of the review process. As part of that function Members have access to DIMIA documents that must be supplied to the RRT in accordance with section 418 of the *Migration Act 1958* (the Act).

The Tribunal is required to determine what weight should be attached to a supporting document and this will largely be governed by the particular circumstances of a case before the Tribunal. The extent to which the Tribunal is required to make further inquiries or obtain additional information also depends upon the circumstance of the individual case, and whether the information is centrally relevant and readily obtainable.

It is not possible for the RRT to respond to specific case issues, primarily for reason of the strict confidentiality provisions of section 439 of the Act. However, the RRT wishes to furnish the following information regarding the provision of documents to the Tribunal.

There are several sections in the Act which relate to the provision of documents to the Tribunal by various parties.

Subsection 418(2) provides that the Secretary of the Department of Immigration and Multicultural and Indigenous Affairs must within 10 working days of being notified of an application for the review to the Tribunal, forward copies of what is in effect the delegate's decision to the Registrar of the Tribunal.

As soon as practicable after being notified of the application, under subsection 418(3) of the Act, the Secretary must give to the Registrar each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision. These documents usually consist of the applicant's departmental protection visa file(s).

The applicant may give to the Registrar a statutory declaration on any matter of fact that the applicant wishes the Tribunal to consider (s423(1)(a)); and written arguments relating to the issues arising in relation to the decision under review (s423(1)(b)).

Persons, (including the applicant) may be invited by the Tribunal to give additional information which the Tribunal considers relevant in conducting the review (s424). However, if the Tribunal gets such information, it must have regard to it, in making the decision on review (s424(1)). This information may be obtained by inviting 'a person to give additional information' (s424(2)). If the invitation is to an applicant to provide the additional information, it must be by one of the methods specified in section 441A.