Chapter 4

Development of ministerial guidelines and the exercise of the minister's discretionary powers

4.1 As discussed in Chapter 2, the discretionary powers under sections 351 and 417 of the *Migration Act 1958* are the minister's alone to exercise – they are non-compellable, non-reviewable and non-delegable within domestic law. This situation has made the Committee's task of understanding the decision making process in individual cases difficult. Nevertheless, the operation of these powers relies heavily on administrative support from the immigration department, which processes requests for ministerial intervention and refers to the minister cases where the minister may wish to exercise his or her discretion to grant a visa.

4.2 Since the discretionary powers were inserted in the Migration Act, the department has established detailed procedures for dealing with intervention related correspondence, assessing cases where ministerial intervention may be a possibility and referring them to the minister. The department's task of assessing and referring cases has been assisted by guidelines set in place by successive ministers.

4.3 This chapter examines the use made by immigration ministers of the discretionary powers under sections 351 and 417 of the Migration Act and the processes in place to manage requests for ministerial intervention at the departmental level, under terms of reference (a) and (c) respectively. It looks first at the development of guidelines and administrative processes under successive ministers since the powers were inserted in the Migration Act in December 1989. It then sets out the current administrative arrangements described in DIMIA's evidence to the inquiry, focusing on the latest version of the ministerial guidelines (MSI 386) and the accompanying administrative guidelines (MSI 387), both of which were issued on 15 August 2003.[1] The chapter's final two sections critically examine the consistency and quality of decision making in the immigration department, and address briefly the role of the RRT and MRT in the refugee and migration determination process, respectively.

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1 DIMIA, Submission no. 24B, Answer to question on notice, 5 September 2003, p.24. Interestingly, in separate answers to questions taken on notice from the public hearing on 5 September, DIMIA states that both ministerial and administrative guidelines 'became operational' or 'were issued' the previous day, 14 August, when they were placed on the department's LEGEND database. From that day, the guidelines were available to all departmental staff and external subscribers but were not made available on the department's website. DIMIA advised that: '…members of the public can access individual MSIs through the Ombudsman, Privacy and Freedom of Information Section of the Department…Members of the public also have access to the updated commercial version of LEGEND, as the department distributes CD-ROM updates to each State and Territory library and the National Library'. Answers to questions on notice, 5 September 2003, p.14, p.15 and p.31.

Development of guidelines and administrative procedures

4.4 The processes set in place at the departmental level to manage requests for ministerial intervention have developed under successive ministers since the powers were inserted in the Act. Information available to the Committee on these developments is somewhat sketchy. DIMIA's submission provides some background on the development of ministerial guidelines for departmental staff on the use of the powers and procedures for managing the system. However, the information appears incomplete, in some instances inconsistent, and the Committee has experienced confusion trying to ascertain the status of some of the documents provided in attachments to the submission.[2]

4.5 Senator Ray (September 1988 – April 1990) was the immigration minister at the time the relevant provisions were inserted in the Migration Act. He does not appear to have actually used the powers,[3] as he moved to another portfolio shortly after they came into effect. However, he did make the following observation on what 'the public interest' could mean in the operation of these powers, noting that:

> The term 'public interest' is not limited solely to public issues. Consideration of the public interest could involve consideration of the circumstances of the particular case having regard to unusual, unforeseen or other features that are deserving of a more favourable response against the background of Australia being a compassionate and humane society.[4]

4.6 This broader notion of the public interest continues to be of relevance in the current operation of the powers, as evidenced by the standard wording of recent statements tabled in parliament.

4.7 Minister Gerry Hand (April 1990 – March 1993) made a statement in parliament on 9 May 1990 on developments in migration legislation. Referring to the ministerial intervention powers, he stated that:

> …I have no intention of intervening under my review powers unless there is a serious reason. That is, I shall not be setting aside decisions reached in accord with the criteria established by the regulations unless I am convinced that there is a gap in policy, that the refusal is an unintended consequence of the regulations or that an individual case requires special consideration. In these circumstances I shall move to amend the regulations as necessary.[5]

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2 DIMIA, Submission no. 24, pp.27-30. See also DIMIA, Submission no. 24B, Answer to question on notice D, p.31

3 DIMIA, Submission no. 24, Attachment 15

4 Senator Robert Ray, *Senate Hansard,* 14 December 1989, p.4503

5 *House Hansard*, 9 May 1990, p.136

4.8 According to DIMIA, this statement provided guidance for departmental officers preparing submissions on cases submitted for ministerial consideration.[6]

4.9 The department issued a policy control instruction in August 1990 (PC1721) outlining the minister's powers and providing some instructions to officers on the kind of information that should be provided to the minister in submissions and tabling statements.[7] However, this document provides little further guidance on the kinds of cases where the minister would consider intervening.

4.10 On 15 October 1990, in a press statement on moves to regularise the status of certain illegal entrants, Mr Hand set out a framework for the exercise of the minister's discretionary powers, suggesting that the following types of cases could be referred to him:

- those in which the circumstances of the case are such that the legislator could not have anticipated them;

- those in which the consequences of not having recognised the circumstances in the legislation were not intended by the legislator;

- those which present compassionate circumstances of such order that failure to recognise them would result in severe hardship to an Australian citizen or lawful permanent resident of Australia.[8]

4.11 These principles were reiterated with slight rewording in correspondence with the Principal Member of the Immigration Review Tribunal (IRT) dated 21 December 1990.[9] They were adopted by the department as guidelines for submissions for the minister's consideration.[10]

4.12 In his letter to the IRT, Mr Hand invited the Principal or relevant Senior Member to refer to him cases that present 'the most extraordinary circumstances' as outlined above. Interestingly, he noted that he anticipated that very few cases would be referred to him under these arrangements. He made the following comments on the most appropriate way for the IRT to refer cases to him:

> I am concerned to avoid as much as possible raising any expectation on the part of the applicant that exercise of my s137 powers will follow the referral of a case to me under these arrangements. It seems to me that raised expectations could most readily be avoided if appropriate cases were referred in as informal a manner as possible. I have in mind a letter from you or the relevant Senior Member to me.

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6 DIMIA, Submission no. 24, p.27

7 DIMIA, Submission no. 24, p.27 and Attachment 3

8 DIMIA, Submission no. 24, Attachment 4

9 DIMIA, Submission no. 24, Attachment 5

10 DIMIA, Submission no. 24, p.28

> I envisage that the letter will set out the reasons why you or the relevant Senior Member consider that the case meets the above guidelines and will attach a copy of the relevant Tribunal decision. As it is likely that I will seek advice also from my department on these cases, I would appreciate a copy of the referral letter being sent to the Secretary…[11]

4.13 During Senator Bolkus' time as immigration minister (March 1993 – March 1996), it appears that three sets of guidelines were circulated to departmental officers.[12]

4.14 The first of these, entitled 'Guidelines for Processing Requests for Ministerial Intervention in Migration Act Decisions', was circulated within the department on 28 July 1994. It provides much more detail than previous documents on the department's role in handling non-humanitarian cases where a request had been made for ministerial intervention, including instructions on identifying cases, briefing the minister, and record keeping.[13] Also attached to these guidelines is a set of pro-forma documents designed to be used for replying to intervention related correspondence, briefing the minister and preparing tabling statements.

4.15 In addressing the question of what sort of cases would be appropriate for ministerial intervention, these guidelines note the following:

> …Successive Ministers have not defined the public interest explicitly, but their statements of reasons tabled in Parliament indicate that they have not restricted the exercise of their powers to cases which raise issues of public importance such as national security or economic issues. The compassionate circumstances attached to a case, particularly as they affect an Australian resident or citizen, have been a common reason for intervention.

4.16 They indicate that the minister would consider cases where:

- the circumstances of the case are such that the regulations could not have anticipated them; and

- the consequences of not having recognised the circumstances were clearly unintended; and

- the applicant presents strong compassionate circumstances of such order that failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or lawful permanent resident aggrieved by the decision; or

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11 DIMIA, Submission no. 24, Attachment 5

12 DIMIA, Submission no. 24, p.28

13 The actual powers dealt with in this document are the old sections 115 and 137, which gave the minister the power to set aside and substitute a new decision for a decision of a departmental review officer and the Immigration Review Tribunal, respectively. They are broadly equivalent to the power now given under section 351 to substitute a decision of the Migration Review Tribunal.

- the applicant would bring substantial economic or cultural benefit to Australia.

4.17 Of these, the first three points were the same as the guidelines issued by Mr Hand, but the fourth was new.

4.18 The second set of guidelines issued under Senator Bolkus was the Guidelines for Stay in Australia on Humanitarian Grounds,[14] which provided a framework for assessing cases of persons who: 'do not meet the requirements for refugee status but who face hardship if returned to their country of origin which would evoke strong concern in the Australian public'. The guidelines note that:

> In accordance with Australia's commitment to protection of human rights and the dignity of the individual, it is in the public interest to offer protection to those persons whose particular circumstances and characteristics provide them with a sound basis for expecting to face, individually, a significant threat to personal security, human rights or human dignity on return to their country of origin.[15]

4.19 The guidelines state that it is in the public interest to provide protection on humanitarian grounds to: persons with Convention related claims in the past and continuing subjective fear; persons likely to face treatment closely approximating persecution; and persons facing serious mistreatment which while not Convention related constitutes persecution.

4.20 The guidelines also state that grant of residence on humanitarian grounds must be limited to exceptional cases where the applicant's fears are well founded and based on serious grounds presenting threat to personal security, intense personal hardship or abuse of human rights. They set out a number of circumstances where the power should not be used, including where the person is seeking residence in Australia principally on non refugee related grounds such as family, medical or economic reasons.

4.21 The third set of guidelines produced while Senator Bolkus was immigration minister are the Guidelines for the Minister's Public Interest Powers Under Sections 345, 351 and 391 of the Migration Act 1958 Non-Humanitarian Cases.[16] This document provides much less detail than the earlier guidelines on non-humanitarian intervention and their primary aim seems to be to reflect the renumbering of the Act which took place in 1994.

4.22 These guidelines stress that: 'They are only "guidelines" and do not define the Minister's power of intervention nor circumscribe it in any way. They also point out

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14 DIMIA, Submission no. 24, Attachment 7. The version of this document in DIMIA's submission is not dated, and it is not entirely clear from the text when it was actually signed.

15 DIMIA, Submission no. 24, Attachment 7

16 DIMIA, Submission no. 24, Attachment 7

that the powers: 'are not intended as an automatic additional tier of merits review, nor do they operate as such'.[17] The wording on cases where the minister may intervene is substantially the same as in the previous guidelines.

4.23 When Mr Philip Ruddock MP became minister for immigration in 1996, he initially accepted Senator Bolkus' guidelines on the operation of the ministerial intervention powers.[18] In 1998 the increasing number of requests for ministerial intervention led to a number of regulation and procedural changes designed to limit repeat requests for intervention.[19] On 31 March of that year Mr Ruddock signed revised public interest guidelines, which became Migration Series Instruction (MSI) 225. These guidelines remained current until August 2003.[20]

4.24 MSI 225 dealt with both humanitarian and non-humanitarian cases and provided a more comprehensive outline of the type of cases the minister may consider for intervention than previous guidelines. It also set out countervailing issues that should be taken into account by case officers, and provided some guidance on how cases should be brought to the minister's attention.

4.25 Factors set out in the guidelines as relevant to assessing whether a case involves unique or exceptional circumstances include:

- Existence of a significant threat to a person's personal security, human rights or human dignity on return to their country of origin;
- Cases that bring Australia's obligations as a signatory to the Convention Against Torture, Convention on the Rights of the Child or International Covenant on Civil and Political Rights into consideration;
- Circumstances that the legislation that could not have anticipated, unintended consequences of the legislation, and particularly unfair or unreasonable consequences of the legislation;
- Strong compassionate circumstances that failure to recognise would harm an Australian family unit or Australian citizen;
- Exceptional economic, scientific, cultural or other benefit to Australia;
- The length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community; and
- The age, health or psychological state of the person.[21]

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17 DIMIA, Submission no. 24, Attachment 7

18 DIMIA, Submission no. 24, p.29

19 DIMIA, Submission no. 24, p.29

20 DIMIA, Submission no. 24, Attachment 8

21 DIMIA MSI 225: Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where it May Be in the Public Interest to Substitute a More Favourable Decision Under s345, 351, 391, 417, 454 of the *Migration Act 1958(1)*, Submission no. 24, Attachment 8, pp.4-5

4.26 A new version of these guidelines was signed by Mr Ruddock on 5 August 2003, becoming MSI 386 on 15 August 2003.[22] According to DIMIA, the amended guidelines were issued in the light of '…the passage of time and changes to policy and legislation'.[23] The main change to the guidelines is the inclusion of the Minister's public interest powers at s501J of the Act. The other changes are 'textual' and include that the new guidelines: cover all current and defunct review tribunals; set out in more detail the circumstances where the powers would not be available; explain in more detail the circumstances where a case may not be appropriate to consider; and state more clearly what action may be taken by officers when notified by a review tribunal that a primary decision has been affirmed.[24]

4.27 The Committee is concerned that the department did not provide any detailed reasons for the changes to the ministerial guidelines that were formalised with MSI 386. The Committee is also concerned that the minister can change the guidelines without explanation, highlighting another deficiency with the administration of the discretionary powers.

4.28 Accompanying the ministerial guidelines (MSI 225 and 386) is a set of administrative guidelines setting out departmental procedures for processing cases.[25] According to DIMIA, these guidelines were provided to departmental staff in draft form in 1999, but were not formalised into an MSI until August 2003, when an updated version became MSI 387.[26] These guidelines provide the most detailed information available both on the identification of cases where ministerial intervention may be considered and on processes for handling them.

4.29 The full text of MSI 386 and MSI 387 are found at Appendix 5.

4.30 DIMIA explained the relationship between the two sets of guidelines in the following terms:

> The Minister's Guidelines…provide guidance to DIMIA officers in relation to the types of exceptional and compelling circumstances identified by the Minister as circumstances he may wish to consider exercising his public interest powers. The Administrative Guidelines…underpin the Ministerial Guidelines and assist department staff in the application of those Guidelines.[27]

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22 DIMIA, Submission no. 24B, Answers to questions on notice D6 and D7, p.33. The new guidelines are included in DIMIA's submission at Attachment 9

23 DIMIA, Submission no. 24B, Answer to question on notice, 5 September 2003, p.33

24 DIMIA, Submission No 24B, Answer to question on notice, 5 September 2003, p.25

25 DIMIA, Submission no 24, Attachment 2

26 DIMIA, Submission no. 24B, Answer to question on notice, 5 September 2003, p.25

27 DIMIA, Submission no. 24B, Answer to question on notice, 5 September 2003, p.32

4.31 Although documentary evidence is somewhat limited, the development of successive sets of guidelines suggests a gradually evolving system with increasing guidance given to departmental officers on identification and processing of cases where the Minister may wish to intervene.

'The public interest'

4.32 An important point to note is that, while the minister's guidelines are intended to provide guidance to staff involved in processing cases, they are not criteria for intervention and are not binding on the minister. DIMIA has made this point clearly in answers to questions on notice, stating, for example that:

> The Minister's Guidelines are not criteria for intervening. Rather they are guidelines for the types of cases that the Minister has asked DIMIA to refer to him for possible consideration for intervention. …
>
> The sole criterion for the Minister's intervention is that it be in the public interest. It is intentionally flexible to pick up cases that are inherently not able to be codified as part of normal visa classes.[28]

4.33 Elsewhere, DIMIA pointed out that:

> The Ministerial intervention process differs fundamentally from the visa determination process, in that the Ministerial intervention consideration focuses on the extent to which the characteristics of the case raise the public interest, whereas a visa determination focuses on whether the individual is able to meet the codified criteria for the grant of a visa.[29]

4.34 As can be seen by the successive guidelines outlined above, the 'public interest' has been interpreted broadly to include humanitarian and compassionate circumstances. Yet whatever guidelines may exist, ultimately it is up to the minister of the day to determine what the 'public interest' is. Because the power is non-compellable, non-reviewable and non-delegable, there is no scope for challenging a minister's personal views on what is and is not in the public interest.

Recent operation of the ministerial discretion powers

4.35 The unreviewable nature of the ministerial discretionary power has largely shielded the department's processes in this area from significant public scrutiny. As discussed in Chapter 2, the operation of the power under section 417 was subjected to some parliamentary scrutiny during the Senate Legal and Constitutional Affairs Committee's inquiry into Australia's refugee and humanitarian determination processes in 1999-2000.

4.36 While the Committee endorses the *Sanctuary Under Review* report's findings and recommendations to improve the administration of the section 417 process and to

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28 DIMIA, Submission no. 24D, Answer to question on notice E3

29 DIMIA, Submission no. 24D, Answer to question on notice N5

facilitate the dissemination and application of the ministerial guidelines,[30] it believes that a great deal of information about the operation of the minister's discretionary power has not yet found its way on to the public record. Accordingly, the Committee believes strongly that one of the benefits of this inquiry is that it has placed on the public record further evidence from the immigration department and other stakeholders about how claims for ministerial intervention, both humanitarian and non-humanitarian, are processed and assessed.

4.37 The Committee is keen to address an area of concern raised during this inquiry – that publicly available information relating to the minister's discretionary power is not widely disseminated and therefore not well understood by those most likely to avail themselves of that power.

4.38 The remainder of this chapter builds on the information contained in *A Sanctuary Under Review* and paints a more complete picture of administrative processes under the section 417 power. It outlines some of the current administrative processes that are in place to manage requests for ministerial intervention at the departmental level, using evidence provided by DIMIA. This partial overview provides a useful backdrop for criticisms of the operation and administration of the discretionary power by a number of witnesses who also gave evidence to this inquiry. This is the subject of the next chapter.

Evidence provided by DIMIA

4.39 DIMIA emphasised that requests for ministerial intervention are not visa applications, and the processes for dealing with the intervention powers should not be benchmarked against the formal determination process for visa applications.[31] This view suggests an assumption that normal processing procedures and standards do not apply, as can be seen from the following answer to a question on notice from DIMIA:

> The concept of overall processing times for Ministerial intervention also has little relevance because there is no formal application process and because there is no obligation for the Minister to consider the use of his powers in a particular case…[32]

4.40 Nevertheless, a more or less established process has developed to deal with the large ministerial intervention workload. The ministerial guidelines (MSI 386) provide two categories of circumstances in which a case can come to the department's attention as a candidate for ministerial intervention. The first category is described as 'Action to be taken after a decision by a review tribunal':

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30 See the discussion of Recommendations 8.1 to 8.5 of the report in Chapter 2

31 DIMIA, Submission no. 24, p.38 and Ms Godwin, *Committee Hansard*, 23 September 2003, p.48. See also DIMIA, Submission no. 24D, Answer to question on notice N5

32 DIMIA, Submission no. 24B, Answer to question on notice C5, p.30

6.2.1 When a case officer receives notification of a review tribunal's decision to affirm a primary decision, they may assess the visa applicant's circumstances against these Guidelines, and:

- if the case falls within the ambit of these Guidelines, bring the case to my [the minister's] attention in a submission, so that I may consider exercising my public interest powers, or
- if the case falls outside the ambit of these Guidelines, write a file note to that effect.

6.2.2 When a review tribunal member holds the view that a case falls within the ambit of these Guidelines, they may refer the case to my Department and their views will be brought to my attention using the process outlined in 6.3.3:

- Comments by members of review tribunals in their decision records do not constitute an initial 'request' for the purposes of 6.3 below[33]

4.41 DIMIA told the Committee that under 6.2.1, assessment of a visa applicant's circumstances against the guidelines is automatic in cases where the RRT or the AAT has affirmed an adverse protection visa decision. Assessment by a case officer following a decision of the MRT is not necessarily automatic.[34]

4.42 The second category is described as: 'Requests for the exercise of my public interest powers':

6.3.1 A person can request the exercise of my public interest powers in writing or by electronic transmission.

6.3.2 Their agent or supporters can also make the request relating to the person's case.

6.3.3 When a first request for me to exercise my public interest powers is received, an officer is to assess that visa applicant's circumstances against these Guidelines, and:

- for cases falling within the ambit of these Guidelines, bring the case to my attention in a submission so that I may consider exercising my power, or
- for cases falling outside the ambit of these Guidelines, bring the case to my attention through a short summary of the issues in schedule format, so that I might indicate whether I wish to consider the exercise of my power.[35]

4.43 Figures 4.1 and 4.2 reproduce flowcharts provided by DIMIA which show the administrative process for dealing with ministerial intervention requests both at the completion of the RRT process and from the receipt of a request. However, the Committee holds the view that these flowcharts are only indicative of a process where applicants can follow multiple pathways before ministerial intervention. The two

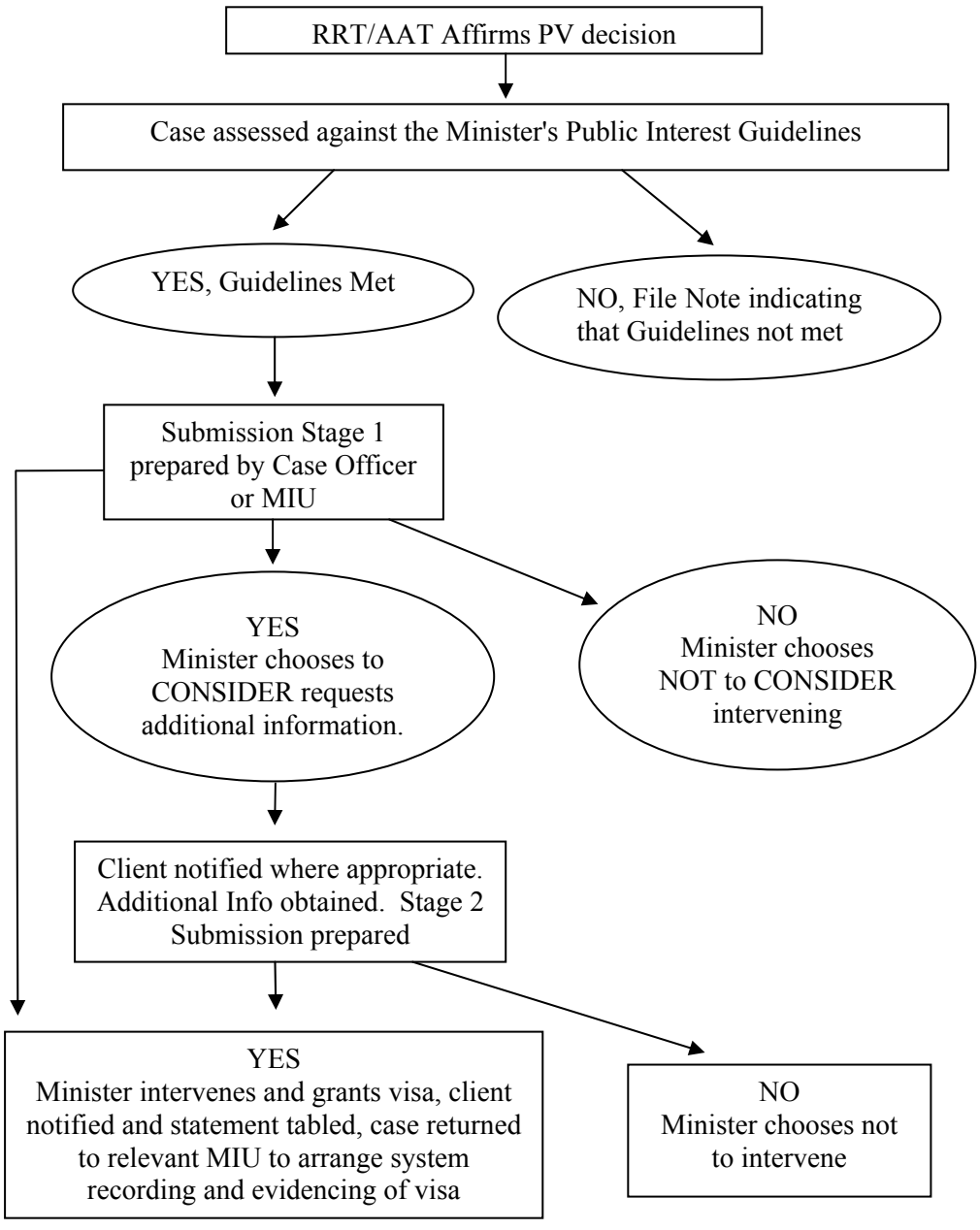
33 DIMIA, Submission no. 24, Attachment 9, p.7

34 DIMIA, Submission no. 24, p.40

35 DIMIA, Submission no. 24, Attachment 9, p.8

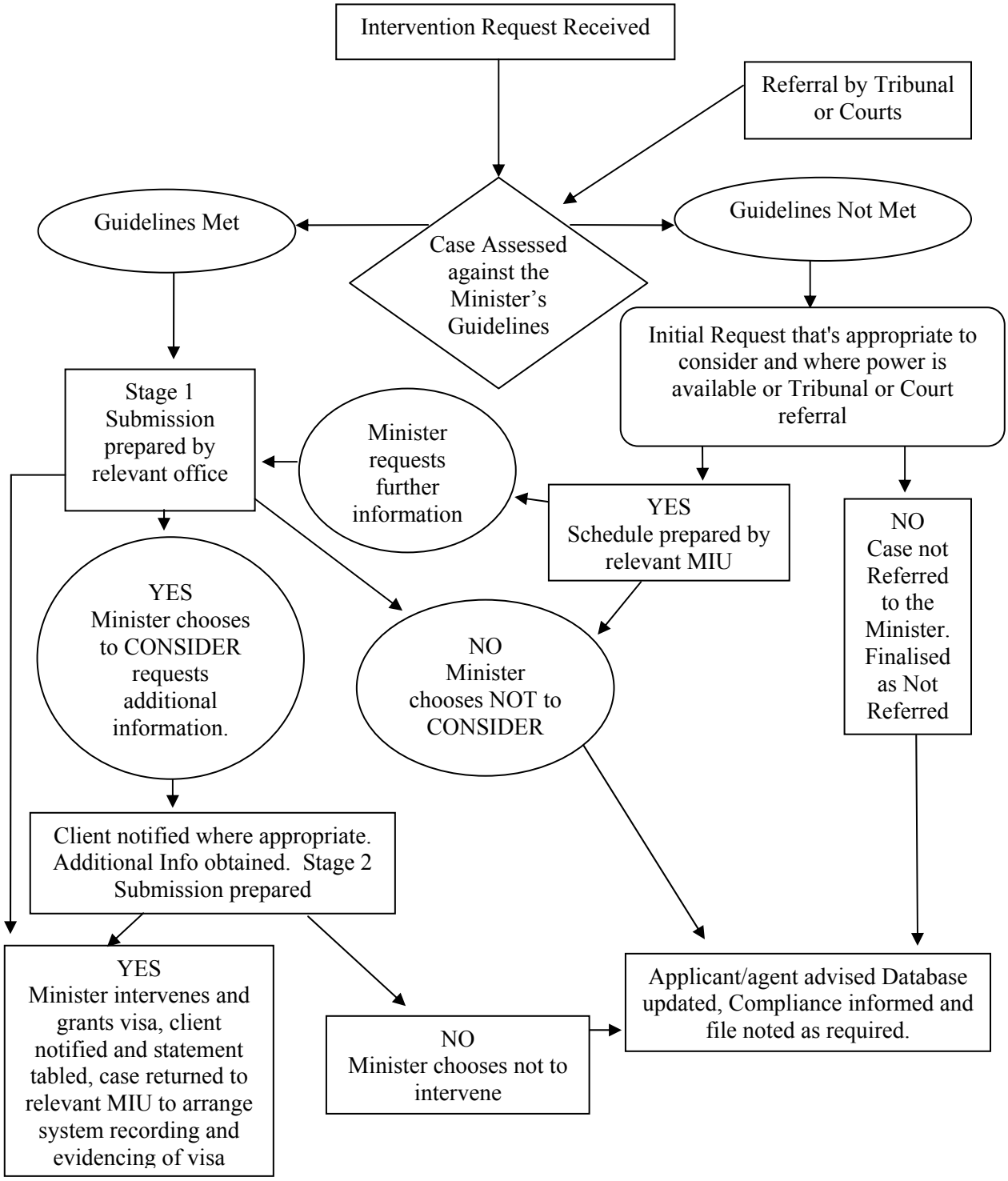
flowcharts provided by the department should not, therefore, be interpreted as fixed administrative processes.

Figure 4.1: Flowchart for the Post RRT Process



Source: DIMA Submission no. 24, Attachment 11

Figure 4.2: Flowchart for Process from Receipt of a Request



Source: DIMA Submission no. 24, Attachment 12

4.44 Although the guidelines appear relatively straightforward in terms of identifying categories of circumstances for the use of the minister's discretionary powers, the Committee nevertheless sought clarification from senior immigration department officers with regard to how the department and departmental liaison officers (DLOs) process requests for ministerial intervention from the time a request for intervention is received, usually by DLOs working in the minister's office at Parliament House.

4.45 A number of issues arising from the administration of the ministerial guidelines relate to the established procedures that enable the minister's office and the department to coordinate the handling and processing of large numbers of intervention requests. These procedures, many of which have not previously been disclosed for the public record, shed some light on the complex and lengthy administrative processes in place for dealing with intervention requests. Some of these issues were examined by the Committee at various public hearings and are discussed below.

Intervention related correspondence

4.46 DIMIA told the Committee that there is no formal application for ministerial intervention and no 'prescribed form' for making a request.[36] A person seeking intervention or their supporters can make a request either in writing or electronic format.[37] Where a request is made orally the person is usually advised to submit the request in writing, however a phone call to the minister's office would be actioned if it raised a matter that required the attention of a departmental officer:

> In the first instance a decision about whether an oral communication amounts to a request would be made by the person receiving the communication. In line with the Minister's clear preferences, an officer identifying an oral request would generally ask that this be made in writing to the Minister. However, the Minister's Guidelines require that DIMIA officers bring all cases to the Minister's attention where they fall within the ambit of the Guidelines.[38]

4.47 There is no limit on the number of requests that can be made for the minister's intervention.[39] Requests are treated as ministerial correspondence, and are tracked using DIMIA's correspondence database, the Parliamentary Correspondence Management System (PCMS).[40] While requests can vary from a one-page hand written note to an extensive submission, DIMIA stressed that the process for handling requests for ministerial intervention is fundamentally different from the normal visa application process. All requests for ministerial intervention are assessed by DIMIA as

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36 DIMIA, *Committee Hansard*, 5 September 2003, p.29

37 DIMIA, Submission no. 24, p.38

38 DIMIA, Submission no. 24E, Answer to question on notice A4

39 DIMIA, Submission no.24, p.38

40 DIMIA, Submission no. 24, Attachment 25. See also *Committee Hansard*, 23 September 2003, pp.39-40

to whether the information in a submission falls within the ambit of the guidelines – there are no separate criteria for the decision maker to apply:

> …a one-page letter may be as effective as a lengthy submission. In a one-page letter the two or three pertinent points that the person wants to draw to attention are there. A very detailed submission may well include those same pertinent points but in amongst a lot of other information, some of which may have already been known to the department.[41]

4.48 Requests for intervention are also treated by the department strictly on a case-by-case basis – a minister's decision to intervene in one case does not set a precedent for any other cases that exhibit similar circumstances.[42]

4.49 The Committee notes the absence of any guidelines on timing for processing a request for ministerial intervention. As previously noted, DIMIA told the Committee that the concept of an overall processing time for intervention 'has little relevance' because there is no formal application process. However, DIMIA did confirm that, while it is extremely difficult to assess workloads, an officer would spend an average of seven or eight hours working on each case.[43]

Departmental Liaison Officers

4.50 DIMIA advised the Committee that apart from the Ministerial Intervention Units (MIUs), at least five areas within the department play a role in processing requests for ministerial intervention. However, the Committee was particularly interested in the role of DLOs in processing intervention requests because such requests are usually received in the minister's office and handled, in the first instance, by a DLO. Because the DLOs are normally the first point of contact for people seeking ministerial intervention, their actions in effect set in motion a complex administrative process. The department's administrative guidelines state:

> 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…is reviewed by a DLO before being forwarded on to the Minister.
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> 4.3.3 Where necessary, the DLO coordinates with the relevant MIU or policy area on urgent issues.[44]

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41 Ms Godwin, DIMIA, *Committee Hansard*, 23 September 2003, p.59

42 DIMIA, *Committee Hansard*, 23 September 2003, p.61

43 DIMIA, Submission no. 24B, Answer to question on notice, p.19

44 DIMIA, Submission no. 24, Attachment 2, p.88

4.51 DIMIA's submission states that the DLOs engage in a 'preliminary examination' of requests for ministerial intervention before they are referred to the department for assessment.[45] At the public hearing on 5 September 2003, departmental officers and DLOs were asked clarify what is involved in a 'preliminary examination' because it implies, mistakenly, that DLOs make an assessment as to whether unique or exceptional circumstances apply in individual cases. DIMIA confirmed that 'preliminary examination' describes only 'a simple cataloguing technique or mechanism' where requests are 'processed in a mostly pro forma manner'. Mr Knobel, a DLO, told the Committee:

> A large amount of correspondence does come into us every day. We do a very initial assessment to determine if it is an intervention request…We try to identify which power of the act these clients are seeking intervention under and then simply mark it off to the relevant ministerial intervention unit…We provide an initial screening of these request to get them moved on to the department.[46]

4.52 The DLOs rarely elicit more information from the person sending the request, but they do correspond with representatives acting on that person's behalf. Mr Knobel told the Committee that a high proportion of phone calls to the minister's office each day relate to questions on intervention: 'has the request been received? How is my case going? We get calls from representatives or members of parliament seeking an update on how the intervention request is going'.[47]

Ministerial Intervention Units

4.53 Following 'preliminary examination' by the DLO, as described by DIMIA, requests for ministerial intervention are allocated to one of four Ministerial Intervention Units (MIU) located in Sydney, Melbourne, Perth and Canberra for processing. All section 351 requests are processed in the Canberra MIU, while the other three MIUs are primarily concerned with section 417 requests.[48]

4.54 The MIU is responsible for assessing intervention requests against the ministerial guidelines. For cases which are deemed to fall within the guidelines, the MIU prepares a submission for the minister outlining the reasons why it comes within the guidelines.[49] The submission generally follows a particular format providing the necessary background and a statement of the case and any relevant issues. The

45 DIMIA, Submission no. 24, p.38

46 DIMIA, *Committee Hansard*, 5 September 2003, p.41

47 DIMIA, *Committee Hansard*, 5 September 2003, p.52

48 DIMIA, *Committee Hansard*, 5 September 2003, p.21

49 DIMIA, Submission no. 24, p.38

submission also sets out a range of visa options available should the minister decide to use his discretionary power.[50]

4.55 Cases deemed outside the guidelines are included on a schedule, which gives a summary of the request and representations made regarding the case as well as information about the primary decision making and review process. It would also include some background information and a statement based on that information to the effect that the matter falls outside the guidelines.[51]

4.56 All submissions and schedules are then handled by the DLOs, a process described by former DLO, Mr Christopher, as 'basically a clerical function…to make sure that submissions, letters and things are properly signed off. If [the minister] forgets to sign, we take it back to him and say: "You need to sign this"'.[52]

4.57 As previously mentioned, there is no limit on the number of times a person may request intervention by the minister. The minister's attention would be drawn to a repeat request by way of some notation in the information that is included in the case file.[53] The administrative guidelines set out in detail the procedures to be followed if there is a repeat request.[54] The key issue is whether new information that is provided by the applicant, or information that had not previously been put before the minister, potentially brings the case within the ambit of the guidelines.[55] The administrative guidelines state that DIMIA is to prepare a submission for cases that do meet this criterion:

> 6.59 The submission 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 suggests that the case may now fall within the ambit of the [Ministerial] Guidelines.[56]

Decision making within DIMIA

4.58 During the inquiry, an inconsistency in DIMIA's written evidence about its role in the decision making process for ministerial discretion came to light. The department points out in its written submission of August 2003 that under revised procedures instituted in 1996, officials no longer reply to applicants whose cases fall outside the ministerial guidelines. Instead, the minister periodically executes a minute

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50 Mr Nicholls, DIMIA, *Committee Hansard*, 23 September 2003, pp.60-61

51 Mr Nicholls, DIMIA, *Committee Hansard*, 23 September 2003, p.61

52 DIMIA, *Committee Hansard*, 5 September 2003, p.56

53 Mr Knobel, DIMIA, *Committee Hansard*, 5 September 2003, p.60

54 DIMIA, Submission no. 24, Attachment 2, pp.97-98 (6.5: 'Repeat requests')

55 DIMIA, Submission no. 24, Attachment 2, p.98 at 6.5.6 of the guidelines

56 DIMIA, Submission no. 24, Attachment 2, p.98 at 6.5.9 of the guidelines

stating that he does not propose to consider the exercise of his discretionary power for persons named on an attached schedule which is provided by the department.[57]

4.59 The key point relating to the revised procedures is that all decision making up to the point where the minister decides not to exercise his discretion actually takes place within the department. This follows from the statement in the submission that the schedule provided to the minister is the department's recommendation that he not consider the exercise of his power.[58] The Committee observes that while in theory it is up to the minister to decide not to use the discretionary powers, in practice the minister's decision is the culmination of a chain of administrative decision making that begins and ends within the department.

4.60 DIMIA's submission contradicts an answer it provided in October 2003 to a question on notice about measures taken within the department to improve consistency of decision making. The answer provided states categorically that departmental officers exercising their judgement whether to prepare a full submission or a schedule *does not* involve decision making at the departmental level:

> The intervention process does not involve decision making at the departmental level. Rather it is a process in which intervention requests are assessed against the Minister's Guidelines as to whether the request falls within the ambit of the Guidelines. In the end, all of the information in a case is weighed by the Minister to form a view of what he decides is in the public interest. This includes contemplation of information other than the individual's circumstances. Different outcomes for apparently similar individuals do not denote inconsistency, but a different judgement by the Minister concerning the public interest.[59]

4.61 The Committee finds it difficult to accept the department's assessment that it is not involved in any decision making during the intervention process. The Committee is particularly concerned that as the inquiry proceeded, the department played down its own decision making role and stressed the importance of the final non-reviewable 'public interest' decision taken by the minister. In fact, the department almost went as far as to suggest that only the minister's final decision constitutes decision making while the department's role amounts to overseeing an administrative process (in effect, applying the ministerial and administrative guidelines).

4.62 The Committee finds that decision making within DIMIA is not restricted to cases where it advises the minister not to consider whether to exercise his discretion. The minister's capacity to formulate an independent view on a particular case that might lead him to exercise his discretion is dependent almost entirely on the information provided by the department. While the Committee accepts that the final decision to grant a visa rests with the minister, the decision making process within the

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57 DIMIA, Submission no. 24, p.36

58 DIMIA, Submission no. 24, p.38

59 DIMIA, Submission no. 24C, Answer to question on notice E4, p.3

department, especially whether to prepare for the minister a submission or a schedule, is critical to the success or otherwise of individual cases.

4.63 This conclusion is supported by evidence provided by the Commonwealth Ombudsman, Professor John McMillan. In expressing concerns about the use of the ministerial guidelines, he told the Committee that:

> The minister, realistically, is heavily reliant upon the work of the department in filtering, feeding, preparing and briefing cases. If there are deficiencies in the work of the department, then necessarily those deficiencies flow through into the integrity of the exercise of the powers by the minister.[60]

4.64 Leaving aside the extent of decision making within DIMIA for the intervention process, an important issue that was brought to the Committee's attention concerns the consistency and quality of decision making within the department, and the effect of departmental decision making on the minister's use of the discretionary powers.

4.65 Serious concerns about the adequacy of departmental procedures were raised by several witnesses. The Commonwealth Ombudsman informed the Committee of known cases where information was not put before the minister by the department; where the officer responsible for considering a case did not have access to all departmental files relevant to a case; and where a person assessing a claim did not consult a file held by the department which contained important information that should have formed part of a submission to the minister.[61] The latter case involved a person who '…had had an operation months earlier, yet the submission to the minister said that he would be required to have that operation in the future and it would cost so many dollars. It would suggest that the file was not examined'.[62] The Committee notes that concerns with the administrative actions of the department were first raised in the Commonwealth Ombudsman *Annual Reports* for 1995-96 and 1996-97.[63]

4.66 The Committee believes that these documented cases reveal serious and fundamental administrative weaknesses in DIMIA's decision making processes. The concerns expressed by the Ombudsman are compounded because DIMIA does not have in place an internal system for auditing its own decision making in relation either to decisions made by the minister or the department's internal submission process. The Committee strongly supports the Ombudsman's view that: '…it would be desirable if DIMIA introduced routine auditing' of its decision-making processes.[64]

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60 Professor McMillan, *Committee Hansard*, 18 November 2003, p.2

61 Professor McMillan, *Committee Hansard*, 18 November 2003, pp.6-7

62 Mrs Hawke, Office of the Commonwealth Ombudsman, *Committee Hansard*, 18 November 2003, p.7

63 Office of the Commonwealth Ombudsman, Submission no. 28, p.10

64 Professor McMillan, *Committee Hansard*, 18 November 2003, p.8

Recommendation 2

4.67 The Committee recommends that DIMIA establish a procedure of routine auditing of its internal submission process. The audits should address areas previously identified by the Commonwealth Ombudsman, namely identifying ways to improve departmental processes for handling cases, and ensuring that claims are processed in a timely way and case officers consider all of the available material relevant to each case.

4.68 The most scathing criticisms of departmental processes were provided by Ms Marion Le, a human rights advocate and registered migration agent who has worked closely with the department and represented people to ministers over a twenty-five year period.

> One of the biggest problems is that the department [does] not always send on submissions that are put to them, and we as the practitioners or the people bringing the submissions do not know when the department [has] passed on our submissions and when they have not, so we never know whether the minister is receiving them.[65]

4.69 Ms Le further commented that:

> The whole situation is really messy. I would not like to say that it is working well; it is not working well. It is messy, time consuming and stressful. Those of us who are doing it do not know what the outcome is – as I said, the submission heads off into the abyss.[66]

Recommendation 3

4.70 The Committee recommends that the Commonwealth Ombudsman carry out an annual audit of the consistency of DIMIA's application of the ministerial and administrative guidelines on the operation of the minister's discretionary powers. The audit should include a sample of cases to determine whether the criteria set out in the guidelines are being applied, and to identify any inconsistency in the approach of different case officers.

4.71 Witness concerns about DIMIA's decision-making were not limited to the ministerial intervention process. The Legal Aid Commission of New South Wales also drew the Committee's attention to problems in the current migration regime, particularly 'very poor quality decision making' at the primary level, which it believes account for the large number of appeals to the minister:

> Most refugee applicants are not interviewed at the primary level. Many of the decisions often bear no direct relation to the points that the person puts in their application. People do not understand the decision making and then are very confused. It is only when they go to the RRT that many people

65 Ms Le, *Committee Hansard*, 18 November 2003, p.47

66 Ms Le, *Committee Hansard*, 18 November 2003, p.51

> finally get to verbalise their claims before a decision maker. Many of them consider this to be the primary decision, because the first decision at primary level was made without discussion and without any feedback from the department.[67]

4.72 Reflecting on the determination system as a whole, Ms Le expressed the view that the ministerial discretion powers were important to counteract poor decision making in the department. She told the Committee:

> Normally I would not go to see a minister on specific cases. But because I feel the system has been so bad in the last two years, so appalling at both the primary decision making level and at the RRT, I have gone to the minister.[68]

4.73 The Committee notes the evidence by Dr Mary Crock which gives a broader perspective on the changing climate of decision making within DIMIA in the late 1990s, when acceptance rates for protection visa applicants reached as high as 98 to 100 per cent for Afghans and Iraqis. Dr Crock argued that statistics on acceptance rates after 1999, which show a drop from 100 per cent to approximately 75 per cent, reflect the 'considerable pressure' that was being exerted on the department by the government when it realised that the high acceptance rates 'started to become such a hot political issue'.[69] Dr Crock claimed this assessment is corroborated by anecdotal evidence from sources within the department which apparently shows that:

> …absolutely direct pressure was placed on departmental members to be tougher with their assessments, that people were brought in from other areas, such as security and enforcement, and placed in the area, that some experts were removed from the area, in a very direct attempt to drive the acceptance rate down.[70]

Referral by a tribunal – the role of the RRT and the MRT

4.74 Cases may be brought to DIMIA's attention by a referral from the RRT and the MRT. Members of the review tribunals may indicate in their decisions that a particular case raises humanitarian issues. However, the RRT and the MRT have slightly different processes for referring cases for the minister's consideration. The RRT notifies DIMIA of potential humanitarian considerations either by reference in a tribunal decision that the case may be suitable for consideration under section 417, or by a letter to the DIMIA State Director that the case may raise humanitarian considerations.[71] The letter would normally state: 'This application may raise humanitarian claims. Please note that the tribunal has no power to consider such

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67 Ms Biok, Legal Aid Commission of New South Wales, *Committee Hansard*, 22 September 2003, pp.22-23

68 Ms Le, *Committee Hansard*, 18 November 2003, p.49

69 Dr Crock, *Committee Hansard*, 21 October 2003, p.35

70 Dr Crock, *Committee Hansard*, 21 October 2003, p.36

71 Migration Review Tribunal and Refugee Review Tribunal, Submission no. 11, pp.2-3

claims'.[72] The tribunal's decision is also provided to the appellants or their advisers.[73] The applicant, however, is not told that DIMIA has been informed of the comment.[74]

4.75 The MRT referral process provides an alternative and somewhat more flexible means of referring cases for the minister's consideration. The tribunal notifies DIMIA of cases involving unique, compassionate and exceptional circumstances through correspondence from the Principal Registry to the Ministerial Intervention Unit in DIMIA:

> The correspondence is produced if, at the end of the review process, the matter is identified by the presiding Member as one potentially raising unique, compassionate and exceptional circumstances. The reasons for the referral or details of the case are included in the correspondence if the Tribunal decision does not contain information relevant to consideration of the exercise of the discretion by the Minister.[75]

4.76 Successive ministers have made sure that referral of cases from the RRT and MRT is a relatively informal process which in no way binds the minister to exercise discretion in a given case. Mr Hand initially requested that the former IRT write to him regarding cases where ministerial consideration may be warranted. The guidelines put in place under Mr Ruddock show that the review tribunals were expected to notify the department, rather than the minister directly, of cases that could raise public interest considerations.[76]

4.77 Evidence from the tribunals indicates that their role in the ministerial discretion process is 'very limited and indirect'.[77] Members of both tribunals are expected to deal with the criteria of the visa at hand and concentrate on related issues rather than consider in detail any compassionate or humanitarian claims that may be raised.[78] As noted above, where such claims are made, the Member may decide to notify the department of the case.

4.78 The tribunals advised the Committee that the MRT does not keep any statistical data or a central record of the number of cases identified as potentially raising humanitarian considerations, and that the same applies to the RRT for the period before July 1999. Furthermore, the tribunals do not record the reasons for the referral of matters to DIMIA for consideration of the exercise of ministerial discretion.[79]

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72 Mr Blount, *Committee Hansard*, 22 October 2003, p.15

73 Mr Karas, *Committee Hansard*, 22 September 2003, p.11

74 Mr Blount, *Committee Hansard*, 22 September 2003, p.10

75 Migration Review Tribunal and Refugee Review Tribunal, Submission no. 11, pp.2-3

76 DIMIA, Submission no. 24, Attachment 8, p.6

77 Migration Review Tribunal and Refugee Review Tribunal, Submission no. 11, p.1

78 Mr Karas, *Committee Hansard*, 22 September 2003, p.4

79 Migration Review Tribunal and Refugee Review Tribunal, Submission no. 11, p.3

4.79 The Committee accepts that the MRT and RRT's limited role in the operation of the ministerial discretion powers reflects the role prescribed for them in legislation. However, it notes the suggestion of some witnesses that the tribunals are well placed to play a greater role in assessing cases that may warrant special consideration on compassionate or humanitarian grounds.

4.80 The Migration Institute of Australia, for example, argued that because the tribunals are in an ideal position to assess the credibility of an applicant's circumstances, their processes '…could be developed to allow [them] to make a formal finding on [an applicant's] suitability for ministerial intervention'.[80] This could involve more thorough reasoning in a tribunal member's decision which would allow a more persuasive case to be put before the minister.

4.81 More forthright views on this subject were conveyed to the Committee by Mr Michael Clothier, Chairman of the Law Institute of Victoria's Immigration Law Centre, but acting in his private capacity. He believes strongly that reforms to the migration law are necessary to enable decision makers at the primary and review levels to exercise discretion in difficult cases. The argument is based on the view that:

> We pay our immigration officers and Tribunal Members significant salaries and we should be expecting more of them than being mere ciphers. The Minister should not, in my view, have to be placed in a position where he is *micro-managing* Australia's Immigration "discretions"…[81]

4.82 The Committee notes that these arguments go considerably further than the recommendation contained in the report of the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian determination processes, *A Sanctuary Under Review*. The report acknowledged that during the review process, the RRT may collect valuable additional information about the circumstances of an applicant seeking refugee status that was not presented, or not presented clearly, by the applicant. However, it concluded in favour of the status quo: 'As the RRT member is not making a determination…it is appropriate that the referral mechanism to the Minister, through the DIMIA case office, continue to be informal'.[82]

4.83 In view of the evidence presented during the inquiry, the Committee believes it is time to reconsider the role of the RRT and MRT in the ministerial discretion process. The Committee accepts that the tribunals' core task is the review of decisions of the immigration department to refuse or cancel protection and other visas. However, the Committee also believes that the tribunals are well placed to assess the entirety of an applicant's circumstances, especially when new information is presented that was not previously available to the department.

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80 Migration Institute of Australia, Submission no. 32, p.9

81 Mr Clothier, Submission no. 20, p.2 (emphasis in original)

82 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.251

Recommendation 4

4.84 The Committee recommends that the MRT and the RRT standardise their procedures for identifying and notifying DIMIA of cases raising humanitarian and compassionate considerations.

Recommendation 5

4.85 The Committee recommends that the MRT and the RRT keep statistical records of cases referred to DIMIA, the grounds for referral and the outcome of such referrals.

Conclusion

4.86 The criticisms of the department's decision making processes canvassed in this chapter are a major area of concern for the Committee. The criticisms raise a host of other issues about the effect of administrative deficiencies on individual applicants who are relying on the minister's discretion as their last opportunity to obtain a visa. They also raise questions about the avenues that are open to individuals to gain access to the minister, and the role played by professional advocates some of whom are bypassing the department and approaching the minister because their experience with the department has been less than satisfactory. The Committee examines both of these sets of issues in Chapter 5 and Chapter 6 respectively.