Chapter 7

The role of the minister

7.1 The preceding chapters of this report have dealt with important aspects of the operation of the ministerial discretion powers under the Migration Act. However, ultimately the discretion to grant a visa using these powers is up to the minister alone to exercise. While the minister may receive advice from the department or representatives of visa applicants, it is the minister's judgment of the 'public interest' that will determine which cases succeed and which do not. Being non-delegable, non-compellable and non-reviewable, the powers vest an extraordinary amount of power over individual cases in the hands of the minister. The only accountability mechanism is the requirement that the minister table statements in parliament every six months giving reasons why he or she has considered it in the public interest to intervene in particular cases.

7.2 This chapter examines the central role of the minister for immigration in the operation of the ministerial discretion powers under term of reference (c). It looks firstly at the extent of the personal discretion vested in the minister by the way the powers are framed. The second part of this chapter examines aspects of the powers' operation and use under the former minister, Mr Philip Ruddock as required by term of reference (a). Mr Ruddock's personal use of the powers was a key area of interest for the Committee, due to the allegations aired in parliament that led to the establishment of this inquiry. Most of the evidence presented to the Committee relates to the seven years during which he was the immigration minister.

7.3 Two key issues raised by the Committee's examination of former ministers' use of the powers are firstly whether there is sufficient transparency and accountability in the operation of the powers, and secondly whether the sheer volume of cases reaching the minister for personal consideration is an appropriate part of the migration system.

The Minister's personal discretion

7.4 It is worth reiterating here a number of key features of the ministerial discretion powers noted in Chapter 2. A previous Senate Committee Report summarises the section 417 power as follows:

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

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

3. If the minister substitutes a more favourable decision he/she must present a statement to inform Parliament of the new decision reached;

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

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

6. The minister is under no duty to consider whether to exercise this power.[1]

7.5 Section 351 is substantially the same, except that there is no provision in the latter to exclude from the statement presented to parliament information that may identify the applicant or associated persons other than their names.

Broad personal discretion in 'the public interest'

7.6 The result of the way these powers have been framed is that the minister for immigration is vested with a broad discretion to overturn a tribunal decision and grant a visa on the grounds of 'the public interest'. The Commonwealth Ombudsman noted that:

> It has customarily been noted by courts that the phrase "public interest" confers an unconfined discretion on a decision-maker, comprehending all relevant matters of advantage and disadvantage.[2]

7.7 In evidence to the Committee, he added that:

> The minister's discretion is an outstanding example of what we call an unconfined discretion. It is a discretion which does not have to be exercised, and it is a discretion which is exercised on the ground of public interest. In theoretical terms, there can be no broader discretion than that.[3]

7.8 As noted in Chapter 4, 'the public interest' has generally been broadly interpreted by successive ministers to include recognition of a wide range of humanitarian and compassionate circumstances.

7.9 The minister may, as all ministers have done since 1990, produce guidelines setting out what kind of cases he or she may consider as possibly raising public interest considerations. The Commonwealth Ombudsman underlined the value of an executive policy such as the ministerial guidelines providing structure and guidance

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1 Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.238

2 Office of the Commonwealth Ombudsman, Submission no. 28, p.7

3 Professor McMillan, Office of the Commonwealth Ombudsman, *Committee Hansard,* 18 November 2003, p.14

for the exercise of a broadly-expressed power. He also pointed out the risk of such an executive policy being followed too narrowly without adequate regard for the breadth of the power it is supposed to inform. He suggested that the former MSI 225 overcame that risk by stating that: "*My ability to exercise my public interest powers is not curtailed in a case brought to my attention in a manner other than that described above*" and that the guidelines are not exhaustive and each case: "*will depend on various factors and must be assessed by reference to the circumstances of the particular case*".[4]

7.10 As can be seen, then, the ministerial guidelines are a guide for departmental staff, and are not binding on the minister's decision making. Ultimately, what factors are relevant to determining 'the public interest' in any given case are up to the minister.

7.11 As noted in Chapter 2, the minister is also not bound by certain sections of the Migration Act when using the discretionary powers. Under the provisions of sections 351 and 417 the minister, when exercising the discretionary power, is not bound by subdivisions AA and AC of the Act and the regulations that complement those subdivisions. DIMIA informed the Committee that the practical effect of these provisions is that the minister does not have to be satisfied that criteria specified in the Migration Act are met and is not restricted as to the type of visa that can be granted.[5]

7.12 According to DIMIA, the Minister not being bound by the entirety of the Migration Act and Regulations in the exercise of these powers:

> …allows individual cases to be considered against public interest factors that are broader than the strictures of the regulatory criteria.[6]

7.13 The Committee notes here the broad discretion vested in the hands of the immigration minister. The Committee has heard of no equivalent ministerial discretion in other Commonwealth legislation.

Power is non-delegable

7.14 Sections 351(3) and 417(3) provide that the powers may only be exercised by the minister personally. In practice, the decision not to consider whether to exercise discretion can be delegated to departmental staff, as discussed in Chapter 4.[7] As noted there, the immigration department performs an important screening function by

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4 Commonwealth Ombudsman, Submission no. 28, p.9

5 DIMIA, Submission no. 24, p.15

6 DIMIA, Submission no. 24, p.17

7 This has been confirmed by Merkel J in *Minister for Immigration and Multicultural Affairs v Ozmanian* [1996] 141 ALR 322. See also Senate Legal and Constitutional References Committee, *A Sanctuary Under Review* (2000), p.263

providing detailed submissions to the minister only on those cases departmental officers have assessed as raising public interest considerations.

7.15 However, the decision to exercise discretion to grant a visa can only be made by the minister. In effect, the minister is the sole arbiter of 'the public interest' with the power to determine who will be granted a visa through this process.

Power is non-compellable and non-reviewable

7.16 In addition to conferring a personal discretion on the minister to make decisions based on 'the public interest', the legislation provides that the minister does not have a duty to consider whether to exercise the power.[8]

7.17 In effect, because the minister cannot be compelled to exercise the discretionary power, the minister's decisions under sections 351 and 417 are not subject to judicial review. DIMIA stated that:

> As the minister cannot be compelled in the exercise of the ministerial discretion powers, there is no scope for a court to issue orders of mandamus, prohibition or certiorari to the minister in respect of the ministerial discretion powers. It is also not clear that a court would be able to make a declaration in such circumstances.[9]

7.18 The codification in 1989 of the then existing discretions under the Migration Act and the non-compellable ministerial discretion provisions introduced in 1989 were intended to quarantine decision making in migration matters from judicial review. DIMIA stated that:

> The breadth of the pre-1989 provisions of the Migration Act also enabled courts to set aside decisions where visas had been refused to onshore persons on the basis of the court's own view of how the discretion should be applied. This was particularly true of cases where there were claims to 'strong compassionate grounds' for remaining permanently in Australia. This led to rapidly escalating numbers coming within these grounds in the late 1980s, and the government no longer being able to set and manage its migration program.[10]

7.19 Elsewhere, DIMIA noted that:

> The non-compellable nature of the power was carefully framed to ensure that an unsuccessful applicant cannot use requests for intervention merely to prolong their stay or disrupt their removal from Australia; nor can a court

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8 Sections 351(7) and 417(7), *Migration Act 1958*

9 DIMIA, Submission no. 24, p.16

10 DIMIA, Submission no. 24, p.4

> order that the minister embark on a consideration of the applicant's case under these discretionary powers.[11]

7.20 What is important to note here is that the minister's personal powers to grant or not grant visas under section 351 or section 417 are not subject to judicial scrutiny. The express intention of framing them in this way was to ensure that the minister's decision was final and not subject to appeal in the courts. Thus an important check on the workings of executive government is absent from the ministerial discretion process.

7.21 The minister's actions in this area are also not subject to the scrutiny of the Commonwealth Ombudsman, as section 5(2)(b) of the *Ombudsman Act 1976* (Cth) provides that: 'the Ombudsman is not authorized to investigate…action taken by a Minister'.[12]

Requirement to table statements in parliament

7.22 The only check on the minister's use of the discretionary powers is the requirement to table statements in parliament every six months. Sections 351(4) and 417(4) set out this requirement as follows:

> (4) If the minister substitutes a decision under subsection (1), he or she must cause to be laid before each House of the Parliament a statement that:
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> (a) sets out the decision of the Tribunal; and
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> (b) sets out the decision substituted by the minister; and
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> (c) sets out the reasons for the minister's decision, *referring in particular to the minister's reasons for thinking that his or her actions are in the public interest.* [Emphasis added]

7.23 The legislative intention of providing for tabling statements is to ensure a measure of parliamentary scrutiny of the minister's use of his or her discretionary powers. In his closing speech to the second reading debate on the Migration Amendment Bill (No. 2) 1989, the then Minister for Immigration, Local Government and Ethnic Affairs, Senator Ray, stated:

> I can intervene in the public interest, but I must report to this chamber as to why I have intervened. That is our critical achievement in progress through the migration law. Let us make sure that those reports are scrutinised by every honourable senator. If that happens we can guarantee that fairness and equity can flow in immigration like it never has before.[13]

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11 DIMIA, Submission no. 24, p.7

12 Commonwealth Ombudsman, Submission no. 28, p.4

13 *Senate Hansard*, 14 December 1989, p.4609

7.24 The then Member for Dundas, Mr Ruddock MP, told the House of Representatives on 21 December 1989 that:

> Obviously it is important that the parliament be aware of the way in which a power of this sort is exercised … There is a specific provision for public reporting in relation to the new power that is being introduced: the minister will report six-monthly on the way he has exercised this power in particular circumstances.[14]

7.25 In theory, these statements should provide sufficient information for parliament to understand how the powers are operating, and effectively scrutinise the incumbent minister's use of them. Whether they are an adequate accountability mechanism is considered below.

Operation of the powers under Minister Ruddock

7.26 During his seven years as Minister for Immigration, Mr Ruddock made more use of the ministerial discretion powers than any previous minister. As noted in Chapter 3, he used the powers to intervene in 1916 cases from 1996 to mid-2003, with an additional 597 interventions made between July and October 2003.[15] General reasons for the growth in the use of the powers were discussed in Chapter 3. However, some aspects of Mr Ruddock's personal use of the powers are worth noting.

7.27 Many witnesses, from both inside and outside the department, gave evidence that Mr Ruddock was attentive to the ministerial discretion workload. Ms Marion Le said she had a great deal of respect for Mr Ruddock's knowledge of the immigration law, and suggested that the system had only worked because of his depth of knowledge of the way the system worked and the law.[16] Mr Lombard similarly said that the system only worked: 'because the minister is incredibly assiduous in the amount of work he does'.[17] Dr Mary Crock suggested Mr Ruddock had an extraordinary capacity for work and for attention to detail.[18]

7.28 Witnesses from the department gave evidence that Mr Ruddock had extensive knowledge of the Migration Act and regulations gained through his experience and long term commitment to this policy area. They suggested that Mr Ruddock often had

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14 *House of Representatives Debates*, 21 December 1989, p.3458

15 Figures provided by DIMIA, Senate Legal and Constitutional Legislation Committee *Hansard* (Budget Estimates Supplementary Hearings), 4 November 2003, pp.41 and 43.

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

17 Mr Lombard, George Lombard Consultancy Pty Ltd, *Committee Hansard,* 22 September 2003, p.57

18 Dr Crock, *Committee Hansard,* 21 October 2003, p.44

greater knowledge of the Act than departmental officers, and could think of options that departmental officers simply had not thought about.[19]

7.29 Mr Ruddock as minister would on occasion use the intervention powers in ways not suggested by departmental staff. The department gave evidence that from mid 2000 to mid 2003 Mr Ruddock requested full submissions on 105 cases that the department had placed on a schedule, presumably as they were assessed as not falling within the ministerial guidelines. Likewise, Mr Ruddock would on occasion choose to grant a visa class outside the range presented by the departmental submission.[20]

7.30 Departmental witnesses saw nothing unusual in Mr Ruddock acting outside the scope of departmental advice in his use of the powers. Ms Godwin, a deputy secretary of DIMIA, told the committee that:

> …because it is a non-compellable discretion, because our role in it is to provide the minister with information and because in the end it is his decision to make and his alone that, notwithstanding the information put before him, if he also raises other issues for consideration or takes a view beyond that which is in the material put by the department then that is consistent with the nature of the power.[21]

7.31 When the minister does choose to act outside the scope of departmental advice, even where he appears to act contrary to his own published guidelines, he is not required to provide any explanation for so doing. Even departmental officials could be left in the dark as to reasons for the minister's decisions.[22] Referring to the minister's choice of visa class, the department noted that:

> The type of visa granted is a matter for the minister to decide. The minister is not required to provide an explanation for his decision other than in the information tabled in parliament, nor is the department required to report on his decision.[23]

7.32 Despite repeated requests to DIMIA to provide relevant case files, the Committee has not been able to examine individual cases where Mr Ruddock may have acted contrary to his own guidelines by intervening in a cased assessed by DIMIA as falling outside them. It therefore remains unclear to the Committee exactly

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19 Mr Storer, DIMIA, *Committee Hansard,* 5 September 2003, p.67

20 Mr Knobel, DIMIA, *Committee Hansard,* 5 September 2003, p.57

21 Ms Godwin, DIMIA, *Committee Hansard,* 5 September 2003, p.69

22 Ms Johanna Stratton's submission includes the following quote from interview with a DIMIA officer: '…unless you are able at the time [the minister] makes the decision, to be in his mind, it's impossible for us to even give you the slightest hint as to why the minister may decide that a particular type of visa should be granted.' Submission no. 10, p.22

23 DIMIA, Submission no. 24D, Answer to question I6.

what may have prompted the minister to seek further information about a case placed on a schedule: whether there was something in the brief case summary that caught his attention, or whether his desire for further information was triggered by other considerations. It does seem unlikely to the Committee that, of the thousands of cases presented in the schedule format, the minister would select a few for special consideration solely on the basis of a brief case summary.

7.33 As mentioned in Chapter 6, the Committee heard in evidence that Mr Ruddock was open to discussing individual cases with advocates able to access him or his office, such as parliamentarians and community leaders. A departmental liaison officer, Mr Peter Knobel told the Committee that:

> The minister [ie. Mr Ruddock] has made it clear that he is open to speak to parliamentarians and community leaders about individual cases.[24]

7.34 While he would not usually discuss cases with individuals who called his office,[25] Mr Ruddock was open to interested people at community events making representations to him about cases. After such events, he would sometimes seek information on cases that had been raised with him. Mr Knobel said that:

> The minister [Mr Ruddock] is often out and about at functions and meets many people. Occasionally he will come back with a case that has been raised with him and he will just ask for some background information on where it is at.[26]

7.35 This could happen at any stage of the process. In some instances, Mr Ruddock would alert his DLOs, and through them the MIU, of a case raised with him where a formal intervention request had not yet been made. As noted in Chapter 6, Mr Ruddock would on occasion alert DLOs to a case that had been raised with him at a community function before an application had been received, and the DLOs would in turn notify the relevant MIU that the case was coming through.[27] Referring to such occasions, Mr Knobel said:

> I recall that on those occasions the minister alerted me to the fact that an intervention request would be coming through and that there might be circumstances surrounding it that could warrant consideration.[28]

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

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

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

27 Mr Knobel, DIMIA, *Committee Hansard,* 5 September 2003, p.77

28 Mr Knobel, DIMIA, *Committee Hansard,* 5 September 2003, p.78

7.36 It does seem therefore that direct contact with Mr Ruddock at a community event could help expedite a case through the department's initial processing phase as Mr Ruddock was prepared to alert the department to cases of interest to him before they reached him through the normal channels.

7.37 The mixed views of external stakeholders about the appropriateness of raising individual cases directly with the minister were canvassed in Chapter 6. The Committee observes that Mr Ruddock's open door policy appears to have added to the perception that direct access to him could assist a case gain ministerial intervention. Mr Ruddock does not seem to have taken steps to contain this perception by, for example, insisting that all cases should be processed on equal terms by the department before being brought to his attention. Mr Ruddock's willingness to discuss individual cases at community events and other functions may also have encouraged a climate in which community leaders could assert that their links with the minister could help individuals known to them get visas through the ministerial intervention process.[29]

7.38 Again, without access to individual case files, the Committee has been unable to examine the extent to which the media allegations of undue influence of certain community leaders on Mr Ruddock's decision making are justified. As repeatedly stressed by departmental witnesses, the intervention powers are the minister's alone, and he or she is the sole arbiter of the 'public interest'. Any need to document decision making appears to stop once a case reaches the minister's office. Exactly what factors led to intervention in some cases and not others may be known only to the minister, or recorded in case files or documents the Committee was unable to obtain.

Family ties

7.39 The Committee heard strong anecdotal evidence that Mr Ruddock had a clear preference for intervening in cases where the applicant had family connections in Australia rather than cases raising purely humanitarian considerations. As seen in Chapter 3, this anecdotal evidence is backed up by data on the type of visas granted under the intervention powers, which show a preponderance of spouse and close ties visas granted under both sections 351 and 417.

7.40 One issue raised in connection with Mr Ruddock's use of the powers to recognise family ties is that his judgment of what constitutes 'family ties' could be entirely subjective, and bear no reference to relevant legislation. A number of witnesses suggested to the Committee that Mr Ruddock was more likely to intervene on behalf of an applicant with biological Australian citizen children than Australian citizen step children. If this were the case, it appears to be contrary to the definition of 'child' in both the Migration Regulations and the Family Law Act.[30] Another witness suggested

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29 In-camera evidence

30 For example, Mr David Bitel, Submission no. 26, p.2, Mr Clothier, *Committee Hansard,* 18 November 2003, p.41. Ms Le disagreed, citing a case where the minister had intervened on behalf of an applicant with step children. *Committee Hansard,* 18 November 2003, p.47

that Mr Ruddock was more likely to intervene on behalf of an applicant with Australian citizen children if that applicant had not previously been married or in a relationship giving rise to children.[31]

7.41 Whether the minister's personal judgment of what constitutes 'family ties' when considering an intervention request is inconsistent with other legislation is a moot point. The Committee has not been able to test these assertions, owing to the lack of detailed information on what factors influenced the minister's decision in any given case, especially where the minister decided not to intervene. More importantly, since there is no avenue to appeal the minister's decision to the courts, there is no way to test whether the grounds for a given decision are consistent with other Commonwealth legislation.

Accountability to parliament

7.42 As noted above, the sole accountability mechanism in cases where the power is used to grant a visa is the requirement to table statements in parliament on a six-monthly basis. According to the legislation, these statements should set out the minister's *reasons for* thinking intervention is in the public interest.

7.43 While the statements made under section 351 go some way to providing case specific reasons for ministerial intervention, those made under section 417 since 1998 provide no case specific reasoning. The majority of witnesses to this inquiry argued that the ministerial statements under s417 contain insufficient information to judge how the power is being used. The complaint was succinctly put by Dr Crock, who said that: 'they do not tell you anything'.[32] In *A Sanctuary Under Review* the Senate Legal and Constitutional References Committee reported that 'the only information that can be gleaned from [s 417 tabling statements] is the number of times the discretion has been used, and the type of visa class granted'.[33]

7.44 There has been some evidence of a decline in the amount of information provided in the section 417 statements during Mr Ruddock's tenure as immigration minister. Research undertaken by Ms Johanna Stratton noted Mr Ruddock's failure since 1998 to provide case-specific reasons for section 417 interventions.[34] Supporting

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31 Mr George Lombard, Submission no. 16, p.6. In evidence to the Committee, Mr Lombard stated that it was a departmental officer who told him this was the case, *Committee Hansard,* 22 September 2003, p.54. This assertion appears to supported by evidence from the NSW Legal Aid Commission, Submission no. 17A, p.2.

32 *Committee Hansard,* 23 September 2003, p.28

33 Senate Legal and Constitutional Affairs Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.265

34 Ms Johanna Stratton, Submission no. 10, pp.27-28

Ms Stratton's research, the Catholic Commission for Justice Development and Peace submitted that:

> The result of the current practice of only referring to the public interest reason without specifically stating what it is, means that there is a lack of clarity about the reasons behind the minister's exercise of s 417 and makes it an opaque and unaccountable process.[35]

7.45 The Refugee Council of Australia commented that:

> … it was the practice that the minister would set out in parliament the case-specific reasons why he/she had chosen to exercise these [discretionary] powers. This is no longer done. The minister now uses a standard reporting format, making reference to the public interest. This means that it is no longer possible for parliament to scrutinise the reasons why decisions have been made, making the process far less accountable and opening the way for criticism that the system is being abused.[36]

7.46 DIMIA claimed that the nature of the tabling statements has been consistent over the years. Ms Godwin stated:

> There are minor variations in wording, but essentially they reflect, I think, successive views about the balance between the need for information and the need to meet, in some instances, statutory requirements … if you look at the tabling statements over a period of years the pattern has remained pretty much the same.[37]

7.47 However, the Committee's examination of the tabling statements supports the view that section 417 tabling statements no longer provide reasons for the minister's decisions. Until late 1997, reasons were generally given, even if these were often not particularly revealing. For example, ministers often merely stated that the applicant would face hardship or severe hardship if returned to his of her country of nationality. Some were more detailed, for example, 'The applicant is from India, has suffered torture in the past and because of his subjective fear, it would be inhumane to return him to India'. Since late 1997, however, a standard form of words has been used, namely, 'Having regard to the applicant's particular circumstances and personal characteristics, I consider it would be in the public interest to allow the applicant to remain (temporarily) in Australia'. Examples of statements tabled in parliament before and after 1997 are at Appendix 6.

7.48 It is the Committee's view that this now-standard form of words is not sufficient for parliamentary scrutiny. The statements are failing to provide, as required by

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35 Catholic Commission for Justice Development and Peace, Submission no. 15, p.13

36 Refugee Council of Australia, Submission no. 12, p.3

37 DIMIA, *Committee Hansard*, 5 September 2003, p.32

legislation, the ministers *reasons for* considering his or her actions to be in the public interest. The Committee appreciates that it may be difficult in some cases for the minister to balance the legislative requirement under paragraph 417(4) that reasons be tabled for the decisions with other requirements under paragraph 417(5) that are intended to protect the applicant or the applicant's associates. Nevertheless, the Committee considers the statements that were presented by the former minister inadequate for the purposes of parliamentary scrutiny. Sufficient information should be provided for the Houses to determine how the discretionary powers are being exercised.

7.49 As noted above, Mr Ruddock's statements relating to the use of his discretion under section 351 set out case-specific reasons. Nevertheless one witness suggested that these statements could be made more useful if they included the names of the persons concerned. Mr Clothier argued that, given that MRT hearings are public and its decisions are published, there is no justification for secrecy. He suggested that:

> Parliament could, in my view, could go a long way to fixing this problem, by amending section 351 and making all non-refugee interventions transparent to the public. The minister would have to truly justify himself if he intervened for one person's grandmother but not for another and people would be able to compare and judge those interventions because they would be out in the public arena, which is what I think parliament really intended in 1989.[38]

7.50 The Committee notes advice from the Privacy Commissioner that other means of making the operation of the powers more transparent should be carefully considered before seeking to amend the legislation to name individuals.[39] However, given the pressing need for parliament to have sufficient information to scrutinise the use of the powers, and that MRT decisions are public, there seems little justification for withholding the names of all people granted a visa through the ministerial intervention process where the safety of the individual or their family is not an issue.

7.51 The Commonwealth Ombudsman also highlighted the need for the tabled statements to provide more information so that parliament can understand how the system is operating. He suggested that:

> The transparency of the system would be enhanced if the minister's notification statement to the parliament under ss 351 or 417 indicated briefly the path by which a case came to the attention of the minister – by an approach from the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department, or in some other way. Over time,

38 Mr Michael Clothier, Submission no. 20, p.2

39 Office of the Federal Privacy Commissioner, Submission no. 43, p.3

> this would enable a better picture to be drawn of the manner in which this important aspect of the migration scheme is operating.[40]

7.52 The Committee's inquiry has found that meaningful transparency and accountability in the ministerial intervention processes essentially stops at the door to the minister's office. The Migration Act vests a very broad personal and non-reviewable discretion in the minister, and the now-standard format of statements tabled in parliament when the powers are used provides inadequate information about the operation of the powers. With a process designed to deal with a few exceptional cases now being used on average several hundred times each year, this Committee considers it more important than ever to improve the transparency and accountability of the minister's decision making process.

Recommendation 15

7.53 The Committee recommends that the minister ensure all statements tabled in parliament under sections 351 and 417 provide sufficient information to allow parliament to scrutinise the use of the powers. This should include the minister's reasons for believing intervention in a given case to be in the public interest as required by the legislation. Statements should also include an indication of how the case was brought to the minister's attention – by an approach from the visa applicant, by a representative on behalf of the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department or in some other way.

Recommendation 16

7.54 The Committee recommends that the Migration Act be amended so that the minister is required to include the name of persons granted ministerial intervention under section 351 in the statement tabled in parliament unless there is a compelling reason to protect the identity of that person.

Volume of cases decided by the Minister

7.55 Another feature of the operation of the ministerial discretion powers during Mr Ruddock's tenure is the comparatively large number of cases in which intervention was both sought and granted. As observed in Chapter 3, use of the minister's discretionary powers has gradually become more frequent since they were inserted in the legislation, going from 17 cases in 1992-92 to 483 cases in 2002-03, to 597 cases in three months from July to October 2003. DIMIA suggests that the number of interventions may simply reflect the expanding pool of cases that qualify for consideration of ministerial intervention. Yet the sheer volume of cases reaching the minister's desk for consideration raises two related issues: can a minister possibly give equal consideration to so many cases, and is it appropriate that a minister's time

40 Commonwealth Ombudsman, Submission no. 28, p.11

should be spent considering the details of thousands of individual cases rather than on overall policy development?

7.56 The Refugee Council of Australia suggested that during 2003, the minister would have before him or her, in addition to the 9 – 12 thousand persons whose cases will be affirmed by the tribunals, 1700 East Timorese who applied for refugee status in the early 1990s and about 140 Kosovars who were granted 3-year Temporary Humanitarian Concern visas that expired in August 2003. During 2004, the minister could also have to deal with more than 2000 requests from persons whose Temporary Protection visas expire. The Council concluded that the workload would be unreasonable for any full-time worker, let alone a minister of the crown with exhausting portfolio responsibilities.[41] Witnesses from the department confirmed that assessing ministerial intervention cases is 'an enormous workload on the minister of the day'.[42]

7.57 In his last week in that office, the former minister personally decided some 203 individual cases,[43] including at least 129 East Timorese.[44] The Committee calculates that, even if the minister had worked a 40 hour week doing nothing but assessing intervention requests, that allows at most 17 minutes for considering each intervention. This calculation does not allow for cases the minister considered but chose not to intervene, or for any other work during that week.

7.58 While many witnesses to the inquiry suggested that the former minister dedicated great time and attention to these matters, even he appears to have felt under some strain due to the quantity of work that was being generated by requests for ministerial intervention. Mr Purcell told the Committee of a meeting with Mr Ruddock where:

> He [Mr Ruddock] was expressing his frustration at the sheer volume of requests that were coming through under section 417 and saying that it was beyond any one individual to be able to work through that volume of applications.[45]

7.59 Given the number of cases reaching his desk, it is unsurprising that Mr Ruddock would have felt some frustration. It would be surprising in fact if he were able to give equal consideration to the merits of every one of the cases put before him and still

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41 Refugee Council of Australia, Submission no. 12, p.3

42 Mr Storer, DIMIA, *Committee Hansard,* 5 September 2003, p.56

43 Senate Legal and Constitutional Legislation *Committee Hansard* (Budget Estimates Supplementary Hearings), 4 November 2003, p.43

44 *Committee Hansard,* 18 November 2003, p.69

45 Mr Purcell, Catholic Commission for Justice, Development and Peace, *Committee Hansard,* 17 November 2003, p.33

have time to fulfil his other portfolio responsibilities. Unfortunately, procedural constraints have prevented the Committee from directly seeking Mr Ruddock's views.

7.60 This was not the intention when the powers were inserted in the Act. On the contrary, the changes were in part designed to limit the minister's involvement in individual cases. In parliamentary debate on the 1989 legislation, Senator Ray noted that the old system giving the minister power to reverse any decision made by a departmental officer:

> …can result in a minister becoming involved in the minutiae of the portfolio, at the cost of developing overall policy in the depth which, in my view, is essential.[46]

7.61 In relation to the 1989 changes, he said that:

> My concern is to ensure equity and consistency in decision-making. I believe this is best done where a minister concentrates on determining overall policy directions, and limits decision-making to those classes impacting most on national well-being.[47]

7.62 The Committee heard several witnesses suggest that the large number of cases reaching the minister is one of the problems in the current regime. Ms Biok of the Legal Aid Commission of NSW, noted the thousands of applications that are received regularly. She suggested that:

> Because of this, it is difficult for many of the applicants to understand what will constitute a successful appeal to the minister. This does create a perception in many people's minds that there is a randomness to who gets a visa through the ministerial powers.[48]

7.63 The Committee also heard suggestions that the blow-out in the number of cases being decided personally by the Minister reflects systemic problems. Ms Marion Le told the Committee that if an immigration minister was taking so much upon himself in making these decisions then there was something wrong with the system. She suggested that:

> That is because no minister should have that many cases going through to him if everyone down the line is acting with integrity and only bringing cases that are…ones that people consider to be absolutely essential.[49]

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46 *Senate Hansard*, 5 April 1989, p.922

47 *Senate Hansard*, 5 April 1989, p.922

48 Ms Elizabeth Biok, Legal Aid Commission of NSW, *Committee Hansard,* 22 September 2003, p.22

49 *Committee Hansard,* 18 November 2003, p.49

7.64 Ms Le felt that poor quality decision making in the first instance and at the RRT was contributing to the rise in the number of cases reaching the minister.[50] She suggested that the department was 'not doing its job' in some cases, which led to the minister having to exercise his intervention powers unnecessarily.[51] She also suggested that more flexibility in the system would avoid the need for the minister to personally decide so many cases.[52] This concern relates to the arguments discussed in Chapter 9 about the desirability of placing the only meaningful discretion in an otherwise heavily codified system in the hands of the minister.

7.65 Yet the volume of cases decided by Mr Ruddock is at least to some extent a matter of personal choice. The Committee notes that 1994 guidelines issued under Senator Bolkus included the following paragraph:

> Review Monitoring Section will monitor and report regularly on any interventions, and will initiate discussions with policy areas and the minister's office when it appears that a series of particular decisions to intervene may indicate that a preferred approach may be to amend current procedures or regulations.

7.66 Mr Ruddock, however, does not seem to have taken the view that continued use of ministerial intervention for similar cases was in itself problematic and should lead to reconsideration of the regulations. For example, the Committee heard that many of the cases receiving ministerial intervention relate to parents of Australian citizen children. One witness suggested that these cases could be more appropriately dealt with by creating a visa category,[53] which would mean that such cases could be dealt with through normal administrative processes and would not need to be considered by the minister in person. Mr Ruddock does not appear, however, to have considered this desirable or necessary, preferring to decide such cases himself. Similarly, since 1997 Mr Ruddock has chosen not to create special visa categories for groups such as the East Timorese, preferring to decide each case in person using the ministerial intervention power.

7.67 Mr Clothier suggested to the Committee that one reason ministers have preferred to use this power is to woo ethnic communities.[54] While the Committee has not heard unequivocal evidence to suggest that this was Mr Ruddock's intention, it notes that excessive use of the minister's personal power rather than usual administrative processes increases the scope for politicisation of immigration decision making.

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50 *Committee Hansard,* 18 November 2003, p.50

51 *Committee Hansard,* 18 November 2003, p.49, p.55

52 *Committee Hansard,* 18 November 2003, p.52

53 Mr George Lombard, George Lombard Consultancy Pty Ltd, *Committee Hansard,* 22 September 2003, p.49

54 *Committee Hansard,* 18 November 2003, p.34

7.68 The Committee considers that the high volume of cases that Mr Ruddock dealt with in person indicates serious problems with the operation of the ministerial discretion system. If ministerial intervention is necessary to ensure a fair or desirable outcome in so many cases then this suggests that the system as it exists is becoming unmanageable as the workload being generated is too great for one minister to handle.

7.69 The evidence suggests that Mr Ruddock himself had doubts that it was feasible for an individual minister to cope with the caseload. The Committee finds it surprising, then, that Mr Ruddock did not take steps to investigate the factors causing the high number of applications or find other ways to address a situation that he recognised as problematic.

7.70 The Committee considers that ministerial discretion should be a last resort to deal with cases that are truly exceptional or unforeseeable. No immigration minister should be left in the position of micro-managing the immigration system. Where a series of interventions in similar cases suggests a recurring problem, a preferable approach would be to amend the regulations or institute a group visa class so that such cases can be dealt with under normal administrative processes.

Recommendation 17

7.71 The Committee recommends that the minister should make changes to the migration regulations where possible to enable circumstances commonly dealt with using the ministerial intervention power to be dealt with using the normal migration application and decision making process. This would ensure that ministerial intervention is used (mainly) as a last resort for exceptional or unforseen cases.