Chapter 9

Appropriateness of the minister's discretionary powers

9.1 This chapter looks at some of the points of view raised during the Committee's inquiry on the appropriateness of the minister's discretionary powers within the broader migration system under term of reference (b). Having examined aspects of the recent operation of the powers in earlier chapters, this chapter looks chiefly at the desirability of vesting all discretionary powers in the migration system in the hands of the minister alone.

9.2 As we have seen in earlier chapters, the ministerial discretion powers were inserted during the 1989 codification process to provide an outlet to deal with difficult cases that did not fit statutory visa criteria. It was parliament, not the incumbent minister, that insisted on the discretion resting with the minister rather than a departmental delegate. This approach was different from that suggested in the Committee to Advise on Australia's Immigration Policies' (CAAIP) report and model migration bill, which advocated building some room for discretion into the migration regulations themselves so that departmental officers would have some room to grant visas in difficult cases.

9.3 Since the powers were inserted in the Act, we have seen a gradual increase over time in their use, to the point that in 2002-03 the minister personally intervened in some 483 cases using these powers, having presumably considered many more. Essentially, powers designed to take care of a few difficult cases each year seem to have become an established path of review for visa applicants. In light of this, the question of whether the ministerial discretion powers remain the best way to deal with difficult cases needs to be reviewed.

9.4 This chapter notes the reasons put forward for maintaining an outlet for the exercise of discretion in an otherwise codified visa system. It discusses why governments have opted to retain the discretion solely in the hands of the minister and some of the concerns raised by witnesses about this approach.

9.5 Finally, this chapter considers the appropriateness of the minister's discretionary powers continuing to exist in their current form under term of reference (d). It proposes a new model to make the operation of the powers more transparent and accountable.

The need for discretion in the migration system

9.6 Almost all witnesses to this inquiry have agreed that some capacity for discretion needs to be built into what is otherwise a highly codified visa system. No legislation or regulations could be expected to anticipate all possible life circumstances, and an immigration system bound strictly by codified visa criteria with no room for discretion could result in harsh and unintended consequences for individuals and communities.

9.7 DIMIA's submission noted that:

> The discretionary powers are integral features of the legal framework of the [Migration] Act, providing a 'safety net' for the exercise of migration laws which are generally fair but may, in certain exceptional cases, lead to an unintended harsh result.[1]

9.8 It went on to say that:

> Given the highly prescriptive nature of the statutory framework, the discretionary powers allow cases that do not fit neatly within that framework to be resolved at minimum cost to the applicant where:
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> - there are compelling individual circumstances, such as where the person has strong family ties in Australia;
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> - they would meet criteria for a visa, but are barred from making a further application while in Australia;
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> - their circumstances do not fit within the statutory criteria, due to a deficiency with those criteria which may have been subsequently changed; or
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> - they face removal from Australia and significant international obligations for Australia may arise.[2]

9.9 While expressing reservations about the current form of the ministerial discretion powers, the Migration Institute of Australia described the powers as 'an important safety valve in an otherwise discretionless system' and argued strongly for the discretion to be maintained.[3]

9.10 Legal practitioners who gave evidence to the inquiry were in general agreement that there needs to be some discretionary power in the area of migration law. Mr Paul Fergus suggested that:

> …a largely discretionless system works hardship on individuals in many instances since it cannot address all the circumstances of all cases that come before departmental officers. It is necessary, therefore, to provide a mechanism to overcome this and the Ministerial discretions to grant visas are appropriate to achieve this end.[4]

9.11 Mr George Lombard had the following to say on the need for discretionary powers in the system:

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1 DIMIA, Submission no. 24, p.14

2 DIMIA, Submission no. 24, p.8

3 Migration Institute of Australia, Submission no. 32, pp.6-8

4 Mr Paul Fergus, Submission no. 4, p.1

> We are very much in favour of the continued availability of discretionary powers to overcome the straightjacket of strict regulation under the Migration Act…In effect, the existence of this power acknowledges that there are imperfections with the Migration Act and Regulations and that instead of attempting to foresee and forestall each and every possible negative eventuality through legislation, it is more convenient to offer this failsafe mechanism for protecting the innocent.[5]

Humanitarian cases

9.12 As discussed in Chapter 8, the minister's discretionary powers are the primary means which humanitarian claims not falling within the Refugee Convention definition can be recognised onshore. While questions have been raised about their adequacy in this regard, most asylum-seeker advocates supported their retention, especially in the absence of any complementary protection system. Amnesty International, for example, argued that:

> The Ministerial Discretion under s417 of the Act is an essential part of the current system, as it is the only opportunity for those with a well founded fear of returning to their country (though not for reasons as set out in the 1951 Convention…) to be granted protection.[6]

9.13 In sum, the Committee has found almost unanimous support for having some capacity for discretion in the migration legislation. This seems entirely logical given the difficulty of framing regulations capable of producing fair outcomes in the myriad of individual circumstances to which they may be applied. Agreeing that there needs to be capacity for the exercise of discretion, however, does not necessarily entail agreeing that that discretion should rest solely with the minister.

Should the discretion rest only with the minister?

9.14 While some submissions to this inquiry have argued that the current ministerial discretion powers are in fact the best way of allowing for the exercise of discretion,[7] many of the submissions appear to have supported the existence of the ministerial discretion powers simply in preference to having no capacity in the legislation for the exercise of discretion. Ms Jennifer Burn summed up this view in evidence to the Committee, saying:

> My view would be that because the migration jurisdiction is so codified there has to be some kind of method to ameliorate the strict effect of the regulations. The only method that we have, really, is the Minister for Immigration and Multicultural and Indigenous Affairs exercising his personal discretion…[8]

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5 Mr George Lombard, Submission no. 16, pp.1-2

6 Amnesty International Australia, Submission no. 23, p.2

7 See, for example, Mr Paul Fergus, op. cit

8 Ms Jennifer Burn, *Committee Hansard*, 23 September 2003, p.22

9.15 Other witnesses supported the minister having a power to intervene in truly exceptional cases but advocate some discretion being built into the system at a lower level to deal with many of the cases that can now be decided only by the minister.

9.16 In justifying the existence of the ministerial discretion powers on the grounds that they offer necessary flexibility in an otherwise rigid system, DIMIA's submission fails to acknowledge that alternative approaches could have been taken to provide the same degree of flexibility. It appears to assume that demonstrating a need for discretion in the system is enough to demonstrate the appropriateness of ministerial discretion.

9.17 In considering the appropriateness of the ministerial discretion powers, then, it should be pointed out that ministerial discretion was not the only way that some discretion could have been built into the legislation. In this context, it is worthwhile noting briefly the approach suggested by the CAAIP before the migration reforms took place in 1989.

Building discretion into the regulations: CAAIP's approach

9.18 DIMIA's submission suggests that the ministerial discretion powers inserted in the Migration Act in 1989 were in line with the views of the CAAIP and supported by parliamentarians and all parties.[9] This does not seem consistent with the evidence discussed in Chapter 2 showing that the powers were not initially supported by the minister of the day, but were in fact inserted at the insistence of the opposition parties late in December 1989. This Committee has heard persuasive evidence that the powers are not in a form recommended by CAAIP.

9.19 Mr Michael Clothier, who was a member of the legal panel responsible for drafting CAAIP's model migration bill in 1987, points out in his submission that that bill did not give the minister the power to overrule the regulations.[10] Instead, a degree of discretion was built into every statutory rule, as described in the following excerpt from the CAAIP report:

> Each rule will feature both a policy objective and the criteria for making a decision. Some criteria will be essential, some will not. A decision maker will be expected to consider all the criteria in reaching a decision. However, in exceptional cases where strict application of the criteria would produce an unfair or unjust result, there will be room for discretion in favour of the applicant. The rules are intended to give a high degree of predictability of decisions for the people affected by them and those who act as advisers.[11]

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9 DIMIA, Submission no. 24, p.26

10 Mr Michael Clothier, Submission no. 20, p.1

11 Mr Michael Clothier, *Committee Hansard*, 18 November 2003, p.31. The extract is from *Immigration: A Commitment to Australia*, Report of the Committee to Advise on Australia's Immigration Policies, Australian Government Printing Service, Canberra, 1988, p.113.

9.20 The CAAIP report advocates a pivotal role for the minister in setting rules that define the criteria for decision making under the bill. It envisages that all powers under the Act would be vested in the minister. However, the power to exercise discretion in individual cases is delegated to decision makers at the departmental level, who can act with the authority of the minister.[12]

9.21 Both Mr Michael Clothier and Dr Mary Crock suggested to the Committee that an approach devolving the capacity to exercise discretion to primary decision makers would be preferable to one that channels all power to make such decisions into the hands of the minister.

9.22 Mr Clothier expressed the opinion that the immigration department had 'botched' the codification reforms in 1989 by refusing to build appropriate discretions into the regulations themselves. This led, he suggests, to:

> Enormous pressure on the Minister to intervene when the Department's regulations produced many absurd outcomes and failed to allow discretion in cases where it was needed.[13]

9.23 Dr Crock also felt the current system had gone 'off the rails' by not giving some discretion to primary decision makers. She spoke of a draining of power from the bureaucracy, accompanied by a 'loss of belief in notions that individuals should be able to choose and to exercise balancing functions in a way that is legitimate'. She said:

> With one stroke of the legislative pen in 1989 we had removed from the Migration Act the power to grant visas on strong humanitarian or compassionate grounds. That was never replaced, except with this residual discretion that we have vested in the minister. Therein, I think, lies the main problem.[14]

9.24 Ms Jennifer Burn expressed a similar view to Dr Crock, stating that:

> My feeling is that the problem is not just that the minister has been given more discretion but rather that everybody else has had their discretion taken away from them. The thrust of my submission is that it is not bad per se to have discretion in a system. On the contrary: I would advocate the reintroduction of discretion. The problem with the system is that the discretion is focused in one person. What we need to see happen is the diversification of power again.[15]

9.25 Having established that there was an alternative to ministerial discretion advocated by the government's expert advisory body prior to the powers being

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12 *Immigration: A Commitment to Australia,* Report of the Committee to Advise on Australia's Immigration Policies, Australian Government Publishing Service, Canberra, 1988, p.113

13 Mr Michael Clothier, Submission no. 20, p.1

14 Dr Mary Crock, *Committee Hansard*, 23 September 2003, p.19

15 Mr Jennifer Burn, *Committee Hansard*, 23 September 2003, p.23

inserted in their current form, the Committee next considers the factors that have led governments to adopt and support this approach.

Why ministerial discretion?

9.26 In Chapter 2 the Committee noted the reservations of then minister Robert Ray about placing the discretion in the migration system in the hands of the minister rather than a departmental delegate. On Parliament's insistence, however, the final form of the legislation as amended in December 1989 gave the minister a non-compellable, non-delegable, non-reviewable discretion in individual cases rather than giving any discretion to departmental decision makers.

Political responsibility for migration decisions

9.27 In parliamentary debate on the 1989 codification reforms, Mr Philip Ruddock, as shadow minister, opposed vesting the discretion in the Secretary of the immigration department as proposed in the original legislation. His reasoning was that:

> …it is inappropriate for the Minister to divest himself of that discretion, a discretion which was seen by us to be important and, certainly, was seen to be important to ethnic communities in Australia.[16]

9.28 The Opposition's view was put more expansively by Senator Richard Alston, who said:

> We welcome the Government's ultimate decision to retain in the Minister the discretion to make the ultimate decision on who should enter this country and who should remain here. As the Minister said previously, it is necessary to detach final decisions from political influence but, at the end of the day, there are some decisions the Government simply cannot shirk. It is a responsibility of the Government, not the bureaucracy, and there are and always will be hard cases.[17]

9.29 He also expressed a view that it is not appropriate to vest real decision making power in the bureaucracy, saying:

> It has been a change for the better that the Minister, to his credit, has been prepared to rethink the matter and to have the discretion vest where it ought to vest and not be devolved to bureaucrats, who should not be put in the invidious position of having to make hard decisions.[18]

9.30 Initially, then, the discretionary powers were vested in the minister rather than the bureaucracy at least in part because of a view that, ultimately, it is politicians, not bureaucrats who should be responsible for migration decisions.

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16 *House Hansard*, 1 June 1989, p.3484

17 *House Hansard*, 29 May 1989, p.2958

18 *House Hansard*, 29 May 1989, p.2958

Flexibility

9.31 A clear advantage for the government in having a ministerial discretion is the flexibility it allows to deal with difficult cases quickly without needing to change the legislation or regulations. DIMIA's submission states:

> The Minister's non-compellable discretionary powers provide the flexibility to address specific individual circumstances (for those groups of people for whom access to review rights is warranted) that were not intended or envisaged by the strict statutory rules governing the grant of visas. This flexibility is provided in a manner that ensures factors such as relevant international obligations are respected, and broader public interest factors can be addressed.[19]

9.32 The ministerial discretion powers enable such flexibility in individual cases without ceding any influence to the courts, or setting precedents that would broaden the scope of migration regulations, as discussed below.

Government control over immigration intake

9.33 DIMIA's submission and evidence to this Committee reflected a view that retaining the ministerial powers as the only place for the exercise of discretion in the migration system is necessary to maintain government control over immigration. DIMIA's submission stressed Australia's 'rigorous and transparent approach' to selecting migrants, and the risk of 'informal and unregulated movements' breaking down public confidence in the system.[20] It stated that:

> The migration selection criteria have been framed to ensure that those criteria cannot be interpreted such that the government loses its ability to effectively manage its migration program. Immigration is about people's lives and people do not always fit neatly within visa categories. The Ministerial discretion powers provide a mechanism for dealing with people in extenuating or exceptional circumstances that cannot be easily legislated in visa rules.[21]

9.34 It went on to argue that:

> Without the Ministerial discretion powers, considerable pressure would be placed on the rigorous migration selection criteria we have in place and we could be forced to take a less rigorous approach by lowering Australia's standards in the selection of migrants.[22]

9.35 This paragraph appears to suggest that building discretion into the regulations themselves, or allowing anyone other than the minister to exercise discretion in

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19 DIMIA, Submission no. 24, p.51

20 DIMIA, Submission no. 24, p.13

21 DIMIA, Submission no. 24, p.13

22 DIMIA, Submission no. 24, p.13

interpreting and applying migration law would lead to a watering down of the criteria and result in less meritorious applicants being granted a visa.

9.36 DIMIA's submission also suggested that keeping the discretion in the minister's hands only is necessary to prevent 'unmeritorious' applicants using review processes to prolong their stay in Australia, saying, for example that:

> These powers provide flexibility in an otherwise highly prescriptive visa process with set criteria. The flexibility provided by the scheme enables the government to provide responsive visa solutions in exceptional and unforeseen circumstances in a way which retains its capacity to manage the onshore visa framework and also limits the scope for unmeritorious applicants to use processes to frustrate and delay removal from Australia.[23]

9.37 It stated that suggestions in the Sanctuary Under Review report on aspects of the powers' operation have been ignored 'due to the capacity to undermine or remove the Government's ability to effectively manage its migration program.'[24]

9.38 Maintaining control over the outcome of onshore applications appears to be one factor behind former Minister Ruddock's preference for using ministerial discretion to deal with difficult categories of case, such as the East Timorese, rather than create regulations to deal with systemic problems affecting large numbers of people. DIMIA's submission stated in relation to this that:

> The Government's approach has been to work within the existing legislative framework including the exercise of the Minister's public interest powers to resolve the status of large numbers of people. This represents a move away from adopting broad group resolution approaches, which tend to grant permanent residence without regard to the strength of the individual's claims for residence and more importantly without weeding out those group members who clearly would have little personal claim for special treatment.[25]

9.39 In justification of this position, DIMIA's submission stated that the approach taken by previous ministers of creating special visa classes:

> …was not based on a full case by case assessment of the person's circumstances, it did not address whether there were individual compelling circumstances, nor did it address the outcome for those who did not meet the criteria for a special category visa.[26]

9.40 It seems a somewhat surprising admission to say that the regular assessment process for a visa in any category is not based on a full case by case assessment of a person's circumstances. Also, given that the former minister personally decided some

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23 DIMIA, Submission no. 24, p.7

24 DIMIA, Submission no. 24, p.33

25 DIMIA, Submission no. 24, p.44

26 DIMIA, Submission no. 24, p.45

203 individual cases in his last week in that office,[27] at least 129 of which were East Timorese,[28] the Committee wonders how thoroughly he was able to assess each individual case on its merits.

9.41 It would seem to the Committee that creating regulations to account for such large groups of cases would at least provide clear criteria against which a case could be assessed and a degree of certainty in the process for the applicants concerned. Instead, this government has chosen to use an inscrutable ministerial discretion power which provides no criteria other than the 'public interest' against which to assess individual cases. Additionally, there is no avenue of review at all for those who are not granted ministerial intervention at the end of the day.

9.42 The government's preference for using the ministerial discretion power to determine cases such as the East Timorese reflects a key benefit of this type of system from the government's point of view: it enables the minister of the day to retain tight control over the immigration intake, to the point of retaining final decision making power over individual cases.

Limiting the influence of the courts

9.43 From the government's point of view, another key benefit of having the discretionary power in the hands of the minister stems from its non-compellable and non-reviewable nature. As seen in Chapter 7, this means that a court cannot compel the minister to consider exercising his discretion in a particular case, and thus enables a minister to make decisions on individual cases that cannot be reviewed or challenged in the courts.

9.44 As also pointed out in Chapter 7, DIMIA's submission states that the non-compellable nature of the power was carefully framed to prevent abuse of court processes to avoid deportation. Elsewhere, DIMIA suggests that making the powers compellable:

> …would establish an opportunity for litigation with the potential for the test for intervention being widened and potentially lowered.[29]

9.45 During his tenure as immigration minister, Mr Ruddock was outspoken on his views on the desirability of keeping the courts from interpreting migration law in ways the government did not intend, as was noted in Dr Mary Crock's submission. Dr Crock cited as an example the following excerpt from a speech by Mr Ruddock:

> It is the government, not some sectional interests or loud intolerant individual voices or ill-defined international interests, or, might I say, the

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

28 Ms Godwin, DIMIA, *Committee Hansard*, 18 November 2003, p.69

29 DIMIA, Submission no. 24E, Answer to question on notice from 5 September 2003

> courts that determines who shall and shall not enter this country, and on what terms.
>
> …Only two weeks ago a decision to deport a man was overturned by the Federal Court although he had been convicted and served a gaol sentence for possessing Heroin with an estimated street value of $3 million. Again, **the courts have reinterpreted and re-written Australian law – ignoring the sovereignty of Parliament and the will of the Australian people. Again, this is simply not on.**[30]

9.46 DIMIA's submission makes it clear that vesting the only discretionary power in the hands of the minister is designed to limit the influence of the courts and maintain executive control over the administration of the migration program, noting that:

> The statutory framework ensures that external influences such as the courts and various commentators can not expand the statutory rules to include circumstances never intended by the government. The expansion of these provisions, together with large number of persons seeking to advantage themselves by claiming to come within those interpretations could jeopardise, and render meaningless, the careful and considered settings of the government's migration and humanitarian programs.[31]

9.47 In sum, vesting the discretion in the hands of the minister reflects a view that ultimately it is the minister, rather than officials, who should be responsible for decisions on who is and is not granted a visa to Australia. This approach has a number of advantages for the government, by limiting the influence of external bodies such as the courts on migration decisions and enabling tighter government control of the immigration intake.

Arguments against ministerial discretion

Challenges to the separation of powers and the rule of law

9.48 This report is not the place for a full length dissertation on the subtleties of the notions of the separation of powers and the rule of law as foundations of Australia's political system. However, the Committee must note concerns expressed by several witnesses that the structure of the current migration system, with its largely unfettered ministerial discretion powers to determine individual cases as well as set migration policy, undermines these important principles.

9.49 Dr Mary Crock suggests that the former minister's statements on the desirability of keeping the courts out of the migration process show disregard for notions of separation or balancing of official powers.[32] She notes the worrying implications of

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30 Dr Crock, Submission no. 34, pp.2-3, citing Mr Ruddock, Address to the National Press Club Canberra, 18 March 1998 (emphasis added by Dr Crock).

31 DIMIA, Submission no. 24, p.52

32 Dr Mary Crock, Submission no. 24, p.3

the stance apparently taken by the former minister that, because a minister is an elected representative, his should be the final word in any administrative process. She writes:

> This way of thinking is predicated on very simplistic notions of both democracy and the Rule of Law…the Minister appears to be alleging that because he is elected, he alone should be the source and voice of government policy; and that for the courts or other 'unelected' body to oppose his policies or interpretations of the law is anti-democratic and anti 'the rule of law'.[33]

9.50 Dr Crock's argument is that vesting the minister alone with the power to exercise discretion in individual administrative decisions conflates the power to set policy and introduce legislation into parliament, which is the legitimate power of an elected government, with the power to make the ultimate choices in individual cases.[34] She cautions against making the leap to say that, just because a minister has the legitimate power to set policy, he or she should therefore be the only one to determine the outcome of particular cases.[35] She argues that:

> To accept that one individual should be vested uniquely with this power to choose, or to exercise power, is to render indiscernible the divide between democracy and tyranny. [36]

9.51 Mr Michael Clothier also voiced concerns about the current system of ministerial discretion undermining the rule of law. His evidence to the Committee suggests a view that the current situation, where thousands of cases are considered each year for ministerial discretion and hundreds are decided in person by the minister, in effect takes us back to the days before codification. It places excessive power in the hands of the minister to 'micro-manage' Australia's immigration discretions without appropriate checks and balances.[37]

9.52 In short, the argument has been put forcefully to this committee that placing the only discretionary power in the migration system in the hands of one person, albeit an elected minister, with no opportunity for judicial or meaningful parliamentary scrutiny, undermines the notions of separation or balancing of official powers. Without wishing to engage in a long theoretical debate on Australia's political system, the Committee notes the question mark that has been raised about whether the ministerial discretion powers as currently framed are appropriate in this context. In light of the increasing use of these powers to determine hundreds of cases every year free from any meaningful scrutiny or accountability, and with nothing to ensure

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33 Dr Mary Crock, Submission no. 24, p.3

34 Dr Mary Crock, Submission no. 24, pp.3-4, and *Committee Hansard*, 23 September 2003, pp.31-33

35 Dr Crock, *Committee Hansard*, 23 September 2003, p.31

36 Dr Mary Crock, Submission no. 24, p.4

37 Mr Michael Clother, Submission no. 20, and *Committee Hansard*, 18 November 2003, p.35

natural justice for those not granted intervention, it would seem that some concern on this front is justified.

A system open to corruption?

9.53 Several witnesses to this inquiry have expressed concern that a system which places the only meaningful discretionary power in the hands of the minister without meaningful scrutiny is open to corruption, if not inherently corrupt. Dr Crock suggested that:

> Any system will become corrupt when one person alone has the power to choose, particularly where the responsible individual is not accountable in any meaningful sense.[38]

9.54 In response to questioning on whether she saw the current system as being actually corrupt, Dr Crock stressed her point that it is 'corruptible', meaning open to corruption and certainly open to the perception of corruption.[39] She suggests that, even if the politicians involved are 'as pure as the driven snow', by concentrating all discretionary power in one individual, the system itself encourages unscrupulous behaviour behind the scene.[40]

9.55 Mr Clothier expressed a similar view, suggesting that a system where a minister has a 'completely unfettered power' and will be influenced by people connected to him has led to:

> …growing corruption in that area. You have to have, because if you have unsupervised power you are going to get corruption. It is axiomatic.[41]

9.56 Mr Clothier later made the point that the sort of corruption to which he refers is not in the form of direct bribes for the exercise of ministerial discretion, but rather the wooing of ethnic communities using that special power.[42]

9.57 Mr Marc Purcell also had similar concerns, suggesting that Lord Acton's famous quote 'Power corrupts and absolute power corrupts absolutely' is relevant here as:

> S417 has all the elements of unfettered power inherent in its operation, which could undermine the integrity and probity of the most scrupulous of Immigration Ministers.[43]

9.58 Leaving aside for the moment arguments about systemic corruption, claims that the structure of the system inevitably leads to the perception of corruption have been a

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38 Dr Mary Crock, Submission no. 24, p.4

39 *Committee Hansard*, 23 September 2003, p.36

40 *Committee Hansard*, 23 September 2003, p.35

41 *Committee Hansard*, 18 November 2003, p.35

42 Mr Clothier, *Committee Hansard*, 18 November 2003, p.34

43 Catholic Commission for Justice, Development and Peace, Submission no. 15, p.22

constant refrain throughout this inquiry. Many witnesses argued that, while they had seen no suggestion of actual corruption in the way ministers have used the power, the structure of the system, with its lack of accountability and lack of public information leaves it open to the perception of corruption in the form of favouritism and influence peddling. This view was put by Mr George Lombard, who, without suggesting that there is actual corruption in the system at present, submitted that:

> The volume of discretions exercised by the present government is of course at record levels, and to exercise these discretions in this secret way invites patronage, inconsistency and uncertainty.[44]

9.59 Other witnesses were concerned that vesting the discretionary power in the immigration minister, whose work inevitably involves maintaining relationships with representatives of ethnic and community groups, will invite suspicion that the minister's personal relationships will influence the exercise of the discretionary power. This point was made by Ms Judith Burgess of the Immigration Advice and Rights Centre, who said that:

> We are concerned that such a perception could discredit the process of Ministerial intervention and ultimately make the Minister less inclined to use the power.[45]

9.60 While ultimately in favour of retaining a discretionary power as a safety net in the migration system, Ms Burgess made the point that this need not be done by the minister personally. Her suggestion was that the public interest power could be exercised by a panel of people appointed by the minister, instead of by the minister personally.[46]

9.61 The point here is that while discretionary powers may be necessary, a system which vests all power in the hands of one individual without proper checks or accountability is open to the perception of corruption. This is ultimately undesirable, as it undermines confidence in this part of the migration system, and leaves room for unscrupulous behaviour at all levels.

Prolonging the visa determination process

9.62 A final point worth considering is whether, in the broader context of the application, decision-making and review process, the discretionary power should be available only at the end, once an applicant has exhausted all avenues of merits review. DIMIA told the Committee that making the powers available only after a visa applicant had exhausted their merits review rights was an important factor in their development.[47] Putting them at the end was presumably designed to preserve the

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44 Mr George Lombard, Submission no.16, p.2

45 Immigration Advice and Rights Centre, Submission no. 22, pp.5-6

46 Immigration Advice and Rights Centre, Submission no. 22, p.6

47 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, p.3

statutory basis and consistency of visa decision making generally, while having a last avenue of redress in circumstances where the system had produced a manifestly harsh or unreasonable outcome.

9.63 While the intention seems sound, as has been seen in Chapter 5 the Committee has heard evidence from many witnesses that having this discretion available only at the end of the decision-making and review process can cause unnecessary delay and hardship for individuals in unusual or difficult circumstances. There is also the issue considered in Chapter 8 of non-Refugee convention related humanitarian claims, which can only be considered after a lengthy assessment and review process against irrelevant criteria.

9.64 Worth noting here is a perhaps unintended consequence of having this unusual discretionary power at the end of the merits review stage: namely, that it has apparently come to be seen by many as, in effect, a supplementary tier of merits review. The department and/or former minister evidently did not see this state of affairs as desirable, and the reduction in the number of protection visas granted following section 417 ministerial intervention was in part designed to suppress this view.[48] Ms Godwin stressed that the ministerial discretion process was not a third tier of review, but a safety net after all of the formal processes have concluded.[49]

9.65 The Committee suggests as a possibility that placing the only discretionary power at the end of the appeals process may in fact detract from the finality of the established decision-making and merits review system. While the intention of limiting discretion throughout the decision-making process is to limit the grounds for appeal, thus streamlining the visa determination process, an open ended, vaguely defined discretionary power coming after the merits review stage appears to prolong it in the eyes of many determined visa applicants.

A flawed approach?

9.66 Ms Jennifer Burn argued in her submission that the current Migration Act and Regulations represent a flawed approach to migration decision-making, suggesting that:

> The legislative scheme fails to offer a framework for decision-making in situations that fall outside a strictly prescriptive codified fact situation. The failure of the legislation to deal in a sensible and legally appropriate way with non-citizens who make humanitarian and compassionate claims has led to a situation where an approach to the Minister for the exercise of his discretion in the public interest is the last legislative resort.[50]

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48 DIMIA, Submission no. 24D, Answer to question I3

49 Ms Godwin, DIMIA, *Committee Hansard*, 23 September 2003, p.48

50 Ms Jennifer Burn, Submission no. 30, p.2

9.67 Several other witnesses, such as Dr Crock and Mr Clothier already extensively cited above, maintain that the system put in place in 1989, by placing all discretion in the hands of one person, is inherently problematic.

9.68 Yet in spite of these concerns, by far the majority of witnesses were in favour of retaining the ministerial discretion powers at the end of the process as a final safety-net for difficult cases. Indeed, most witnesses were more concerned with the powers not being used enough for deserving cases than with their existence per se.

9.69 Whatever the flaws in the migration system as a whole that have led to serious complaints about the recent operation of the ministerial discretion powers, most of the evidence put to this committee has supported their existence in some form. The general view is that, while they are not perfect, they are currently a necessary part of a system that would otherwise provide no outlet to recognise difficult cases not dealt with adequately by existing regulations.

Appropriateness of the present ministerial intervention processes

9.70 The Committee accepts the compelling evidence put to it that there needs to be some provision for discretion in an otherwise highly codified visa system. While noting the concerns aired above about the way the ministerial discretion powers themselves are framed, the Committee's chief concerns are not so much with the existence of these powers themselves, but with the problems in their recent operation outlined in previous chapters. Briefly restated, these are: weaknesses in administrative procedures, which can lead to problems for some visa applicants; a perception of favouritism or bias in the way the powers are used, heightened by the apparent influence of certain advocates with the minister; a lack of transparency and accountability, due to the inadequacy of statements tabled in parliament and lack of public information on the operation of the powers; concerns about the adequacy of discretionary powers to implement international legal obligations that are not discretionary.

9.71 The Committee finds that ultimately it would be desirable to consider improvements to the overall migration system to reduce the number of cases currently coming before the minister. However, on balance it seems appropriate to maintain the ministerial discretion powers in some form as a final safety net in cases where the system appears to have produced an unduly harsh or unreasonable outcome.

9.72 Having said that, immediate steps need to be taken to improve accountability and transparency to prevent the risk of corruption endemic to such an unfettered ministerial power.

Recommendation 20

9.73 The Committee recommends that the ministerial intervention powers are retained as the ultimate safety net in the migration system, provided that steps are taken to improve the transparency and accountability of their operation in line with the findings and other recommendations of this report.

9.74 In this context, the Committee notes one of the suggestions put forward by the Migration Institute of Australia for improving the transparency of the ministerial discretion process. MIA's submission contained an option to replace the existing process with one in which a committee reviews the decisions. According to MIA:

> This may best be achieved through the establishment of a statutorily appointed committee, comprising a range of informed parties who are vested with the power to make a decision or recommendation - this could include representatives from DIMIA, a member of a merits review Tribunal, a community representative, a member of parliament, an international representative such as the International Organisation for Migration or the United Nations High Commissioner for Refugees and a migration agent recommended by the MIA.
>
> This group could be either tasked with making the decision or making a recommendation. If the group was tasked with making the decision, then the Minister may wish to retain a veto power. In all cases, the recommendation and the reasons, or an executive summary, could and should be provided to the Minister, the Parliament and the person seeking the intervention as a means of providing transparency and procedural fairness.[51]

9.75 The Committee sees some merit in establishing a system along these lines, although further consideration would be needed to determine the committee's membership. While the Committee believes that the ultimate decision making power should remain with the minister, a statutory committee or independent panel of experts could be formed to review DIMIA's submissions and schedules and make a recommendation to the minister on which cases it considers should receive ministerial intervention. While this recommendation should not be binding on the minister, the statements tabled in parliament should indicate whether the minister's decision is in line with the committee's recommendation.

9.76 The Committee considers that bringing the views of an independent panel of experts into the ministerial intervention process could help improve the equity and transparency of the process and restore public confidence in the system.

Recommendation 21

9.77 The Committee recommends that the government consider establishing an independent committee to make recommendations to the minister on all cases where ministerial intervention is considered. This recommendation should be non-binding, but a minister should indicate in the statement tabled in parliament whether a decision by the committee is in line with the committee's recommendation.

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51 Migration Institute of Australia, Submission no. 32, pp.10-11

Conclusion

9.78 This Committee's inquiry has highlighted a pressing need for reform of the ministerial discretion system. While not opposed to maintaining the powers in some form, the Committee considers that immediate steps must be taken to improve the transparency and accountability of their operation. The Committee's recommendations are therefore aimed at generating more information about the use of the powers and improving the transparency of the decision making process.

9.79 The problems encountered by the Committee in obtaining relevant information to assist its inquiry detailed in Chapter 1 demonstrate the lack of adequate accountability in the recent operation of the powers. If a minister can use the ministerial discretion powers without the possibility that parliament can scrutinise the decision making process then an important check on the workings of executive government is missing, opening the way for corruption and misuse of power. The Committee has ongoing concerns about the recent operation of the powers that have not been alleviated during the course of this inquiry because of the current minister's refusal to provide relevant information as requested.

Finding

9.80 In particular, the refusal by the minister and the department to provide certain key documents and case files has resulted in the Committee being unable to form a view as to the number of matters which were properly the subject of its inquiry. These include:

- The allegations relating to the visa or visas that were issued to Mr Bedweny Hbeiche, as outlined in Chapter 1;
- The basis for the high success rate of intervention requests made by Mr Kisrwani;
- The process by which intervention requests by Mr Kisrwani were dealt with by Mr Ruddock and by the department; and
- The factual basis on, and the process by, which Mr Ruddock exercised his discretion in relation to applicants whose matters the department had determined fell outside the ministerial guidelines.

9.81 The Committee expresses its disappointment that the department and minister have refused to provide certain key documents and information. It notes with concern that many aspects of the information requested were patently within the ability of the department to provide. For example, the Committee requested information regarding the process by which the successful intervention requests were made by Mr Kisrwani in its letter of 29 October 2003. Much of the information requested by the Committee must necessarily have been in the department's hands in order for Mr Ruddock to have responded in the terms set out in his correspondence to Ms Gillard MP on 16 June 2003.

9.82 While appreciating that DIMIA made a significant effort to compile statistical data on the use of the powers to assist this inquiry, the Committee has found that this has not been done as a matter of course, and hence until now parliament and the public have had limited information to understand the operation of the ministerial discretion system as a whole. The Committee considers it essential that statistical data on the operation and use of the powers be routinely kept and published so that parliament and the community can gain an understanding of how the minister's discretion is exercised overall.

9.83 Although the discretionary powers are the minister's alone to exercise, the Committee notes the important role that DIMIA plays in assessing possible intervention cases and preparing briefing for the minister. The Committee considers that DIMIA must take steps to ensure that its processes are rigorous and fair to all applicants, which is why it has recommended that a system of internal and external audit be established to scrutinise the department's decision making processes in this area.

9.84 In light of the concerns about current procedures expressed by many representatives of visa applicants, the Committee has made a number of recommendations to make the system work better for the people it is designed to assist. It is hoped that increased availability of information will reduce the scope for exploitation of vulnerable people caused by the seemingly Byzantine nature of the system at present.

9.85 A key area of concern for the Committee has been to understand all the factors that may influence a minister in the exercise of the discretionary powers. It is clear that representations to the minister made by parliamentarians, lawyers, migration agents and community leaders can be influential. While recognising the importance in a democracy of people being able to make representations to a minister, the Committee is concerned about the perception of bias and favouritism that can be created when access to the minister is seen as necessary to gain a favourable outcome. The Committee considers that improvements to the accountability and transparency of this aspect of the system are essential to address this problem.

9.86 In assessing the appropriateness of the ministerial discretion powers overall, the Committee has concerns that vesting a non-delegable, non-reviewable, non-compellable discretion in one person's hands without an adequate accountability mechanism creates both the possibility and perception of corruption. More potential for external scrutiny of decisions is necessary to bring a greater degree of transparency into the decision making process and reduce the scope for corruption of the system. It is for this reason that the Committee recommends that the Government consider establishing an independent committee to inform the minister's decision making.

Senator Joseph Ludwig

Chair