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SENATE

SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

Reference: Ministerial discretion in migration matters

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SENATE

SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

Wednesday, 22 October 2003

Members: Senator Ludwig *(Chair)*, Senator Santoro *(Deputy Chair)*, Senators Bartlett, Humphries, Johnston, Sherry and Wong

Senators in attendance: Senators Bartlett, Humphries, Johnston, Ludwig, Santoro, Sherry and Wong

Terms of reference for the inquiry:

To inquire into and report on:

(a) the use made by the Minister for Immigration of the discretionary powers available under sections 351 and 417 of the Migration Act 1958 since the provisions were inserted in the legislation;

(b) the appropriateness of these discretionary ministerial powers within the broader migration application, decision-making, and review and appeal processes;

(c) the operation of these discretionary provisons by ministers, in particular what criteria and other considerations applied where ministers substituted a more favourable decison; and

(d) the appropriateness of the ministerial discretionary powers continuing to exist in their current form, and what conditions or criteria should attach to those powers.

WITNESSES

Committee met at 9.01 a.m.

BLOUNT, Mr John, Deputy Principal Member, Migration Review Tribunal and Refugee Review Tribunal

KARAS, Mr Steve, Principal Member, Migration Review Tribunal and Refugee Review Tribunal

LYNCH, Mr John, Registrar, Migration Review Tribunal and Refugee Review Tribunal

CHAIR—Welcome to this hearing of the Senate Select Committee on Ministerial Discretion in Migration Matters. The Senate established this select committee on 19 June 2003 to inquire and report on the use, operation and appropriateness of the ministerial discretion powers under section 351 and 417 of the Migration Act 1958. The committee has received 36 submissions for this inquiry, 34 of which have been authorised for publication and are available on the committee's web site.

Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in a private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I now welcome Mr Steve Karas and officers of the review tribunals, Mr Blount and Mr Lynch. You have lodged submission No. 11 and additional information dated 15 October with the committee. Do you wish to make any amendments or alterations to that information?

Mr Karas—No, other than to indicate that the two matters that we wanted to correct from the record of our first appearance before the committee were contained in the letter of 15 October, as well as information that we took on notice from that first appearance.

CHAIR—Do you want to make a short opening statement, at the conclusion of which the senators on the committee can ask you questions?

Mr Karas—We are quite happy to take questions from the outset, Senator.

Senator JOHNSTON—Yesterday we had a number of witnesses say to us that they were concerned with the level of consistency with respect to the decisions made in the RRT. For the RRT I suspect we can say the MRT too, but the particular emphasis, particularly from one of our witnesses, was that there was such a level of inconsistency in the criteria giving rise to determinations that she perceived it as being unjust. Firstly, I think you need to respond to that and, secondly, I would like to know what mechanisms you have in place to ensure that, in your decision making processes, you do your best to live up to some form of precedent and some form of adherence to consistency. I know it is a very difficult area and that individual applications, whilst superficially similar, are often totally different to each other. Can you just give us a bit of an insight into how you deal with that consistency issue?

Mr Blount—I think it is the case that often there is a superficial inconsistency because matters may be characterised as similar but, in fact, there are often very particular circumstances. However, we do have a number of mechanisms in place to ensure that there is a common starting point in terms of the country information, and in terms of the understanding of the jurisprudence, the legal aspects and so on, and the approaches to them. That is done in a number of ways: through training, the provision of information and each other's decisions to members. When members commence they take part in a fairly intensive four days of training, which focuses very heavily on the legal framework as well as the means of conducting hearings, writing decisions and so on.

Whenever there is a judicial decision of any significance at all, a summary of it is circulated to all members with a link to the text of the judgment. When there are more significant matters, our legal section issues and distributes a bulletin to all members about them. We have, as a result of the accumulation of all that, an internal guide to refugee law, which is available both in hard copy and on the internal web for members. It is kept up to date as new decisions emerge, and people are encouraged to use it. We have similar mechanisms in place with regard to ensuring that we have, and make available to members and draw to the attention of members, the most up-to-date country information on those countries of ongoing interest.

We have from time to time ongoing professional development sessions for members with regard to country situations. For example, we recently had a UNHCR officer from Kabul, who was visiting Australia, come and talk to members about the situation there. Similarly, we had someone from Médecins Sans Frontières, who had been posted in Herat in Afghanistan. So we do this both on an unstructured basis and on an ad hoc basis as people are available. We also, where appropriate, run training sessions on new legal issues. This is both for new members and for ongoing members. We have other mechanisms also. All new members are required to put their first 20 or 30 decisions through the legal section so that that section can draw to their attention any legal errors or questions that may arise. Members generally have the option of referring decisions to Legal for those kinds of comments if they wish, and that happens often when people are dealing with complex or precedential matters.

Where there are caseloads of particular difficulty, or where consistency may be a particular challenge, we take other measures as appropriate. For example, we have started receiving review applications from former TPV holders who have already been to the department of immigration and who are now seeking further protection visas. At the moment those early cases are predominantly Afghan. Significant legal and country information issues arise in relation to those. They are matters which a wide number of members will be doing because we expect that there is going to be a significant number of cases. In that instance—and we have been doing this as a very deliberate process over the last three months—a representative group of those initial cases has been constituted to our four senior members and me. We have been working through the issues in relation to those cases in consultation, as appropriate, with our legal and country people.

Although there is no formal statutory basis for decisions being precedential, we expect that by the time members more generally come to do these cases there will be a number of carefully thought out decisions from the more experienced members that have been done in a very deliberate manner. We will have a legal issues paper circulated. We have already updated the country information, and that would be an ongoing process. In short, we are conscious that this

must always be an issue with a very large number of decisions and a large number of members sitting as a single member tribunal. We do take a range of practical measures to try to ensure that, although outcomes may be different, people are starting from the same basis.

Senator JOHNSTON—You may not be able to answer this, but can you give us an indication of how members perceive themselves? Do they perceive themselves as acting purely administratively, quasi-judicially or judicially? I am interested to know the practical way that members deal with the decision making process. It is very common in some administrative areas for decision makers to pre-empt the decision by disclosing what is on their minds and seeking submissions based on what they perceive to be the kernel of the matter and then having a debate with counsel and/or applicants. Forgive me, I have not appeared before the RRT: is that the way you would do it or is the nature of the judicial proceeding a little bit more stilted in that submissions are taken, you go away and consider your judgment and then come back and announce it? How do they perceive themselves and how do they do the mechanics of handing down decisions?

Mr Blount—It is not judicial. Clearly, we are in a legal sense administrative decision makers but there certainly are some quasi-judicial aspects. What happens can be incredibly wide-ranging, because what presents itself can be very different. There is a very consistent core to it, which is that by the time it comes to us it is at the review stage. So the applicant's own case—their claims and what they see as their relevant experience—have been presented in their application and submissions and, sometimes, if it is a detention case, at least in the primary interview and we have that file. So when a member is constituted a case they open the file, they read it and they see what the applicant's case and claims are. Any obvious difficulties with that case would normally have been spelt out in the primary delegate's record or reasons for decision, which would have been sent to the applicant. That would also contain references to relevant country material. The member, having looked at it, would firstly determine whether it was possible to reach a favourable decision on the papers that were in front of him or her. That is rarely the case—by definition, you have something that has been problematic, which is why it is on review.

Senator JOHNSTON—So the member is actually looking to be positive. You are saying that he is looking to say, 'Is there any way the criteria or thresholds are breached here?' So it is not a negative approach; it is positive approach.

Mr Blount—He has to determine whether he is satisfied that the criteria are met. Initially he does that from the papers in front of him. It is rare that he can reach that view because if the matter was a lay down misère it should not have come to us in the first place—it should have already got a tick. It does happen, but rarely. The member or the tribunal will then write to the applicant advising the applicant that it is not possible to reach a favourable decision on the papers and offer him the opportunity for a hearing to present his case for which he may nominate witnesses. That hearing date typically offered is for somewhere between four to eight weeks in the future.

The tribunal would not normally define the issues at this point, partly because, in essence, they are already defined by the application, the reasons for decision, and, fundamentally, the definition that has to be applied to them. So, in that sense, the issues are normally fairly well flagged. But if there are particular gaps in information, or if the tribunal has particular

information that is personal to the applicant on which comments should be sought, there is a mechanism through section 424 or 424A of the act to seek that information or put that information to the applicant in writing prior to the hearing. But, very frequently, more general information on the situation in the country will be discussed at the hearing. Often, there is not a lot of point in sending out 100 pages of country information in advance to someone whose English is not very good.

The issues often only crystallise in the course of the hearing. My experience has been that you go into a hearing with an expectation that someone has quite a strong case and, within five minutes, you find that things are on a very different footing and the reverse. Those issues do crystallise in the course of the hearing. You explore with the applicant their experiences; you try to draw out what is relevant; you put considerations to them which are perhaps giving you some trouble, or which you need clarification on; and you put information about the country that might be relevant to them in a way that crystallises what that actual issue is.

If there are substantive problems of that sort, you might well—whether or not the applicant or their adviser requested it—give them a couple of weeks post-hearing to hand over country information or not. Depending on how much detail there is and what you have been able to give them the gist of, you can say, 'I'll give you a couple of weeks to come back with any further information or any further comments on anything that has come up at the hearing.'

The hearing itself is conducted more as a formal interview rather than something quite like a court or an AAT hearing. We do not conduct them in our own hearing rooms in the kind of pseudo-court atmosphere that the AAT hearing rooms tend to have. It really is an interview room with a fairly substantial and formal desk on one side at which the applicant and the interpreter sit and the member sits on the other side. But it is a relatively small interview room in the RRT.

The adviser does not have a cross-examining role at the hearing. The most useful role for an adviser is normally assistance with providing a focused submission before and/or after the hearing. Typically, at a hearing the member will explain the purpose of the hearing, the essential elements of the convention definition and what is going to happen. As I said, they will then proceed through exploring the applicant's claims. There would normally be both open-ended and fairly specific questions. There would be opportunities for the applicant to add anything else they wish to say. Towards the end, the member would normally give an indication of the kinds of things that might be a problem or which the member is going to have to particularly focus on to satisfy themselves. If there is an adviser, the adviser will also be given an opportunity after the applicant's evidence to make an oral submission if they wish. Invariably, if they wish to make a post-hearing written submission, that is accommodated.

There is provision for an oral decision to be made at the hearing. That is rarely availed of unless it is a very clear-cut case. Typically the member will reach their final view and write up the decision over some weeks after the hearing. Once the decision has been finalised, under the present legislation the applicant is then called back for the decision to be handed down. That is a very formal procedure; there is no further discussion at that point. The member himself is not involved; it is an administrative matter handled by registry. The applicants simply come in and the one-sentence decision, following the reasons for the decision, is read out and they are given the written reasons. They do not have to attend and I think most of them do not. It is a step that was inserted several years ago. Does that give you a sense of how it works?

Senator JOHNSTON—Yes, thank you.

Senator WONG—Can you remind me about the process of appointment of RRT and MRT members. Those positions are advertised and people apply for them. Is the appointment made by this minister?

Mr Karas—All of the members on the tribunal now were appointed by the government.

Senator WONG—Yes, but in terms of ministerial decision, is it the immigration minister or the Attorney-General?

Mr Karas—The immigration minister appoints a selection advisory panel which interviews selected applicants after an advertisement is placed and applications are made. Certain qualifications and skills are sought in relation to the applicants and they go through an interview process where the selection advisory panel, which is appointed by the minister, interviews a number of people. Then the recommendations are made to the minister. From there I understand the minister will consider the matter and take it to cabinet, and then it goes on to the Governor-General. The appointments are made by the Governor-General.

Senator WONG—Is the selection panel constituted ad hoc or is it an appointment of people to that selection panel for a period of time?

Mr Karas—It is usually brought together at the time of an appointment round. It is usually chaired by a person from the Department of Immigration and Multicultural and Indigenous Affairs because it is a matter for appointment by the minister and government rather than the tribunal itself. I am a member of that panel, or have been for the last number of rounds, since I have been the principal member. There are also one or two other people who are usually on the selection panel who come from a particular background. One who comes to mind was a previous member of the tribunal as well.

Senator WONG—Are tribunal members appointed for five years?

Mr Karas—Three years usually, with the possibility of a renewal of appointment at the expiration of their terms.

Senator WONG—And that renewal can continue how many times?

Mr Karas—Mr Blount is an example; he has been there since 1993—since the inception of the Refugee Review Tribunal.

Senator WONG—We had evidence yesterday that was quite critical of the RRT, suggesting that there was a perception of bias and inconsistency. I am not endorsing these comments; I am simply reporting them to you. There would be those who would argue that having an appointment process entirely done by people appointed by the particular minister and renewable three-year terms instead of fixed terms would certainly create a perception that members might be more likely to want to do things that kept them on the reasonable side of the minister. Do you think it would be more appropriate to have a fixed term appointment of a longer duration to ensure the perception that members are prepared to act and judge without fear or favour?

Mr Karas—It has been a debate in the public arena for some time in relation to appointments and the terms of appointments. Having been appointed to the Immigration Review Tribunal for a period of five years and again for another period of five years and then to the Refugee Review Tribunal and the Migration Review Tribunal for periods of three years on each occasion, I would say—and I think I speak on behalf of most members—that the length of the term really does not enter into your mind vis-a-vis your decision making. One makes the decisions in relation to substantial justice, the merits of the case and the facts that are before you. In other words, when I come to make a decision I do not say, 'Now, how is the government going to react?' or, 'How is this going to impact on my appointment, reappointment or whatever?' I have a job to do. I think I professionally adapt myself to doing that. I do not think the other matters people raise from time to time are as in front of members' minds as the perception seems to be or as they are related to committees of inquiry like your own. But it has been a matter of debate.

I think most people would say that the longer the term the longer people do not have to think about reappointments or anything of that sort, but in practice I find members do not say six months out, 'Look, I'm going to have to start changing the way I make decisions or the outcomes of decisions because I am going to be before the government again for reappointment.' My response to that is that members are professional. They bring their skills to the making of decisions, and the fact that their term is or is not coming up does not really enter into the job that they have to do.

Senator WONG—I appreciate that that is where you come from, Mr Karas. I am more concerned about the perception that people appear to have—and I think you have confirmed that—that a system of three-year rolling renewals is not a system which some practitioners and some advocates would see as being sufficiently separate from the interests of government. I was not so much referring to a longer term but to perhaps a fixed term—in other words, to not having the prospect of renewal. Then from the outside you would remove any incentive to—

Mr Karas—The three-year terms are fixed terms.

Senator WONG—But they are for renewal. I am suggesting that, if you had a non-renewable tenure, that would create a difference of perception.

Mr Karas—But, if you had a non-renewable tenure on the basis that people were appointed for three years, then at the end of three years you would lose all of that experience.

Senator WONG—I am suggesting a longer term.

Mr Lynch—There are a range of issues—apart from the obvious perception issue, which you have raised—which I think need to be taken account of, including management of the case load itself. We have a mix of both full-time and part-time members and, depending on the workload that is available in both tribunals, there is the capacity for the executive of the tribunals to keep people in full employment on a part-time basis—and I am talking about part-time members—for four days a week or three days a week. That is an additional consideration. It is not purely this issue of influence by government.

Senator WONG—Mr Karas, it has obviously been communicated to you before that there is this perception.

Mr Karas—It has been the subject of debate down the years ever since the creation of the tribunal. As I understand, it is the situation with other tribunals as well. But the three-year appointment seems to now be the norm rather than the exception with Commonwealth tribunals.

Senator WONG—Mr Blount, in answer to Senator Johnston, you went through a number of procedural measures you are taking to ensure probity—I think that was the term you used.

Mr Blount—'Consistency' was the word.

Senator WONG—Those would be things one would think should exist anyway. What has prompted you—

Mr Blount—They have existed anyway. This is not new. These are not things we have suddenly done this week.

Senator WONG—What has prompted these new measures?

Mr Blount—I am not quite sure which measures you are referring to as new. The only one that is particularly new is the way we are handling the Afghan-FPV case load, because that case load has just emerged. I was talking, for example, about the legal issues papers that are done about induction training and so on. These have been in the tribunal in one form or other pretty much from the outset. Obviously, different aspects of professional development get developed further over the years. You try to improve what you are doing, but none of these is particularly new.

Senator WONG—I turn to conflicts of interest. I assume cases are allocated to MRT and RRT members by the registry. Is that right?

Mr Lynch—There is a constitution policy in both tribunals. Essentially, in the Refugee Review Tribunal the Deputy Principal Member, through officers of the registry, allocates cases against a number of criteria, including the expertise of particular members, the priority of case loads that the Refugee Review Tribunal may have on hand—detention matters are always a priority—and a range of other considerations based on members' productivity and so forth.

Senator WONG—By the Principal Member or a principal member?

Mr Lynch—The Deputy Principal Member, Mr Blount, in association with registry staff, regularly reviews the compactus holdings of applications for review to establish whether a particular case load is not getting attention. For example, if there is a long period during which cases of a particular country are not being constituted, they are constantly revised to make sure that standards of service are maintained.

Mr Blount—We have a structured constitution policy relating both to countries and to perceived complexity or time involved in particular case loads.

Senator WONG—I assume that the criteria which you use to allocate is written down somewhere—is it?

Mr Blount—We have a constitution policy which we develop and renew every 12 months, which goes through issues like the number of cases. I referred at our last session to the way in which we weight various things to decide what the numbers are going to be for each member. A particular member will know at the beginning of the year, for example, that there has to be a certain number of more complex cases, less complex cases and so on. They nominate particular countries, and we work through it in a fairly systematic, structured way each year.

Senator WONG—Two questions arise out of that. Firstly, could you provide us with a copy of that constitution? Does that set out the totality of the allocation criteria or are there additional criteria set?

Mr Blount—Those are the overall criteria for the case load. Within the case load there is a category that is allocated in a more ad hoc way on a regular basis through the year, and that is of what we call priority cases, which are constituted as priorities rather than waiting in a queue. They are, for example, detention cases, Federal Court remittals, community assistance cases and torture and trauma cases, and we will also be seeking to constitute further protection visa cases as priorities. Each week we see what we have of those, and typically there might be half a dozen. We circulate them and ask members to indicate interest, then a few days later I make decisions on which members get them. If we do not have takers, we make decisions. That particular component of the flow gets constituted very quickly—within a week or so of getting the DIMIA file.

Senator WONG—The second question arises out of that and your previous answer which suggested that members can also nominate countries in respect of which they have particular expertise. So in relation to that and the priority cases there is an element of self-nomination by members.

Mr Blount—There is.

Senator WONG—How do you deal with possible perceived or actual conflicts of interest—for example, if there is a possibility, because the member is familiar with a particular community, that they may know the participants or other members of that community? Do you have any process in place to deal with perceived or actual conflicts?

Mr Blount—People should identify if they have a conflict of interest with a particular case and disqualify themselves from it. It does not arise very often in my recollection. I am not aware that we have any members doing case loads where there is a broader conflict of interest. I do not think that knowledge of a particular country is necessarily a disqualifying factor.

Senator WONG—Certainly knowledge would not be. What I was referring to was perhaps relationships between the member and certain members of the community which might lead to a perceived conflict.

Mr Lynch—We do have a code of conduct which governs integrity issues. We would expect a member to disclose a conflict of that sort when it arose. Members generally do notify us of potential conflicts, even those where a perception may arise in somebody's mind but where there is no potential conflict—for example, a relationship with a migration adviser or some previous

experience in the industry whereby they have handled a particular issue which is now before them.

Senator WONG—Could you provide us with a copy of the code of conduct. Are there any other written procedures which indicate how the tribunals handle perceived or actual conflicts of interest?

CHAIR—Is there a complaint-handling process?

Mr Lynch—As I was going to say, we have a complaints mechanism. The issue you raise is an interesting one, because I do not believe we have had complaints of conflict of interest—certainly none that I am aware of.

CHAIR—That was my next question. Perhaps you could look at whether or not you have actually had any complaints and whether or not it is possible for migration agents to request particular members—whether, when a person makes an application, it just goes into the process or whether you can request a particular member.

Mr Blount—They certainly cannot request a particular member.

Mr Karas—We try to do everything to avoid 'forum shopping'.

CHAIR—I imagine you do.

Senator WONG—So, apart from the complaints process, essentially what you rely on is members either disqualifying themselves or bringing to the attention of, I suppose, the Deputy Principal Member or the Registrar a conflict of interest in respect of a case. Is that right?

Mr Karas—Yes. If one arises, the member would be obliged to bring the matter forward and say: 'I should not be the member for this particular case for these reasons. Could it be reconstituted?' Usually that would be accepted if it were found to be a valid reason.

Senator WONG—I presume that it is similar to most tribunals in that, if an advocate raises a conflict of interest issue, the member themselves has to determine whether or not to disqualify themselves.

Mr Blount—Yes, but if there was a substantive matter of that sort which was not straightforward the member would no doubt discuss it with their senior member or with me.

Senator WONG—But at the end of the day it is the member's decision.

Mr Karas—Not necessarily. If there was a perception by the Deputy Principal Member or the Principal Member of a conflict of interest or a perception of a conflict of interest, it is more than likely that the case would be reconstituted.

Senator WONG—In attachment C in your confidential submission—and I will not go to the names—do you do this matching process quarterly or annually?

Mr Lynch—Matching in relation to the additional information that was supplied?

Senator WONG—I understood that this was a matching between RRT and MRT decisions and outcomes.

Mr Lynch—No. This was the only occasion when that was done. I alluded to it last time we were before the committee. It was a matching exercise undertaken during 2001 by the former acting Principal Member.

Senator WONG—Yes, you gave evidence about this.

Mr Lynch—It is the only example I was able to identify of this sort of analysis of RRT cases by the RRT. You will note that the fourth page of that document does not show analysis undertaken. I attempted to find out why that was so and was unable to get an answer because personnel who might have been involved in that process were no longer with the tribunal or had moved on. It was an exercise that was undertaken at the time and I really do not know a great deal more than that.

Senator WONG—Are you saying to me that there is nothing other than this document which sets out a list of those RRT matters which were subsequently the subject of a positive ministerial intervention?

Mr Lynch—To my knowledge, this analysis has not been repeated.

Senator WONG—Or a similar analysis?

Mr Lynch—Or a similar analysis, no.

Senator WONG—So, if we had questions regarding particular RRT cases which were referred for 417 consideration and they are not on this list, you would not know what the outcome was? Is that how it works?

Mr Lynch—Yes. We receive a list from the department every six months, but we have not worked on those lists, because there is no value-add for us.

Senator WONG—So you have received a list from the department every six months in relation to RRT matters where the minister has intervened under 417?

Mr Lynch—Yes, that is the departmental list of what was tabled in the parliament by the minister.

Senator WONG—Which has RRT numbers?

Mr Lynch—It has departmental numbers, and this list has the matches of the tribunal numbers, with names. We have separately written to the secretary in relation to that.

CHAIR—Do you send that to the relevant tribunal member, Mr Lynch, or do you just file it?

Mr Lynch—On this particular occasion, I do not know what happened. I think there may have been some discussion with some members about the cases. Whether all the members referred to in that list have been referred this document I do not know. It is quite likely that the last acting Principal Member would have discussed these outcomes with some or all of those members. I do not know that.

Mr Blount—I think it was possibly just circulated to members.

Senator WONG—Can we come back to this report from the department? Is it six-monthly or annual?

Mr Lynch—It is six-monthly.

Senator WONG—Does that have both the RRT number and the departmental number or just the departmental number?

Mr Lynch—Just the departmental number.

Senator WONG—So what do you then do with that list?

Mr Lynch—If action were to be taken on it similar to what was taken here, some analysis and cross-referencing on the case management system would be undertaken. There is a great deal of effort involved in that and, as I say, we just have not had the professional interest or the resources to do that.

Senator WONG—So you do not do that?

Mr Lynch—We do not do that.

Senator WONG—So that effectively means tribunal members do not know in relation to which cases the minister has intervened—

Mr Lynch—That is correct, yes.

Senator WONG—even if they have indicated in the judgment that they think this is a matter which deserves humanitarian consideration?

Mr Blount—I do not think they would necessarily put in the judgment that it deserves humanitarian consideration. They would just indicate that the issue arises but that it is not for the tribunal to address.

Senator WONG—There are judgments or decisions where there is a specific reference to the applicant, saying that the applicant should take a 417 application.

Mr Blount—Yes, but I do not think it expresses a view as to what the outcome should be, though. It flags the circumstances.

Senator WONG—There is an RRT file number on which I would like to know whether or not there was any action taken. If I provide you with that number, are you able to determine that from your list from the department?

Mr Lynch—Yes.

Senator WONG—I will not mention the name. It is N01/137400.

Mr Lynch—Senator, we would have to take that on notice.

Senator WONG—I appreciate that. From your previous answers, Mr Lynch, I figured that would be so.

Mr Lynch—As well as our capacity to supply the information, we are constrained by section 439 of the act, which obliges us not to disclose the particulars of a matter, even including to the houses of parliament.

Senator WONG—This case is reported.

Mr Lynch—There are some nice legal issues there as well.

Senator WONG—All I want to know is what happened on the 417 intervention. Presumably that information has also been tabled.

Mr Lynch—I am sure the department could supply that, and we will have a look at whether we are able, at law, to supply that as well.

CHAIR—If you are unable to then perhaps you could refer it to the department.

Mr Lynch—We certainly will do that, thank you.

CHAIR—Or, I suspect, it should be on that list that you have been given by the department at some point.

Mr Blount—But not without—okay.

Senator WONG—A number of advocates, both yesterday and previously, have expressed a view that the current structure, which requires a negative determination from the tribunal before one can access the minister, creates problems for certain people whose claims would always be on the basis of non-refugee grounds. In other words, they do not fall within what one might say are the narrow definitions under the refugee convention; they are arguing protection under the Convention Against Torture or on the rights of the child or the ICCPR et cetera, but they have to go through this process anyway. From your experience, how often does that occur? How often are you in the position of having to determine cases in which it may well be agreed or the facts are simply that this person would not be a refugee and their claim primarily proceeds on humanitarian grounds?

Mr Lynch—The only barometer we have for that is the number of referrals that we would make or anecdotally where it seems during a hearing that an applicant or adviser may pursue a referral to the minister after the hearing. It is impossible for us to provide that answer in a way that would be constructive.

Mr Blount—There are certainly cases, but I do not know the number or proportion.

Mr Karas—From personal experience and anecdotally, I can recall only a handful of cases in the 15 years or thereabouts that I have been associated with the tribunals where someone has specifically said, 'No, we don't meet the criteria; we're only doing it to action an approach to the minister for the exercise of a discretion.'

Senator WONG—Mr Lynch, coming back to what you are thinking of providing us, obviously there is a capacity to provide that evidence in camera—as per attachment C.

Mr Lynch—I think the legislation even contemplates the provision of that information in camera—it is not permissible—so we will take that on notice. We are very happy to supply the information if we are able to.

CHAIR—I understood that to be the case: the provision does contemplate—

Mr Lynch—Expressly so.

CHAIR—In response to your answer to Senator Wong, an applicant would be unlikely to say that they are filing for the purposes of seeking ministerial discretion on humanitarian grounds because they may be able to convince you that they do have a sufficient case or that they do fall within the refugee convention or protocol. They would start out with that—although it may be a slim hope—and the real hope is to follow through the system to the ministerial discretion regime.

Mr Blount—I think that may well be so. It would be very rare that that would be made explicit and, if it is not made explicit, one cannot really presume to know what they have in mind and whether they really have expectations or not.

CHAIR—But over the last four years the number of cases that you have dealt with has risen, has it not?

Mr Karas—In seeking humanitarian intervention?

CHAIR—No, in RRT cases in absolute terms.

Mr Blount—Yes, very much so.

CHAIR—I did not think it was a trick question.

Mr Blount—It has been rising. Having said that, there has been a fall-off in lodgments over the last 12 months, which is reflected in our figures—not a fall-off in the number of decisions we have made, but a distinct fall-off over the last 12 months or so in lodgments, which has greatly

reduced the number of cases at hand. We expect that to be offset very soon as the former TPV applicants come through for review.

CHAIR—Was that what you were referring to earlier in respect of the Afghans?

Mr Blount—Yes. I understand from DIMIA that the proportion of that caseload who are Afghans is about 40 per cent. Whether that is represented in the numbers that come through to us at review, we will see.

CHAIR—That is 40 per cent of the total number potentially could end up—

Mr Blount—As I understand it, of the caseload that DIMIA is looking to make decisions about with regard to further protection visas, something of the order of 40 per cent are Afghans. We do not know what proportion of those will find themselves in a situation where they will need to or want to seek review, but the percentage is probably a fair indication.

CHAIR—So there is no way we can ascertain the amount of work that is referred to you because of ministerial discretion? It is obviously of interest to the committee to understand how your workload is complicated by the use of ministerial discretion after an RRT decision.

Mr Blount—That part of the case load—the former temporary protection visa holders—would all feel that they have a good case for refugee status, given that they have received temporary protection visas on that basis previously. I would expect that part of the case load to be more motivated, in the sense of being convinced of their case, rather than having some of the elements we sometimes see in the more general case load.

Senator SANTORO—I want to explore a bit more the process that sees the tribunals include within their decisions suggestions or issues relating to humanitarian considerations which may then prompt the department to refer them to the minister. You have been through it briefly, but could you take the committee again through the process leading to the inclusion of references to humanitarian issues which may bear further consideration. Would you also tell us how you come to conclude that there are humanitarian considerations worthy of note.

Mr Blount—The tribunal does not purport to undertake a systematic examination of all cases against humanitarian criteria. That is not part of our jurisdiction or of a policy that is entrusted to us, and it is not a matter for which we are resourced separately from our statutory task. However, these matters present themselves in a number of cases. They generally present themselves because the applicant or their adviser either specifically refers to them and seeks humanitarian consideration if they are unsuccessful in obtaining a protection visa or presents factual circumstances as part of their claims or in describing their situation which are clearly non-convention but might attract some consideration for other reasons. The normal procedure when something like that has presented itself is that the member will ensure that the claim that has been made or the factual circumstance that has arisen is recorded in the decision. They would normally go on to say something to the effect of: 'However, the tribunal can only address matters arising in relation to the convention. Non-convention or humanitarian considerations are a matter solely for the minister.' That is what happens in reaching the decision.

If the member feels there is something that someone should look at further with a proper examination against the guidelines, they would not undertake that themselves but would tick a box on our internal finalisation form so that a pro-forma letter is generated which goes from the district registrar to the state manager of DIMIA. That is a very formal, brief correspondence which says something like: 'Please find attached a copy of X decision. This application may raise humanitarian claims. Please note that the tribunal has no power to consider such claims.' It is really flagging the matter. I do not think that in most instances the member would have sat down with the guidelines and done some kind of preliminary pre-screening examination against the guidelines. They have simply noted that something has been raised. Whether it is has arisen because they have drawn a conclusion from what is in front of them or because it has been put in a specific submission, something has arisen which appears to be something that should be flagged for attention to be looked at in the normal process.

Senator SANTORO—So the process really is quite informal and relatively unstructured.

Mr Blount—It is. We would probably do it differently if we had a specific mandate or it were part of a mandated task to do this but, as I explained, it is not part of our present jurisdiction. There has never been a direction or policy from the government that we should examine all the cases in front of us for that. There is simply a means whereby, if the matter does raise itself, there is a mechanism by which a member can flag it if they wish to do so.

Senator SANTORO—I want to develop that point that you just touched on. A number of submissions to this inquiry have in fact suggested that there should be a more formal role, specifically mandated, for the two tribunals in terms of the assessment of humanitarian or compassionate reasons. How would the tribunal feel about that possibility being discussed in a very serious way?

Mr Blount—That is essentially a matter for the parliament or the government to determine. We undertake whatever jurisdiction or task that we are entrusted with.

Senator SANTORO—Putting the policy consideration aside, which I think you rightly say is the province of government to determine, what are the technical issues that would come to mind for members of the tribunals if that additional requirement was put in place in terms of your jurisdiction? What would you see as being some of the more technical impacts in terms of the way the tribunals operate?

Mr Blount—Effectively, there would have to be a two-part process or decision in that members would then be undertaking a subsequent consideration, a second consideration, formally against the detailed guidelines in a way that is not undertaken at the moment. There would be implications in terms of the training for that, the time that would be involved and how we would structure that in decisions or as some kind of formal post decision. There would be implications we would have to work through if we were formally entrusted with that task and, inevitably, with resource implications.

Mr Lynch—I was going to add that in my estimation there would be massive resource implications if the tribunals were given the authority to receive applications based on compassionate, unique, compelling or humanitarian type grounds for a visa of that description. It would add considerably to our workload and I would anticipate a very substantial number of

additional applications a year. I would imagine the flow-on effect to the courts would be very onerous—much more so than the current situation with the courts' backlogs with migration matters.

Senator SANTORO—You have obviously stated one of the big disadvantages according to you, at least, but are there any advantages that you can see to the system as a whole by going down the line that has been suggested by any of the submissions? That is not to suggest that you adopt that extra—

Mr Lynch—It is returning, I guess, to a policy discussion, which we are loath to enter. It returns to the wide discretions of earlier days when compassionate and compelling or humanitarian grounds were a criterion in the act for consideration by primary and review decision makers. As I understand the structure of the program and the regulatory scheme that applies at the moment, many of the considerations that are considered compassionate or humanitarian are essentially catered for in the range of visa classes that exist, including the protection visa.

Mr Karas—The scheme which the legislation and regulations was to provide prescribed circumstances and criteria for tribunals to consider in relation to whether a person satisfied the requirements for the grant of a visa or otherwise, and the tribunal's role is one of administrative review. As a result of that, we stand in the shoes—so to speak—of the original decision maker and can exercise the powers as they reside in that person. Under the legislation, our role is specifically geared towards providing a final merits review in relation to the criteria, which we have to consider for the particular visa class that is before us. The discretion reposed in the tribunal is that allowed by the legislation. What is being suggested here is perhaps an open-ended discretion for people to take into account compassionate, humanitarian and unique circumstances which, unless defined by legislation, would again mean going to a system—which presently is not the case in relation to the review process provided by the legislation for the tribunals now.

Senator SANTORO—What part of the act enables you to raise issues of humanitarian consideration when they are within your decisions?

Mr Karas—We are specifically prohibited, so to speak; there is no visa that can be granted by the tribunal on humanitarian grounds as such. In a situation where the tribunal member may feel—or it has been put to them—that a matter needs to be considered by the minister under the power residing in him under section 351 or 457, the tribunals basically only provide a mechanism for a member to point that out or to raise that. That is as far as the member goes. It is not that the member is able to—and we do not encourage members to—extract evidence other than that which is required for the function they are doing; namely, to see whether the person is able to meet the criteria for the visa applied for. It is not the function for the member to go on another track and see whether there are humanitarian, compassionate or other unique factors in relation to that particular case, unless of course they are needed in relation to the function of seeing whether or not the criteria for the visa that is applied for is satisfied.

CHAIR—A couple of issues arise out of that. The number of pro-forma letters that are generated—are they available by case? Is there any cross-referencing within the number of cases where intervention is then granted?

Mr Karas—On the RRT, after the decision has been made, as John has indicated, a member ticks a box if he thinks a case has raised humanitarian or compassionate considerations. The registry then sends a pro-forma letter with the decision when it sends it to the department. From there, I understand that the department's investigation unit—

CHAIR—The ministerial intervention unit—

Mr Karas—Yes, the ministerial intervention unit has a look at it and from there on it is a matter for them and the minister. What comes back to the tribunal, as has also been indicated by John, is a six-monthly statement which is tabled in parliament. As I referred to once before, it may be that even though the member ticks off a particular case—say, in the way that we have indicated in 2001—the six-month report that comes back may not necessarily include the outcome of that case. We really do not know when—unless we do the crosschecking that John has indicated needs to be done—to find out if in fact the decision in relation to that has been made.

CHAIR—While you say that, though, unless I am missing something it seems pointless. You say you provide them with a pro forma tick box. In my mind, if I were the tribunal member and were to tick a box, I would obviously fill it out with a view. You would like to know, at some point, whether that view was accepted or what happened to that particular case, given that you probably sat across the table and spoke to the person. You would also like some way of understanding the overall scheme—of understanding whether or not that pro forma tick box is worth the tick in the first place, anyway.

Senator WONG—It is not very onerous; it is just a tick.

CHAIR—I know it is not very onerous. And then of course there are those that the tribunal member missed, for argument's sake, which then are approved notwithstanding that they did not fill out or tick a box. There is also that issue—that now I understand—that all tribunal decisions are referred to the ministerial intervention unit. If that is the case, you now do not need to tick the box in any event, as I understand it. I will clarify that with the department, but my recollection is that the ministerial intervention unit looks at all the RRT decisions.

Mr Blount—My understanding is that the only difference it makes is that it would then go forward by individual submission rather than on a schedule. The department has possibly already elaborated that distinction or could do so—that involves its processes. But, in lining up what has been referred with outcomes, one also has to bear in mind that, as the Principal Member has said, the member is only going on such evidence as has emerged in relation to the refugee application. They have not pursued avenues which might have been relevant to developing whether or not something meets the humanitarian guidelines. If something has been mentioned in relation to that, they have not checked the evidence or whether the assertion of, perhaps, some relationship or something is accurate or not. They have only pursued the evidence in relation to those matters on which they have to make their formal decision. Conversely, at the stage at which these matters might be looked at in more detail by the department against humanitarian guidelines, other submissions and information might be put to the department in that context which simply were not relevant to put to the tribunal in its earlier context. So I am not sure that one can necessarily draw any simple conclusion about the way they might line up, because different views have been taken against different criteria on, perhaps, different evidence.

Mr Karas—The ticking of the box is not making a case for the applicant. That is not the role of the tribunal or the tribunal member. Subsequent to that one would expect that if, in fact, the applicant thought that he or she had humanitarian, compassionate or other grounds then that would be the subject of a submission, either by them or by their adviser on their behalf, and the time that they would spend in relation to that submission and the content that they would be wanting to put forward would be a matter for them. It would not be a matter for the tribunal member to extrapolate and say, 'Here's the case for this particular applicant,' as such. The member only makes the decision in relation to the matter that is before him or her and then, if the applicant does want to access the approach to the minister under the provisions of the act, it is a matter for the applicant or their adviser to make the case for that submission, not for the tribunal or its members.

CHAIR—No, you explained it quite well. That is as I understood it—that it was a flagging process—but it just amazes me why you do it, when you then go to such an extraordinary length to tell me why it is not relevant in any determinative process in respect of humanitarian intervention by the minister. Maybe there is a peculiar reason you know that I do not.

Mr Lynch—There is value in identifying the humanitarian issues which the member considers are worth noting and which comply with the ministerial guidelines. There is definitely value in doing that for the applicant and for the integrity of our whole program.

CHAIR—So does the member use the ministerial guidelines, then?

Mr Lynch—Members are aware of those guidelines, but—through the analysis that Mr Blount has given—they would not sit and compare the facts closely against those guidelines with every case. With experience and professional development, members understand—

Senator SANTORO—And the exercise of your heart, perhaps.

Mr Lynch—Exactly; there is that element. Where issues are brought to or come to the notice of the member, they are identified. That is part of this process, and it is a valuable process. Where I think we may differ a little is on the question of whether, at the end of the parliamentary process—or the process where the minister tables his or her decisions—there is value add in the tribunal understanding which way the minister went. Our answer is that we are functus officio, we do not have the resources to explore that and what value—

CHAIR—There is an argument about whether you are functus anyway.

Mr Lynch—I have not heard that one.

CHAIR—The High Court case involving Bhardwaj.

Mr Lynch—Once the decision is handed down on—

CHAIR—But you are administrative—

Mr Lynch—we are functus, as I understand the position. We do not have an ongoing capacity to review decisions once they have been handed down. I am pretty confident that is the correct legal position.

CHAIR—Have you read the August legal briefing by the Attorney-General in respect of Bhardwaj's case? It is a recent case decided in the High Court in respect of jurisdictional error.

Mr Lynch—I have seen the Australian Government Solicitor's advice on that.

CHAIR—It does argue about whether or not you are functus, but I guess that is not an argument for today. I do not think it is that clear. I know you argue strongly that it is, but I do not think it is.

Mr Karas—As we indicated at our first appearance before the inquiry, I emphasise that the role of the tribunal in relation to the minister exercising his or her discretion is a very limited and indirect one. The tribunal as such has no power in respect of the exercise of the discretion under sections 351 and 417 of the act. Because of the fact that it is a limited and indirect one, as indicated by John and me, we only really provide a mechanism for a tribunal member, if in fact they feel it is a matter on which they want to tick the box, to enable them to do that.

CHAIR—Perhaps you could provide the committee with a list of those boxes that have been ticked, so to speak, in the last three years.

Mr Blount—We have supplied those.

Senator SANTORO—Was that the figure of 929?

Mr Lynch—Yes.

CHAIR—I see; thank you. To clarify then: you do not deal with the ICCPR or CAT conventions in any determinative process; that is outside your jurisdictional area.

Mr Blount—Yes.

Mr Karas—Yes.

Senator HUMPHRIES—Following from that last question, is there any reason why the Migration Act could not be structured so as to require the tribunals to consider matters under conventions like CAT and CRC and things like that?

Mr Karas—Again, it would be a matter for the government. It is a policy decision as to the roles and functions of the tribunal. Up until now, the Refugee Review Tribunal has specifically dealt with the conventions and the protocols in relation to those and the legislation that deals with whether a person meets Australia's protection obligations under those.

Senator HUMPHRIES—Why is it that the RRT does have a specific jurisdiction based on the convention on refugees but does not have any link with those other conventions such as the

International Covenant on Civil and Political Rights, the CAT or CRC? Is there any reason for that?

Mr Blount—I am not sure we are in a position to answer that. I am not sure what was in the mind of the government or the parliament of the day at the time. A number of elements of those conventions are subsumed in the refugee convention, and many things arising under those would amount to persecution. The distinguishing element we apply is the convention reason for the feared harm. If you were applying those as well, having regard to those matters without a convention reason being involved, you would be doing something other than determining refugee status—unless the parliament chose to define refugee status otherwise than at present for the purposes of the exercise.

Mr Lynch—I think the protection visa scheme—in the context of the broader migration scheme set out in the act with the other visa classes that are available, including the ministerial discretionary powers—was designed with the practices that we do have and the ministerial guidelines that do exist. The issues you were talking about were designed to be handled or managed in the way that they currently are. The whole scheme has to be looked at. I think those torture and ICCPR child issues were intended to be swept up in the overall scheme.

Senator HUMPHRIES—Some of the other submissions, specifically the Human Rights and Equal Opportunity Commission's submission, make the point that the onus for addressing those particular conventions falls onto ministerial discretion rather than the tribunals. I am just exploring why it could not be structured so it was for the tribunals to consider that. Do you think there are any resource implications if the criteria that you use were widened to pick up those conventions as well as the refugee convention?

Mr Blount—Do you mean as an additional judgment as to whether they met that? Any additional judgment, the same as we were talking about before with a more general discretion, puts a second part into the process against different criteria. That must inevitably have implications for professional development, time, resources and developing the expertise and so on in relation to those other particular matters.

Senator JOHNSTON—Given what you have said so far, that would be relatively minimal. The members are already familiar with the MSI and the broad discretionary indicia that the minister is looking at. If you were going to change it, surely the most efficient and best way to do so would be to simply attempt to incorporate the MSI ground into the review tribunal's jurisdiction.

Mr Blount—I understood Senator Humphries's question to go beyond that and relate to some of these other conventions as well as, or instead of, the more general humanitarian consideration.

Senator JOHNSTON—That also applies. I think the members are very familiar, are they not? It strikes me that the members are uniquely qualified in this area. They know what is going on in other countries, they know the obligations and they know the treaties and conventions that apply. It seems to me that they are a very extraordinary and unique group of people in this area. Is that not the case?

Mr Blount—That is very flattering, but I think that, whenever anything additional is added that is not part of the main assessment at the moment, there would inevitably be a need to look at that and the jurisprudence surrounding it in additional detail. That is only one aspect. That would not affect the fact that there is time involved in having another process wrapped up within the process to address additional criteria—whatever those are. With regard to people's personal capacity to do it, I am sure that could be done, but it is a matter of policy as to what the scheme should be and the provision of the additional resources that might be involved to do that.

Senator JOHNSTON—Doesn't it equate to the difference between, say, Iraq and Afghanistan and Afghanistan and, let's say, Kenya or Ethiopia? You have to understand what is going on on the ground in those countries to understand what the applicants are talking about. Just to shift your jurisdictional basis is a bit akin to that, isn't it? I would have thought that you are looking at the same sort of development.

Mr Blount—I think it is a bit more complex than that. I guess we would not know until we suck it and see.

Senator HUMPHRIES—Can I ask about the cost of proceedings before the tribunals? Who is actually bearing the cost of these applications? Is it entirely the applicants? You might not be able to answer this question. What public subsidies are going into those applications in the form of legal aid, or something akin to legal aid? Are there private or non-government organisations that are subsidising the applications?

Mr Lynch—I am not able to answer what levels of assistance applicants are able to access through legal aid and so on, but with regard to the costs of running the tribunals—

Senator HUMPHRIES—No, I am not referring to the cost of running tribunals, I am talking about the costs of those people who coming before the tribunals—that is, the party costs.

Mr Blount—I think some people have received assistance from non-government bodies of various sorts. I do not think we could quantify that. Some of those bodies, like RACS, may receive government assistance to provide that assistance—DIMIA would have information on that. I understand there has been government assistance to provide legal representation for people in detention, but we are not involved in any of that. We are conscious that people in that category turn up with legal representation and so on, but I do not think we have information about the details and the costs of it.

Senator HUMPHRIES—Would it be fair to say that the majority of applicants who appear before you are represented at their own expense rather than through some other form of support?

Mr Blount—That would probably be the case. Anecdotally one hears that representation, for those who are represented—and many are not, but the majority do have an adviser of record—involves the payment of sometimes substantial sums. As far as I am aware, where it involves many of these migration agents and so on it is not publicly funded.

Senator SHERRY—Are only migration agents or lawyers, who might not be migration agents, allowed to appear before the tribunals on behalf of individuals?

Mr Karas—Under the legislation, the only people who can give immigration advice are registered migration agents.

Senator SHERRY—I understand that, but do the tribunals themselves have the same legal position?

Mr Blount—The only exception is that people are sometimes accompanied to a hearing by a family member or a friend—perhaps a social worker from a community centre they have been associated with—but that person is normally there simply for support. They may sometimes have something to say at the end about character but they certainly do not take the role of an adviser in the sense of a migration agent.

Senator SHERRY—I want to come back to an issue on which there has been a fair amount of discussion already: the fact that members of the tribunals may, and sometimes do, refer to what they regard as compassionate or humanitarian elements in certain cases. Listening to Mr Karas's response, it struck me that that is a somewhat ad hoc approach. It seems to me that it often comes down to the approach of the individual tribunal member to identify humanitarian or compassionate grounds and, if they identify them, to refer to them in some way.

Mr Blount—I think that is true as far as it goes. The tribunal does not undertake a systematic review of humanitarian considerations.

Senator SHERRY—I understand that. I have been critical of tribunal members, but at the end of the day you are gathering evidence and—as I think Mr Karas said—it is not the function of a member to seek humanitarian grounds. However, in the course of gathering evidence some humanitarian grounds might be identified and referred to. Shouldn't we have a level playing field for the identification of such issues? Is it fair that an applicant before a tribunal may accidentally have humanitarian or compassionate grounds identified which then, depending on the particular inclination of the tribunal member, may or may not be referred to?

Mr Blount—If something is raised in the submissions or claims of an applicant or is a significant factual circumstance that arises before the tribunal, that fact will invariably be recorded in the decision in the factual matrix that is set out.

Senator SHERRY—I understand that. You say 'invariably', but it is not. There is no requirement, even if humanitarian or compassionate grounds are identified, to identify them, is there? Sometimes they may not be.

Mr Blount—In the course of setting out people's claims and matters of concern, non-convention matters that they raise at the hearing are recorded because you need to be able to say: 'They were concerned about the continuity of their schooling,' or, 'They have two young foster children here,' or whatever. You might then say: 'However, this is not something that goes to the convention reasons,' but you have to address it in order to determine that it does not go to a convention reason. If they have raised a matter of concern as the reason they do not want to return—a question that is invariably asked is: what is your concern will happen if you return, why can't you return?—that is recorded in the decision. It might not take them anywhere, but it is recorded.

Mr Karas—The safety net provided—if I could use that expression—is what Senator Ludwig alluded to earlier: the ministerial intervention unit of the department, which reads all of the decisions. If the member does not feel inclined to specifically identify or report on those, and the ministerial intervention unit, in looking at the decision, feels that—because of the reference to the evidence provided—there are humanitarian or other considerations, that goes forward to the minister.

Senator SHERRY—It seems to me that the extent to which that is reported and explored is to some extent up to the concern and interest of an individual tribunal member. One tribunal member might draw out further material on that; another tribunal member may not.

Mr Karas—True, on the basis that the members are there to review the application that is before them, and usually that is in relation to criteria for a specific visa application.

Senator SHERRY—I am not being critical of tribunal members; I understand that they have certain criteria they have to meet. I am just concerned about what appears to be in this area a somewhat ad hoc approach rather than a consistent approach. It seems to me that you have an ad hoc approach that has emerged that depends on the individual circumstances and the individual predilections of tribunal members.

Mr Karas—The consistency is related to the process which is provided by the tribunal for the identification of the particular matters that we are discussing. At the same time, it does depend on the evidence that is put forward as to whether there is an identification of those particular items or issues that need to be considered in the way that we were discussing.

Senator SHERRY—But it would also depend, wouldn't it, on individual tribunal members. If it was referred to in passing and an individual tribunal member then chose to explore that material somewhat deeper, that would really be their call, wouldn't it?

Mr Karas—Yes, it would be, on the basis that they are charged with the function of providing the review that we have spoken of before.

Senator SHERRY—Finally, what is the approximate split of full-time and part-time members?

Mr Lynch—We did supply that material in the correspondence of 15 October. In the MRT, there are a total of 68 members. Fifty-four of those are part-time and nine are full-time, and there are four senior members and the principal member, of course. In the RRT there are 81 members. Forty-two of those are part-time and 33 are full-time, and there are four senior members, a deputy principal member and a principal member.

Senator SHERRY—Sorry, I did not read that. What is the basis of the remuneration of part-time members? I assume that the remuneration is set by the Remuneration Tribunal. Is it a per case or a per hour rate for the part-time members?

Mr Karas—It is a per diem fee of $520.

Mr Lynch—It is calculated on the base remuneration of the full-time members, with a loading.

Senator SHERRY—Are all members of the tribunal members of the Commonwealth Superannuation Scheme?

Mr Blount—I shouldn't think so.

Mr Karas—I am not sure. It varies, I think. CSS, PSS and perhaps some private—

Mr Blount—Very few of us have the opportunity to still belong to the CSS.

Senator SHERRY—I thought that given your service, Mr Blount, you might.

Mr Blount—I never change funds.

Senator SHERRY—Very wise.

Mr Blount—I think full-time members are able to join the PSS.

Mr Lynch—And part-time members would have a choice, and they do exercise that choice in relation to their employment with the tribunals, as well as in relation to other employment.

Senator SHERRY—You mentioned the senior members: are they in the CSS, the PSS or the judges superannuation fund?

Mr Karas—It would not be the judges superannuation fund. We are not judges.

Senator SHERRY—I understand that, but there are some members of the industrial commission who are members of the judges superannuation fund and others who are not.

Mr Karas—They must be more fortunate than us.

Mr Blount—The principal member, the deputy principal and senior members only have access to the same ones.

Mr Karas—PSS and CSS.

CHAIR—Senator Sherry should declare his interest in superannuation.

Mr Blount—We all have an interest in superannuation.

Mr Lynch—On declarations of interests, if I could add some additional information to Senator Wong's earlier question. Sections 402 and 467 require disclosure of a conflict. That includes whether the member has an interest:

... pecuniary or otherwise, that could conflict with the proper performance of the member's functions in relation to that review.

The code is underpinned by that.

CHAIR—Thank you.

Mr Karas—I wanted to add in relation to Senator Wong's question that the member must declare if they have a conflict of interest and then it is a matter for the principal member to decide.

Senator WONG—I would like to go back to the confidential aspect of your submission in attachment C. Just to clarify, are those cases in respect of which the minister has granted a visa pursuant to section 417?

Mr Lynch—That is correct.

Senator WONG—Then can you explain to me why one of the cases on the first page identifies the RRT outcome as 'withdrawn'. I understood that the minister can only exercise 417 after the tribunal has made a decision. If the matter was withdrawn, how was the minister's jurisdiction enlivened?

Mr Lynch—Can you direct me to that?

Senator WONG—It is the fourth one on the first page. The RRT reference is N9610864.

Mr Lynch—I will have to take it on notice. There may be some error in double entries or it could be a simple explanation. I would rather not hazard a particular view on that.

CHAIR—Given that it is an in camera matter, I am sure you can take it on notice. If it is an in camera answer then you can provide it that way or if it is not—

Mr Lynch—It has been suggested there may have been an earlier tribunal decision in relation to that. There are a number of possible explanations.

Senator WONG—How could you have an earlier decision and then a subsequent further action?

Mr Blount—The one withdrawn might have been a second application before the present bar was in place.

Senator WONG—If you could let us know. Finally, I was looking at your supplementary submission and attachment B, where you have given us a copy of the generic submissions received from DIMIA. These are country specific submissions which set out DIMIA's views or analysis of the situation in particular countries. Obviously, this is of relevance for determination of, for example, refugee status. I assume from the note here that these are taken into account by members—

Mr Blount—Where relevant.

Senator WONG—where relevant. There is obviously a reasonable amount of opinion in these submissions. If you look at the entry for China, it says:

Comprises argument based on country information ... on the authorities attitude to followers of Falun Gong ...

What if the applicant's evidence about what might happen to them if they go back is significantly different to DIMIA's opinion? Do you have another source of information you can rely on?

Mr Blount—We have a range of sources of information. I should make it quite clear that the piece of information on, for example, a country like China would be one piece of information among a host of information we have directly and indirectly on our internal system. This is not simply one document that people refer to. It is one among many. It is given no privileged position or weight among the other information that is before people. That caveat in the box at the top is what appears on our internal web site with the lists of and the links to the submissions. That is what we say to members. We say that the relevance will depend upon the facts and issues of the review and that the weight to be attached is a matter for the presiding member to determine in the context of the review—that is, in the context of their view of the legal issues and of the applicable definition out of all the other country information. If you went to the China web site, that would appear among a number of other documents and sources.

Senator WONG—Can I draw your attention to the entry in relation to Iraq. It is headed 'Guidelines for Processing of Protection Visa Applications in light of Armed Conflict in Iraq—28 April 2003'.

Mr Blount—Yes. Those are guidelines for primary decision makers. They have given us a copy of those for our information and asked us to give them weight. They are not guidelines telling us what to do.

Senator WONG—It says:

... argues in light of international armed conflict in Iraq, decisions in cases dependent upon country information should be deferred until the country situation has settled and reliable country information is available.

That is a reasonably contentious view.

Mr Blount—It is.

Senator WONG—It would be easy to find a refugee advocate who would argue that that is not an appropriate way for the tribunal to approach determining whether or not an Iraqi is a refugee.

Mr Blount—I would like to say two things. First of all, there is an argument that you should not finalise a case where the situation is changing and further information may be imminently available. I think strictures on that arose from one of the earlier Cambodian Federal Court cases back in the early nineties—

Senator WONG—I understood the war was over.

Mr Blount—before the onset of this tribunal. In relation to that particular matter, we had separately a couple of months before this briefly circulated all members providing broadly consistent advice on our own behalf—namely noting that the situation was a changing one, that members should bear in mind whether they had the appropriate country information if the situation was changing, depending on what the particular claims were, but that this was a matter for each individual member to determine in light of the particular claims they had in front of them.

Senator WONG—You say these are guidelines to primary decision makers.

Mr Blount—I was in fact confusing that with the last one—the guidelines on making protection obligation assessments, the FPV one. That is the one for primary decision makers which we were given a copy of.

Senator WONG—Would you agree that the paragraph I have referred you to is probably more appropriately constructed as DIMIA's argument about what you should be doing than as a reasonably balanced submission about the state of the country?

Mr Blount—They are entitled to give us submissions in whatever form they like that is consistent with section 423(2). What weight the individual members give them and what they do with them is another question, but they are entitled to put the submissions. We receive them and we circulate them. We always draw the attention of members to the fact that the weight is a matter for them to determine in the context of a particular case, and that is reflected in the generic advice to members that sits at the head of this list.

Senator WONG—But, as a matter of practicality, how is an Iraqi refugee applicant going to have the resources to provide country specific information so as to counter the weight of a submission such as this from DIMIA?

Mr Blount—This submission does not contain specific country information. It simply puts a proposition that the situation is changing and that, in appropriate cases, it might be better to wait for—

Senator WONG—It does not say 'appropriate cases'; it is a blanket.

Mr Blount—It says 'in cases dependent upon country information'.

Senator WONG—That would be all Iraqi applicants!

Mr Blount—But, as I have explained, they are entitled to put whatever submission they wish. The advice that we had previously provided to members was simply that, depending upon what particular information was relevant to the case they had in front of them, they should determine whether they should go ahead or leave them. I should say that, at the time we circulated that in April, there were probably only half a dozen Iraqi cases before members. Most Iraqi cases are awaiting decision at the primary stage at the moment. There were only half a dozen cases before

members, and I think all of those have been determined in the meantime, because we also do not encourage members to defer things indefinitely.

Senator WONG—Does the applicant or their representatives get a copy of this information?

Mr Blount—If there is country information on which the tribunal would rely and their decision is adverse, it would be put to the applicant.

Senator WONG—But that is up to the tribunal member.

Mr Blount—It is part of our practice directions.

Senator WONG—But this document itself is not available publicly, is it?

Mr Blount—That particular document does not contain country information. It puts an argument about proceeding or not proceeding.

Senator WONG—But, if that is in the decision maker's mind—all I am trying to clarify is whether that is something that you distribute to applicants or is it—

Mr Lynch—Under the act, Senator, we have an obligation to supply any material that we might rely on which might form part of the reasons for the decision. So if there is a—

Senator WONG—Before the decision is made?

Mr Karas—Yes.

Mr Lynch—Yes. We have mechanisms to do that in both tribunals by formal notice but also through the hearing process. If any information is to be relied on that is adverse to an applicant and which will form part of the reasons for decision, that information needs, under the statute but also generally for procedural fairness reasons, to be provided. Post hearing submissions can also be received and correspondence between the member, the applicant and the adviser often occurs to clarify issues or, where new country information is available, that is frequently passed to the applicant for comment.

Senator WONG—Do you think the perceptions that we referred to at the commencement of evidence of some advocates and some people that the tribunal is not as impartial as they would like—as I say, I am communicating that, not endorsing it—are assisted or fuelled to some extent by the tribunal taking these sorts of submissions from DIMIA, which do run a very particular argument about how the tribunal should approach a matter?

Mr Lynch—The act enables the secretary of the department to make submissions to present views and information to the tribunal to aid it in the conduct of an application for review. That is part of the process. We have this legislative scheme, and that is one way to get information to the tribunal that is relevant. The process is a fair one because the tribunal is required to share information which is potentially adverse and which will form part of the reasons for decision. We have judicial court scrutiny to ensure that happens, and we have a high percentage of cases

where there is representation by advisers who make submissions—of equal value to DIMIA submissions—to the tribunal. I do not think I can add much more to that perception issue.

Senator SANTORO—Following up on some of the questioning from Senator Wong—and, in asking this question, I am not suggesting that applicants before your tribunal should not be required to make submissions in relation to country specific information—last time you appeared before us, didn't you inform us that you have a very sophisticated research capacity which provides you with some very detailed, specific and valuable country specific information?

Mr Lynch—That is correct. It affords us the opportunity to maintain an independent or objective view on issues where others may differ on country information or other circumstances.

Senator SANTORO—Would it be fair to ask you—and I am not trying to lead you but to establish whether there is a situation that exists—that, even if a refugee or somebody who is before you has not got the sophistication of language or the capacity to advocate directly before you, members of the tribunals would be pretty switched on in terms of the bulk of the relevant country specific information, particularly in relation to a country like Iraq, which is top of mind, top of consideration and controversial in the public domain? Would it be fair to say that? I was listening to Senator Wong and I want to be straight up about this. Would somebody who cannot put country specific information directly before you be at that much of a disadvantage or at any disadvantage at all?

Mr Blount—Members who are dealing with a particular case load or indeed a particular case would access a wide range of country information from research, and they would be familiar with that information if they had been doing that case load on an ongoing basis. They would have a very good understanding of that. In terms of country information and the general situation, we do not apply a burden of proof in the sense that we sit back and say, 'It is up to you to provide information about the country.' We have information about the country; if it is helpful to the applicant, it is helpful to the applicant. If it is adverse, we will put the substance of that to them for their comment. But very often, when we were doing case loads like the Afghan detention cases 18 months or two years back, the bulk of the country information was indeed favourable to the applicants, and that was reflected in the approval rates.

Senator SANTORO—If you had an applicant before you who was wanting to give you specific information about circumstances in their alleged country of origin and there was some difficulty in putting forward the information from their perspective, what is the process? Can the committee adjourn? Can the tribunal adjourn; can they ask for time? Can interpreters get involved? Can information be gathered in a more relaxed manner than exists at a tribunal and then be presented to you subsequently?

Mr Blount—Normally they will have put stuff to us before the hearing. But if at the hearing they say that such and such happened and we say, 'We haven't seen any evidence of that,' and they say, 'I've seen a report that I can produce. If you give me a couple of weeks we can provide this,' we would always accede to that request. It is quite common that we give applicants and advisers if they request it—or sometimes it is on our initiative—two or three weeks post hearing to provide further comments or material.

Senator SANTORO—So in terms of an applicant who may have language or other cultural challenges to overcome, as members of the tribunal you are satisfied that the process is quite sensitive to any real or perceived difficulties that they may be experiencing?

Mr Blount—That is certainly something that is in our minds and that we include in our training for members.

CHAIR—Thank you Mr Blount, Mr Lynch and Mr Karas. Your information before the committee today has been most helpful in our deliberations. I understand you have taken a number of questions on notice. You can liaise with the secretariat about the return date—as soon as you are able to give them would be most helpful.

Proceedings suspended from 10.50 a.m. to 11.08 a.m.

[11.08 a.m.]

MAWSON, Mr David, Executive Officer, Migration Agents Registration Authority

MOSS, Mr David, Member, Migration Agents Registration Authority

Senator LUDWIG—Welcome. Do you have any amendments or alterations to the information that you have already provided to the committee? I think it was provided by the other part of your organisation.

Mr Mawson—I can only speak from the authority's point of view. We provided some information, which the secretariat confirmed they had received, in response to the questions. We have no further information to add.

Senator LUDWIG—Thank you. Do want to make a short opening statement or are you happy to take questions from senators who might wish to raise issues with you today?

Mr Mawson—We are happy to take questions. We have no opening statement.

Senator WONG—You have provided some answers in relation to questions I asked at the last hearing, in which you indicate that since March 1998 you have referred approximately 220 matters to DIMIA. Can you tell us what sorts of matters you would have referred?

Mr Mawson—Unfortunately, when we receive a complaint or identify some issue, our first check is to determine whether the individual is a registered migration agent or, since November last year, whether the person is a former registered migration agent. If that person is not a former registered migration agent or a currently registered migration agent and it appears they have been giving immigration assistance, we just take down the very basic details of who the person is et cetera and then pass the information straight on to the department. So we do not actually do very much analysis of the matter.

Senator WONG—So the 220 are not registered migration agents?

Mr Mawson—They are matters in relation to people who have been giving immigration assistance whilst not registered, yes.

Senator WONG—Right. And your jurisdiction was extended to include formerly registered persons, from July last year?

Mr Mawson—The legislation was enacted in July last year. However, the regulations that brought it alive only came into place on 1 November last year.

Senator WONG—We have had quite a lot of evidence asserting inappropriate conduct by non-registered persons, persons charging exorbitant amounts for advice and assistance or persons who are not registered migration agents providing immigration assistance. So, the 220 names that you referred to would all be people who are not registered and have provided advice

or have charged in relation to immigration assistance? Would that be a broad way of categorising them?

Mr Mawson—That would be a broad way. If I may make a small clarification, some of those will be names of companies rather than names of individuals. From the authority's point of view, we are very focused on individuals rather than on companies, but occasionally there is the name of company in there where it appears there has been immigration assistance given and we are unable to determine from our records whether there is a migration agent in that company, and therefore we pass that information on to the department.

Senator WONG—I see. How are the complaints usually filed—according to people who have been clients of these people or other migration agents, or other persons who come to be aware of the conduct complained of?

Mr Mawson—We have spent the last two years bringing our database up to date. We identify the complaints by the registered agent involved or the complainant. There will also be information about who the referrer is and, possibly, whether there are any interested parties in there. That is the sort of information we capture.

Senator WONG—Does your database have at least a brief summary of what the allegation relates to?

Mr Mawson—Not if it is unregistered practice. If it is unregistered practice, that is the very first—

Senator WONG—That is the allegation.

Mr Mawson—That is the allegation; that is the very first gate—we just mark it as an unregistered practice matter and pass it straight on to the department.

Senator WONG—Would your database indicate, for example, if it was an exorbitant amount of money sought?

Mr Mawson—Not on unregistered practice.

Senator WONG—What about in relation to other cases?

Mr Mawson—For registered practice, certainly, we do go through and seek to identify the amount of money involved. In the initial pass of a complaint, we go through the complaint, identify what potential breaches the complainant is alleging and also try to identify the amounts of money involved, although sometimes that can be difficult to determine from the information we have gathered.

Senator WONG—But would complaints in relation to registered practice form part of the 220?

Mr Mawson—No.

Senator WONG—So that is internal too, to MARA.

Mr Mawson—Yes.

Senator WONG—So, in relation to the 220, are you able to provide us, in camera, with that list?

Mr Mawson—I believe so. I would just have to go back to the office and determine that list. We would have to find out what information is on the database.

Senator WONG—Please take that on notice and do that. I only raise it because—and Senator Sherry may well ask more questions about this—we have had quite a bit of evidence where allegations are made of this sort of activity and obviously it would assist us to understand that, if that is occurring.

Mr Mawson—Certainly.

Senator WONG—Do you get feedback from the department about anyone you have referred to them, out of the 220?

Mr Mawson—Where there has been a successful prosecution we are advised of that. We have not had a great deal of feedback on the information we have handed over to them; our focus is very much on the registered practice area rather than the unregistered practice.

Senator WONG—The previous minister referred to an investigation that was conducted into Mr Kisrwani. He did this publicly on 3 July. Did you participate in the investigation he referred to?

Mr Mawson—Not that we are aware. The main knowledge we had of Mr Kisrwani came from the press and as things progressed from there.

Senator WONG—Was the investigation into Mr Kisrwani prompted by MARA's referral?

Mr Mawson—No, I would not think so.

Senator WONG—On what basis do you say that?

Mr Mawson—I do not have a recollection of Mr Kisrwani being specifically referred to the minister. I would have to check out our files, but I do not have a recollection of that. As I said, my understanding was that Mr Kisrwani came into our knowledge simply through the press, when the information started to come out about the particular allegations that have resulted in this inquiry.

Senator WONG—The minister referred to there having been an investigation into Mr Kisrwani's activities. Are you telling me that MARA had no involvement in that at all?

Mr Mawson—Not that I am aware of.

Senator WONG—So, presumably, that is at the departmental level?

Mr Mawson—That is correct. The only clarification I would make on that, as was disclosed in the media—and, again, that was where we gathered our information from—is that a registered agent was apparently in a business relationship with Mr Kisrwani, and we are reviewing that particular matter.

Senator WONG—I think that name is in the public arena. That is Ms Gilda Ponferrada, isn't it?

Mr Mawson—That is correct.

Senator WONG—So there is an investigation?

Mr Mawson—We have asked some questions of Ms Ponferrada in relation to the information we have been given.

Senator WONG—And that is an investigation conducted internally, presumably, by MARA?

Mr Mawson—That is correct.

Senator WONG—Is the department involved in that?

Mr Mawson—Not at this point.

Senator WONG—To your knowledge, has there been any referral to the AFP or any other authority?

Mr Mawson—Not in relation to Ms Ponferrada or Mr Kisrwani.

Senator WONG—There have been AFP referrals?

Mr Mawson—There have been some allegations made against our organisation, and those allegations were serious enough for the authority to recommend that the AFP be advised of those allegations. It was left to the AFP to determine whether the allegations were founded. They are nothing to do with ministerial intervention matters.

Senator WONG—I do not propose to go there, then. Your annual report in 2001-02 indicates that a number of complaints—I think just over five per cent—received by you related to misleading statements about the prospects of success. That, again, has been a common thread in the evidence before us—that there are unscrupulous operators out there who obviously prey upon people's desperation in this area. You do deal with a lot of people who are very desperate.

Mr Mawson—Yes.

Senator WONG—The advice that these people receive on occasions is unrealistic in terms of the potential success they might have.

Mr Mawson—Yes.

Senator WONG—Have you received complaints relating to the provision of misleading advice in respect of 417 or 351 intervention applications?

Mr Mawson—As far as we are able to determine, no we have not—not from the complainants themselves. We have a number of matters referred from the department in relation to 417—the ministerial matters—and we have been investigating those matters. But we do not receive them from the complainants themselves; we receive them from the individual clients.

Senator WONG—That same report also states that you have received seven complaints relating to an agent purporting to have or implying there was a relationship with either the minister or DIMIA.

Mr Mawson—Yes.

Senator WONG—Did they all relate to the same person?

Mr Mawson—No. Those statistics usually relate to advertising complaints—instances where someone has advertised in the press or somewhere that they have some relationship with the minister or the department. Under the code of conduct and the legislation that applies to migration agents, they are not able to imply any relationship with the minister or with the department or the fact that they have a relationship with MARA. That is under the code of conduct.

Senator WONG—That seems logical. Are you saying that people have advertised implying that they have a special relationship with the then minister?

Mr Mawson—With the minister or with the department—mostly it would be with the department or with the Australian government. These advertisements have usually appeared in the ethnic press or overseas and have been brought to our attention, and we have then gone to the agent and asked them to explain the situation.

Senator WONG—Where overseas have you found these advertisements?

Mr Mawson—I do not have the information in front of me. It would be somewhere like Hong Kong or China. The Philippines would possibly be another area we have received advertisements from. I would have to go back to my information.

Senator WONG—Are you able to provide us with copies of the sorts of advertisements you are talking about?

Mr Mawson—Certainly.

Senator WONG—I presume you have them translated.

Mr Mawson—Yes, we do.

Senator WONG—Would MARA do that investigation? Presumably those advertisements are by agents.

Mr Mawson—The advertisements are usually by an agent. We look at the advertisement and determine whether it is for a migration agent—because migration agents are required under the legislation to have their registration number in the advertisement. If there is no registered migration agent number in the advertisement, we do searches on the company name and try to determine whether there is an agent involved with that company who has forgotten to put their name to it. I cannot be specific about these matters right now, but we can certainly provide that information.

Senator WONG—If there is no link to any registered agent, presumably you would refer that advertisement to the department because it might relate to someone who is unregistered.

Mr Mawson—Yes.

Senator WONG—Could you also provide that information?

Mr Mawson—Certainly.

Senator WONG—Are you not able to say how many related to agents?

Mr Mawson—No, I am not. I am not aware of how many advertisements there have been. Most of our focus is always on registered agents. There are also some issues with the overseas papers in particular, because you do not have to be registered as a migration agent to give immigration assistance outside Australia. Where the matter is inside Australia we raise the issue with the department, because the legislation clearly says that you cannot advertise inside Australia about being a registered agent or something like that if you are not one.

Senator WONG—Could you provide us with those advertisements and indicate where they went—whether you dealt with them or whether they were referred to the department. You have not done your annual report yet, have you?

Mr Mawson—No, the annual report is pretty close to completion.

Senator WONG—In 2002-03 did you have similar complaints?

Mr Mawson—Yes, there would have been similar complaints. In addition to that, in the last 12 months we have focused on the electronic media as well as the published media; so it is not just newspapers we are tracking but also web sites and things like that.

Senator WONG—Can you provide us with that information as well—that is, complaints in relation to persons implying a relationship with the minister or DIMIA which have resulted in MARA taking some action, whether it is their own investigation or a referral to DIMIA?

Mr Mawson—Certainly.

CHAIR—What we are interested in is the nature of the complaint itself, where it went and what action was taken by either MARA or the department in respect of the matter. If upon reflection these matters should be dealt with in camera, we can always reconvene and hear them in camera. That is always a possibility if you look at them and decide that they require that level of protection.

Mr Mawson—Normally the advertisements will state things like 'ex-DIMIA officers on staff' or 'Australian government registered'. That is the style of complaint we would see. We can certainly give you that information.

Senator WONG—Presumably the advertisements themselves would not have to be in camera, because they are already in the public arena.

Mr Mawson—That is correct. Anything in the public arena is no problem at all.

Senator WONG—In relation to matters that DIMIA investigates, you say that you do not participate in any investigation.

Mr Mawson—No, we do not.

Senator WONG—You are only told of what has happened to that investigation if it results in a prosecution; is that right?

Mr Mawson—Usually, that is correct.

Senator WONG—So, if it does not proceed to prosecution, are you ever told what occurred?

Mr Mawson—Usually not. From our perspective it has been an unregistered matter. The matter is referred to the department; it would have no consequences for us to know what the end result was, excepting possibly where there are allegations of other issues, such as someone holding themselves out also to be a solicitor or something like that. We may get involved in that as a feedback mechanism only, nothing more.

CHAIR—But they are referred to the relevant law society.

Mr Mawson—Yes. We have a fairly close relationship on an operational level with the various professional associations for lawyers. When that sort of thing occurs we give them the information as quickly as possible—and vice versa; they do the same for us.

Senator WONG—Does the referral to DIMIA then go to the internal investigations unit?

Mr Mawson—I do not know. We hand it over to the migration agents policy and liaison section in Canberra, which is our direct contact. Everything to the department flows through that particular section.

Senator WONG—What about people who were formerly migration agents and have either discontinued their registration or been deregistered? You have the authority to deregister, don't you?

Mr Mawson—We have the authority to sanction an agent, and that includes cancelling their registration. We can suspend them or place a caution against their name. The other process that we also have available to us is that each year an agent must apply for registration. We refuse registration on a few occasions every year, for a number of reasons. However, an agent may allow their registration to lapse. That is why we do not use the word 'deregister'—it has a number of consequences.

Senator WONG—It has a different—

Mr Mawson—It has a different connotation.

Senator WONG—Are there any cases in relation to advice on ministerial discretion that were not pursued because the agent concerned had discontinued his or her registration?

Mr Mawson—I am not aware of any. I would have to check that out. Certainly, we have a couple of current matters where the agent has been sanctioned and we are awaiting the determination of the review period for the sanction before we make a decision as to what to do with the ministerial intervention matters. If the review results in the agent obtaining a stay of our decision, which is the usual case, we will then proceed to continue the finalisation of those ministerial intervention matters through the complaint process.

Senator WONG—Is information about any sanction or other action taken publicly available through your web site?

Mr Mawson—There are two ways of finding out about a sanction of a registered agent. As soon as the authority makes a decision, whether it is a caution, a suspension or a cancellation, the appropriate action is taken on the register, which is a public document and which is available on the web site. The second element to that is that, after the appropriate review period has occurred—and if the agent has not applied for review and the matter was a cancellation or a suspension—we then put the decision on our web site and we place an advertisement in the newspapers. Sometimes, however, if the agent is able to obtain a stay of the decision and they keep operating—and then it takes time for the AAT to make their decision, or it goes further, to the Federal Court—we have to wait for the appropriate delay period, and then we put the material on our web site and in the newspaper.

Senator WONG—How long does it stay there?

Mr Mawson—Currently, it stays there forever. Under the current legislation there is no time limit on that information.

Senator WONG—If someone were to go to the web site, they could find all the decisions that MARA have made in relation to agents—where a complaint has been upheld, essentially?

Mr Mawson—Where there has been a suspension or a cancellation, that is correct.

Senator WONG—But not a warning or anything like that?

Mr Mawson—Not a caution. A caution is held on the register for the life of the agent, which is the first element on the register itself, but there is not a public notice about the decision.

Senator WONG—Is there any way the public can obtain those details?

Mr Mawson—Not at this point in time. I refer you to the Migration Legislation Amendment (Migration Agents Integrity Measures) Bill that is currently before the parliament. That is part of the issue that is being addressed in that particular bill, which would allow the reasons for a caution to be published on the web and provide time limits as to how long decisions will be held on the web. That is mainly because a caution is a warning yet it has to stay against the agent's name while they are an agent, which may seem a bit unfair when it could be a fairly minor event.

Senator WONG—If somebody had their registration cancelled and subsequently engaged in giving migration advice, that would be contrary to—

Mr Mawson—The legislation, that is correct.

Senator WONG—What about requesting ministerial intervention or writing a letter of support for a 417?

Mr Mawson—Under the legislation, where a person makes an immigration representation—a communication with the department or with the minister on behalf of a visa applicant—and they charge a fee, that is a breach of the legislation. If they do not charge a fee, there is no requirement for them to be a registered agent.

Senator WONG—How do you know?

Mr Mawson—We do not, unfortunately, but that is the way the legislation is structured.

Senator WONG—It is quite possible that there are people who—and I have had a look at some of your cancellations—

CHAIR—That is why it is cash.

Senator WONG—and the evidence we have had is of cash payments. These are only allegations because nobody seems to want to come forward and say—obviously. I hardly think the client is going to.

Mr Mawson—We have the same problem.

Senator WONG—There is nothing to stop a migration agent who has had their registration cancelled writing in support of a 417 application to the minister, is there?

Mr Mawson—No, there is not as long as they do not charge a fee.

Senator WONG—If payments were made, as long as you did not know about it they would not be brought to anybody's attention?

Mr Mawson—That is correct. They would need to be brought to the department's attention because, once they are unregistered, we have no purview over them, unfortunately.

Senator WONG—To your knowledge, is the minister advised in a submission by you or by DIMIA if one of the representations is from someone who has been a migration agent and has had their registration cancelled?

Mr Mawson—The department is made aware of all the agents that we have cancelled. Whether they would be able to identify that is the internal workings of DIMIA, which I would not understand.

Senator WONG—It would be reasonably relevant, you would think?

Mr Mawson—I would think so. But I do not have knowledge of how the department works internally in relation to those matters.

Senator SANTORO—How clean do you believe the migration agents industry is? You are obviously very familiar with the industry and know a lot of these people. All sorts of allegations, suggestions and comments have been put to this committee and vented in the media about the state of the industry—that some are shonks, rorters, cheats, liars and that some are very good. We have heard the range of opinions about migration agents. How clean do you think the industry is?

Mr Mawson—I would say that most agents are scrupulous. There is certainly a small percentage of agents who are not scrupulous, and MARA continues to work towards removing those individuals from the profession. We have complaints against approximately 10 per cent of the profession at any one time. Of all the complaints that we have processed, we have found 51 agents who were deserving of a sanction. That is a sanction, not necessarily a cancellation. I think that shows that the number of unscrupulous agents that we are told about is fairly small. We are aware that people may not complain because of cultural issues about complaints and so on. But generally we believe that the bulk of the industry is scrupulous and, as MARA has moved forward over the last five years, we have found that more agents are willing to assist in that, which I think is a healthy indicator of how the profession is maturing and taking more responsibility for itself.

Senator SANTORO—Are you satisfied from your vantage point that the supervisory system—the system that is meant to make all of these people accountable, make them operate in the right way and keep them on the straight and narrow—is sufficiently robust and accountable?

Mr Mawson—It is certainly very accountable, given the number of reviews we have had over the last five years.

Senator SANTORO—I meant the way that it works.

Mr Mawson—Yes. As with any organisation, it is strapped for resources. We have recently had a fee increase because it is a self-funded operation, which has allowed us to put on more staff and implement more robust auditing processes to do random checks on individuals, and to continue to address the ever increasing complaint load.

Senator SANTORO—Is there a culture in the industry that sees other agents dob in or refer their colleagues who are doing the wrong thing by their client or the system generally? Does that exist?

Mr Mawson—Certainly. I would say that five years ago we did not see that culture. Now we see a culture where individuals are concerned about the standing of the profession. They refer matters to us and actively encourage clients to make complaints to us, which is what we would hope to see. That is part of the profession understanding its maturity and helping to clean itself up, which is a very important part of the process.

Senator SANTORO—How proactive are you in reminding migration agents of their responsibilities, particularly to their clients and to the code of ethics? How proactive is your association, and has it become much more so in the last four or five years, the time period you just referred to?

Mr Mawson—I cannot talk on behalf of the association, the MIA, I can only talk from MARA's perspective because that is my focus. MARA has a number of programs that we use to try and alert migration agents to the need for involvement. We provide them with documentation, such as a complaint form and a brochure which outlines complaints. We have an electronic email system which reminds them of their obligations. The documentation is often provided in the form of a compact disc. They get at least two of those a year now. In addition, MARA actively participates with the education providers in the continuing professional development area to attend and give lectures to agents about their obligations under the code of conduct. We have a number of other lecturers who we give information to to assist them to get the right message out.

Senator SANTORO—Would you agree that the industry is very tight-knit? Do you think it is fair to say that people basically know what other people are doing? Is there a reasonable amount of scrutiny among agents within the industry from your experience?

Mr Mawson—From my experience? Having not come from the industry, I have not been in that area.

Senator SANTORO—From knowledge and input that you have gained from people talking with you at functions or wherever.

Mr Mawson—There is some knowledge of what each person does in the industry within groups, but I do not think it is as tightly knit a community as I would see lawyers being a tightly knit community—it is nowhere near that tight. It may be based on cultural groups or something like that. Generally, the industry has a fairly significant churn of 300 to 400 agents dropping out of the system every year, which is about 10 per cent. It does not allow for these long-term associations. The average life of an agent in the profession so far would be around 3½ years so that mitigates against very close associations. You just have a high turnover going on the whole time.

Senator SANTORO—However, there are key established players within the industry, some of whom have appeared before us. They seem to have—albeit with the advantage of public hearings such as the one that you are participating in today—a lot of knowledge about success

and failure rates in relation to other participants. What do you think is the level of knowledge of each others' operations out there?

Mr Mawson—With regard to success rates, whilst I have read some of the material that has come from this and other inquiries, the comments I have had from agents since the inquiries have been going on have been a bit of surprise. That says to me that people do not have a real understanding of how successful other participants in the industry are.

Senator SANTORO—A question that will hopefully draw on your knowledge of agents and the industry generally is: does ability have anything to do with the achievements of high or low success rates? Do you think that there is a difference in the capacity of some agents to argue the case to bring forward the evidence? Is there a range of ability out there amongst the people you oversee?

Mr Mawson—I believe there is. However, that ability really goes to how much hard work an individual agent wishes to put into the application. Through the complaints process, we see a range of approaches, which would be from a minimalist approach to a very thorough and full approach. The more thorough the approaches and understanding of what the clients' needs are, the more successful they tend to be.

Senator SANTORO—The early bird gets the worm.

Mr Mawson—Pretty much. The more successful cases are where there is actually real work done. If all they have done is a cut and paste, their chance of success is fairly minimal.

Senator SANTORO—Would you also agree that the types of cases handled by some agents will fundamentally influence or impact upon success or failure rates?

Mr Mawson—Yes. I am aware that, within the profession itself, there are vertical columns of experience in certain visa categories. Some agents will never go near a humanitarian visa and other agents will never go near a business visa. I think that is true of the profession right through.

Senator SANTORO—What is your view of the amendments that are being proposed to the migration agents act?

CHAIR—I would have said they are unnecessary after the submissions this morning, but ask by all means.

Senator SANTORO—I still thought I would draw the witnesses out.

Mr Mawson—We are making submissions next week before the Senate committee on that particular matter. In general the authority fully supports the bill. There were three areas that we had some concerns about, and they were enunciated in our submissions. The main one was identified in the explanatory memorandum to the bill, in that we had some concerns about a mathematical approach being used on the mandatory sanction scheme, and we had some concerns about the width of the redefinition of immigration assistance. I have forgotten the third one; I did not do that preparation for this particular session. There is a third area where we have a concern; it is just that my mind has a blank on it at the moment.

Senator SANTORO—You have still been of assistance with those first two points. I want to ask you two sensitive questions, one which has been canvassed already this morning. I want you to be very clear in your answer to the committee: am I correct that I heard you say that there have been no complaints lodged with you in relation to Mr Kisrwani?

Mr Mawson—That is my understanding, yes. As I indicated to Senator Wong, I would have to go back to the database and check that but that is my understanding. Mr Kisrwani was not a name that I had heard until it was raised in the paper, and I tended to see across most of the matters going through the system.

Senator SANTORO—The other question, and I suppose what I have been trying to ascertain, is the depth of your knowledge of the industry that you are overseeing. It seems to me that you know the migration agents industry quite well. You would agree with me, wouldn't you?

Mr Mawson—I have a good understanding of some of the behavioural issues within the industry, particularly in relation to complaints. I could not give you any idea at all about immigration assistance because I have very little understanding of that area. The authority has undertaken a very deliberate process.

Senator SANTORO—In the context of that answer I would like to ask you a final question, at least for now: allegations have been made in various places, including at this inquiry, that some migration agents enjoy a high success rate in their referrals for ministerial discretion because they have received ministerial preference. Are you aware of any evidence out there in the marketplace that would substantiate those allegations?

Mr Mawson—No, not at all.

CHAIR—But you have received complaints about misleading statements about prospects of success and access to the minister, haven't you?

Mr Mawson—The complaints referred to in our annual report would be something like a person being guaranteed success, not necessarily by the minister, in getting a visa. They have actually said 'success guaranteed' in an advertisement. When we have done our random audits, we have found that they have said that in a contract or they have put some wording in a letter to a client and that has been raised with us. But, typically, it is that they will get a visa rather than it being an issue in relation to the minister.

CHAIR—You have received seven complaints relating to an agent purporting to have or implying a relationship with either the Minister for Immigration and Multicultural and Indigenous Affairs or DIMIA during that year. What would the reason be for that?

Mr Mawson—For receiving those seven complaints?

CHAIR—No. For what reason would there be that implication?

Mr Mawson—As I mentioned to Senator Wong, it is usually something like the person having said they are Australian government registered and that they have previous DIMIA officers on staff. It tends not to be with the minister as such; it is more with the department or

with the Australian government. I think there was one matter—it may not have been last year—where they talked about their relationship with the authority, which is limited by the code. So it is that sort of thing. I do not believe any of the matters that we saw—and I would have to check—related to comments or statements about a relationship to the minister.

CHAIR—And the purpose of implying a relationship with DIMIA or the department?

Mr Mawson—What they have told the authority is that it has been an error in our translation. We believe that either they have not understood the process or they have sought to have a market advantage. That is the reason why the legislation is in place—to limit that market advantage.

CHAIR—In short, is this the nature of it—and perhaps you could agree or disagree with this statement—'Because I have a relationship with the department, I can get you the business class visa,' or whatever it happens to be?

Mr Mawson—Yes, I think that is the sort of thing they are trying to imply.

CHAIR—You have taken on notice the question about what they are, in any event, so we can have a look at that.

Mr Mawson—Yes.

Senator SHERRY—Isn't it fair to describe your response to complaints, at least in the past, as a reactive position rather than a proactive position?

Mr Mawson—We have a number of areas to cover within the scheme. We have a mix of proactive and reactive processes within the investigation and monitoring functions of the authority. We have had for at least four years a process through which we have monitored, on a random basis, various aspects of a migration agent's business. They have been chosen for a number of different factors, but it has been a random process.

Senator SHERRY—What is this random process? What proportion of people are randomly inspected? In what way? What is the form?

Mr Mawson—We have typically used a number of five per cent in a particular year. We first started in relation to their attendance at continuing professional development sessions. Once we understood a little bit more about that, we started to undertake random inspections of the client accounts. We ask for client account bank statements to check; a copy of their current contract or variance to ensure it complies with the code of conduct and the law; a copy of their contingency plan in relation to the client documents, in case there is a disaster—I am sorry, the fourth one escapes me at the moment. We refer to those as the 'four pillars' that we go after an agent with.

That is the paper based approach. There is another level should we identify some serious issues. We will then go to an agent's site and conduct an audit. We ask the agent to show us selected files, we inspect those files and ensure they have protected the client's material correctly. We also ensure they comply with the code of conduct in relation to how they display the code et cetera.

The final layer we use, which has only been used in the last 12 months, is a much more forensic approach: we use a forensic accountant to inspect the books of the agent, or very experienced data processing people to inspect the agent's computers about certain things, and we look at other aspects of their operation. The last one is the most expensive and very limited; we have to have a very good reason to be doing it. The mid-range one is particularly where we have concerns about fraud or multiple applications of the same type—cut and paste type processes and so on.

Senator SHERRY—Churning?

Mr Mawson—Yes.

Senator SHERRY—You say that is quite limited. I understand the resource restrictions—the way you are structured, your funding base—and the limitations that gives you, but what sort of proportion gets that more forensic examination? You say it is in response to complaints or queries.

Mr Mawson—The very forensic one will be where we have a clear pattern of avoidance by the agent in providing information to the authority on a number of issues. We would really want to know what is going on in that agent's business because we were getting a pattern of avoidance. I think we have only had three of those in our history; they are quite expensive. In terms of the site visits, where we turn up to look at the files and ask questions, I would think there are most probably 20 or 30 of those a year. I am guessing, but I know it is in that sort of range. Most of our work is paper based.

Senator SHERRY—What you have outlined and your earlier response have been about there being, in your view, a small percentage of practitioners there is some significant problem with. The Financial Planning Association have put information to me in another forum with similar types of processes—checks and audits, some of them random. The review carried out, not by them, was called a shadow shopping exercise, where people pose as consumers and go to a range of in this case planners and then there is an assessment carried out. You have not done anything like that?

Mr Mawson—No, we have not. We have actually considered it but not implemented those considerations. The issue is having the appropriate people to be able to pose, and that may mean we would have to go and hire people to do that. We just have not done that to this point in time.

Senator SHERRY—So you are aware of that as an approach but it is not something you have explored.

Mr Mawson—It is not something we have done. We have certainly looked at it and considered it. The issue has been having someone with the appropriate knowledge to be able to do that, which needs training, and that gets to be an expensive exercise.

Senator SHERRY—At least in the case of financial planners the shadow shopping exercise revealed a fairly significant minority of practitioners with a range of problems. You mentioned persons overseas who are giving advice. I assume there are jurisdictional issues here. I am assuming—I would like to know whether I am correct in this assumption—that Australian

embassies and consulates overseas would not be in any way cooperating or working with people who are giving advice who are not registered.

Mr Mawson—My understanding is that in the overseas posts—and my information is more anecdotal—they have developed relationships with individuals who assist clients to apply for visas. We have a number of registered migration agents in the scheme who have other staff with them who work closely with the embassies the same as a registered migration agent would. At this point in time the embassy would allow anyone to assist a client.

Senator SHERRY—I am a little surprised at that because, if the embassy has contact with, gives advice to or cooperates with anyone, that means that people do not meet the sorts of registration requirements that, for example, we have talked about this morning, do they?

Mr Mawson—No, they do not, and again I would refer you to the statutory review of 2001-02. That issue has been canvassed and certainly we are aware that the department are looking at the concept of extraterritoriality as we talk about it, where individuals who are not Australian citizens and not within Australia would be able to be registered and we would be able to assist in raising the standards for those individuals. But that is a departmental issue. They have to work out how to do that.

Senator SHERRY—I would have thought that, if we have standards of practice in this country, notwithstanding the extraterritoriality issue, at the end of the day the Australian embassy could simply refuse to deal with a person who did not conform with Australian standards. They would be quite within their legal rights to refuse to deal with them, wouldn't they?

Mr Mawson—I cannot comment on that. It is an area of law I am not familiar with.

Senator SHERRY—But from a position of having requirements, whether we think they are adequate in Australia and adequately enforced or whatever, the fact is that we do not have requirements for people who operate overseas when dealing with Australian embassies and consulates on these same matters.

Mr Mawson—That is my understanding; yes.

Senator JOHNSTON—When I look at the broad clientele that your agents are dealing with, it strikes me that a significant proportion of that clientele are quite uniquely vulnerable and quite desperate in their applications. Would you concede that?

Mr Mawson—Certainly, Senator.

Senator JOHNSTON—So the burden upon your authority is quite a special one, in contrast to a whole lot of other commercially based administrative authorities.

Mr Mawson—I would agree with that.

Senator JOHNSTON—Your qualification guidelines say:

… be a person of integrity or be otherwise a fit and proper person.

How do you establish that in order to grant a licence?

Mr Mawson—We have a number of processes that we use. First off, for a person to become a registered migration agent, they must place an advertisement in the public arena. We get some feedback from those advertisements about individuals who may not be of integrity or may not be fit and proper.

Senator JOHNSTON—What happens if you do get some comment that is adverse to the applicant?

Mr Mawson—We put that comment to the applicant, we ask the applicant to explain the situation, and we make a decision around their response and any information supporting it.

Senator JOHNSTON—What is the refusal rate like when someone complains that a certain person is not a fit and proper person? How many have you knocked back on that basis in the last year?

Mr Mawson—I cannot talk about the last year, because we have not had a great volume of objections from that area. However, in the objection area I think we have had two or three come through. One was a matter where the person had been an embezzler; another was where the person was bankrupt in another country; and a third was where the individual had been breaking rules more in a local government area, but still they were able to complain about that. It is that sort of stuff that we see, but that is only one element.

We also require applicants to do an Australian police check; that is, a name check. It has to be an Australian police check. We also ask them to disclose to us any matters they have been investigated for and any convictions they have had other than spent convictions. In addition to that, our processes in relation to people who apply for registration are such that the staff and the members of the board are also aware of who is coming through. We have identified through our own actions individuals who are not fit and proper. They may have lied to us on their material—not disclosed matters to us—but we are still able to determine that there are problems with their application. I think that comes from the natural inquisitiveness of some of the staff and some of the members.

Senator JOHNSTON—Can you tell me how many rejections you have handed out over the last couple of years? Is there a rate or percentage?

Mr Mawson—There is not a percentage, but I believe that we have refused registration to just over 100 people since 1998.

Senator JOHNSTON—How many applications have you had?

Mr Mawson—In that time we would have had somewhere around 4,000, so it is a fairly small number.

Senator JOHNSTON—It is four per cent.

Mr Mawson—It is something like that. That is initial applications; I am not talking about the repeats. It may have been 3,000. In the first year or two we had about 500 or 600 people applying. In the last couple of years there have been about 700.

Senator JOHNSTON—How many migration agents do we have in Australia today?

Mr Mawson—In Australia today we have 3,240.

Senator JOHNSTON—When they have to show a 'sound knowledge of migration procedure', what sort of examination do you put them through?

Mr Mawson—When MARA took over the scheme in 1998 we adopted the six courses that were then being used by the Migration Agents Registration Board. Since that time we have been working fairly consistently to look at the standard of entry to the profession. In August this year we had the situation where the current six courses were no longer sufficient for a person to come into the profession. As of November this year, and three times a year thereafter, a person who does not have a prescribed qualification—currently, that is a law degree or practising certificate or something of that ilk—has to go through an examination. That examination is done through an organisation called ACER in Melbourne. The authority went through a tender process and contracted ACER to run an examination for it.

The authority writes the examination questions, and individuals must gain a pass mark in each of the four categories of the examination. The examination is what is called a limited open book examination. You cannot take anything into the examination except two pencils and an eraser and you can only walk out with two pencils and an eraser. All the information is on the desk in front of you, but you would need to know your legislation to get through the exam. As I say, the first examination for that process will be in Sydney and Melbourne on 7 November, I think it is, and after that it will be run in March and July every year. It will be run anywhere in Australia or overseas where there are sufficient candidates.

Senator JOHNSTON—What is the rate of pass?

Mr Mawson—We have not had the first exam yet, so I cannot give you any figures on it. The first exam, as I said, will be in November this year. On advice from ACER, the exam is constructed in such a way that you cannot simply say that it is a 50 per cent pass mark. It is a variable pass mark based on a number of psychometrics within the exam, but certainly someone would need to pass each section and demonstrate that they know what they are doing.

Senator JOHNSTON—Is that examination process subject to independent audit?

Mr Mawson—The process itself? I am sorry, I cannot answer that question at this point.

Senator JOHNSTON—Coming now to your code of conduct, I note that you have a whole lot of things that a migration agent has to do, but there is nothing in there that sets out that the migration agent should disclose some concept of the scope of work and the cost therefor prior to undertaking the work. Would you not think that is pretty reasonable in this area?

Mr Mawson—I think if you look at clause 5.1 or 5.2—I will just check—there is a clear indication in there.

Senator JOHNSTON—I am looking at this fact sheet from the Department of Immigration and Multicultural and Indigenous Affairs that is in your submission.

Mr Mawson—That is from the department. I would refer you to part 5 of the code of conduct. Clause 5.2 says:

A migration agent must:

(a) before starting work for a client, give the client:

(i) an estimate of fees in the form of charges for each hour or each service, and disbursements that the agent is likely to incur as part of the work; and

(ii) an estimate of the time likely to be taken in performing a service ...

They also have to advise if there are any changes in that.

Senator JOHNSTON—Does that say 'in writing'?

Mr Mawson—No, the actual giving of the estimate et cetera does not have to be in writing. However, the clause then says:

(b) as soon as possible after receiving instructions, obtain written acceptance by the client, if possible, of the terms of the work to be done; and

(c) give the client written confirmation of the terms of the service to be rendered ...

So it ends up being in writing; it may not begin that way.

Senator JOHNSTON—So it is a self-serving letter from the agent confirming what has been discussed?

Mr Mawson—It is very similar to what a lawyer would give you in relation to a cost agreement, yes.

Senator JOHNSTON—In most circumstances, with a cost agreement, there has to be a signature and an acknowledgement by the client. This seems to fall short of that requirement—it is just a letter confirming what has been agreed.

Mr Mawson—No, the agent is required to get a written acceptance by the client, if possible—the term 'if possible' is there—of the terms of the work to be done.

Senator JOHNSTON—You have your fee structure—for commercially based agents you have $1,760 as a registration fee—but then you have individuals who act on a non-commercial, non-profit basis.

Mr Mawson—Yes.

Senator JOHNSTON—We actually have a provision for amateurs in this area, do we?

Mr Mawson—No. The legislation that is focused on the charging mechanism, which is how MARA actually is funded, is separate from the legislation in relation to the responsibilities of a migration agent. All migration agents are looked at under section 290 of the act regardless of whether they are commercial or non-commercial. The only privilege, if you wish, that occurs is for those individuals who have a prescribed qualification such as a practising certificate or a law degree, where they are not tested for their knowledge.

Senator JOHNSTON—But isn't it really dangerous to have this subcategory of non-commercial agents?

Mr Mawson—Certainly not, Senator. The purpose of that 'category' is really a recognition that there may be a severe impost for organisations and agents that assist the financially disadvantaged to pay the full fee, but they are not treated by the authority other than the payment of the fee. They are not treated differently by the authority.

Senator JOHNSTON—I accept that. I understand there is a group of organisations out there that fit the necessary category. But, if I were a travel agent and just structured my work so that I did not charge for any immigration work, I could be a migration agent, if I had passed the test and done everything else.

Mr Mawson—No, Senator. With the way the legislation has been constructed at the suggestion of the authority, there has been a number of changes to the legislation. The first is that we have moved it from being a non fee-charging agent to acting on a commercial or for-profit basis. In addition to that, the changes in March of this year clearly defined that the person must solely act in a non-commercial, not-for-profit basis, as well as act for an organisation that acts on a non-commercial, non-profit basis, and, in addition to that, must be in Australia. Those are all elements that we have learnt over the years where you have the housebuilder who organised visas but just happened to sell a house at the same time and things like that. Over the years, we have tightened the structure so that we are able to remove those individuals from the system.

If I may make the comment, we do receive criticism that the number of non-commercial agents in the scheme has reduced from a number over 300 to currently around 270. I think the main reason that has occurred is because of our tightening of that definition and the fact that we were able to weed out a significant number of individuals who were claiming to be non-commercial but who, when we looked into it, were commercial.

Senator HUMPHRIES—Very briefly, who registered migration agents before MARA?

Mr Mawson—They were registered by the Migration Agents Registration Board, which was encapsulated by the department of immigration.

Senator HUMPHRIES—Have the number of complaints to MARA or the number of referrals from MARA to DIMIA arising from complaints against agents increased in the five-year life of MARA?

Mr Mawson—Certainly. We believe that, as the community gains more knowledge of us and as we do things like advertise in the *Yellow Pages*—and we are just about to start a new campaign on MARA—we are getting more complaints. Certainly the industry is also generating complaints, so the complaint load has been increasing year by year.

Senator HUMPHRIES—So you put that increase in load down to greater awareness rather than more misbehaviour in the industry.

Mr Mawson—I believe it is certainly because of a greater awareness. It also is because there are more agents in the scheme and because, with the legislation came in last year, we are now able to act against former agents, which we were not able to do before. It was very frustrating that we were not able to act against former agents.

Senator WONG—In earlier evidence, you indicated there was an investigation currently being undertaken by MARA in relation to Ms Ponferrada.

Mr Mawson—Yes.

Senator WONG—What is the nature of the allegations which are being investigated?

Senator JOHNSTON—Isn't it inappropriate to ask a question about a matter that is subject to investigation by the Commonwealth authority?

CHAIR—It is not sub judice. We do not know what the nature is.

Senator JOHNSTON—The authority has the power to sanction. I would have thought it would be highly prejudicial to discuss those matters now.

CHAIR—That is a matter for Mr Mawson to tell us about, or Mr Mawson can ask for us to go in camera and we can hear it in camera. I am happy to do that, if you think that is more appropriate.

Mr Mawson—I think it would be more appropriate, but I would also have to go and get some information on that particular matter. I was updated as to where the matter was, but I have not got into all the detail of that particular matter. That should be easily solved.

Senator WONG—So you are asking to take it on notice, Mr Mawson?

Mr Mawson—Yes, on notice and in camera, I believe. If we are going to give information about the complaint, it may be worth while having that particular part of the question in camera.

CHAIR—Yes, if you think so.

Mr Mawson—Yes.

Senator SHERRY—We have talked extensively, both here and at Senate estimates, about the increased workload and about resource issues. You are totally self-funded in the sense that you are dependent on income from registered agents?

Mr Mawson—That is correct.

Senator SHERRY—It strikes me that that is a fairly unusual circumstance for what is at least a semi-government organisation responsible for regulation in this area. Have you ever made a request to government for a budget allocation to assist in the provision of your regulatory functions?

Mr Mawson—No, we have not. We have sought to negotiate, and we were successful in the early days, the payment to the government in relation to its services to us. So we have had a reduction in that area, but we have not asked for a budget allocation as such. The belief of the authority is that the profession should be responsible for itself and it should fund its own operations.

Senator SHERRY—I understand that argument, but I am certainly one who can see in certain circumstances that a budget allocation has been necessary. For example, in the financial services area, ASIC and APRA are largely funded from industry levies but there is some budget supplementation to meet what have been identified as more difficult and emerging issues in that area. You might like to quote it as a precedent.

Mr Mawson—Thank you, Senator.

CHAIR—There being no further questions, thank you Mr Mawson and thank you Mr Moss. There has been a wide range of questions this morning. Thank you very much for your attendance today. It has been very helpful to the committee's inquiry.

Proceedings suspended from 12.18 p.m. to 1.37 p.m.

DUFFIELD, Mr Stephen Ronald, Manager Human Rights Unit, Human Rights and Equal Opportunity Commission

LESNIE, Ms Vanessa Nicole, Senior Policy Officer, Human Rights and Equal Opportunity Commission

NEWELL, Ms Susan Majken, Policy/Research Officer, Human Rights and Equal Opportunity Commission

CHAIR—Welcome. You have lodged a submission with the inquiry. Do you have any amendments or alternations to make to that?

Mr Duffield—Not particularly. I do have an opening statement to make on behalf of the commissioner. The Human Rights Commissioner extends his abject apologies for not being able to attend today. He has fallen very ill with a viral infection. He went to the doctor this morning and received a medical certificate and was sent home. So as not to disrupt the committee's hearings, we decided that it would be preferable if I attended in his place to give the opening statement. My colleagues will of course be able to answer any questions that the committee may have.

CHAIR—Thank you. We wish Dr Ozdowski a speedy recovery. I now invite you to make a short opening statement, at the conclusion of which I will invite senators to ask questions.

Mr Duffield—This statement does not really extend anything that was submitted by way of written material, but it was thought useful to reiterate the main points. The primary message of the commission's submission is that the ministerial discretion under section 417 of the Migration Act is insufficient to protect people who are seeking protection from refoulement under the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Convention Against Torture. To explain a bit further, the present system of ensuring non-refoulement is directed almost wholly towards protecting those who fall within the refugees convention definition of 'refugee'. Under that system, the ministerial discretion is the final safety net for those who believe that they are refugees but have not been recognised as such by the Refugee Review Tribunal.

The commission believes that this safety net should remain. However, there are people who may not be refugees but who must still be protected from refoulement because they face a real risk of fundamental human rights violations on return to their country of origin. For those people the section 417 ministerial discretion is the first and only stop. In the commission's view the protection against non-refoulement in the ICCPR, CRC and CAT is not a matter that can be satisfied by the ministerial discretion under section 417. There are a variety of reasons for this view. One is that non-refoulement obligations are not discretionary obligations under international law; the ministerial discretion, on the other hand, is non-compellable. The current system does not make adequate provisions for the possibility of flaws in the decision making process when considering non-refoulement under the ICCPR, CRC and CAT. In particular, the ministerial discretion is not reviewable. By forcing people to apply for refugee status before they

can apply for protection under the ICCPR, CRC and CAT, the pathway to the minister is unnecessarily long and may involve arbitrary detention.

Similarly, by forcing people to apply for refugee status first, the refugee status determination process and section 417 processes are unnecessarily burdened with cases that are inappropriate to those processes. I would like to reiterate that protection from refoulement under the ICCPR, CRC and CAT can be matters of life or death. The seriousness of these issues warrants a detailed consideration of the best way to protect those rights with appropriate consultation. The commission would be willing to assist in such an examination in the future. Hopefully, the commission can begin that assistance by answering your questions today.

CHAIR—Thank you, Mr Duffield.

Senator HUMPHRIES—Where is the most appropriate place for Australia's anti-refoulement obligations to be met? You point out in the submission that it is the minister's discretion where they are presently met, and I take it that your view would be that either there should be a streamlined path to the minister without going through the tribunal and seeking refugee status to be able to seek the exercise of those powers or, I assume, that there be some other path to take for a person who is seeking such protection. I am wondering about the possibility of changing the criteria or the basis for decisions on which the RRT and the MRT work to incorporate those obligations into their terms of reference. That would have the advantage that people would go there, if not necessarily in the first instance, certainly straight after they had been rejected by the department. It would presumably be possible to do that on the basis of laying out in the legislation what the terms of Australia's obligations are under the international agreements and building those into the criteria for the tribunals. What do you feel about that as an option? Is that the best option?

Ms Newell—Our submission did not go into any detail about how those options, for example for legislative changes, might operate, as you are pointing out. However, we do make the point that there are certain steps that should be taken in order to do that. Firstly, there should be appropriate criteria for assessment. What we are talking about in particular in our submission is simply the non-refoulement obligations under ICCPR, CRC and CAT, not the more general humanitarian considerations. We feel that those should be picked out from the ministerial discretionary power and dealt with earlier in the process in some way. We do not yet have a clear view—it requires examination—as to exactly how that might operate. There are three features of that system that probably should be dealt with. One is to ensure that there are clear criteria. That should include being clear about what it means to say that you have to be protected from non-refoulement under the ICCPR, CRC and CAT. That probably needs further investigation in order for it to be clarified. That is the first step.

Secondly, you need some sort of protection against errors in making an assessment, a process which ensures that there is some due process. That very well might be the type of process that is undertaken with refugee applicants. That is probably a good starting point to take. The third thing which is necessary is, once you have assessed whether or not they meet those criteria through that process, you need to give them something, which of course would be a visa, in order for there to be an outcome from that process.

If you look at the way that the refugee claimants are treated through that system, there are clear criteria that they have to meet the refugee convention definition of 'refugee'. There is a process for them to go through. They apply on that basis and the department considers that. If that does not work, or they are rejected, they can go to the RRT. So they actually have the right of review. They have a right to present their views before the RRT and they have legal assistance in that. There is a set process which ensures against errors. Of course, they can also apply for judicial review in certain cases and to ministerial discretion after that. The protection visas are specifically for them. I suppose that would be a good starting point for how you might treat these other claimants under the ICCPR, CAT and CRC. As Stephen has mentioned, we would be happy to help in any examination of how that might work in practice. It is something that is not simple. It would probably require substantial consultation with various parties.

Senator HUMPHRIES—Having read your submission, I put that suggestion to the tribunal representatives this morning. They cited additional costs entailed in taking on a larger workload within a tribunal, but they did not even quantify that so I assume that is a factor that would have to be assessed with the sort of factors you are talking about.

When you say that clear criteria need to be espoused, you are suggesting that the criteria should be clearly set out in legislation. You can reduce what obligations fall on Australia into criteria in legislation. I assume there is no problem with that, but you would presumably advocate discretion to remain with the minister at the end of the day if a person was unsuccessful with the department and the tribunal.

Ms Newell—In the submission, we have certainly taken the position that the maintenance of ministerial discretion is probably a good thing, not only for people who have possibly been through the RRT system—and, if a new category were created for these other reforms on cases, through that system—but also for a variety of other people for humanitarian reasons, who cannot be dealt with through that system and require some sort of assistance. So we are not arguing against getting rid of ministerial discretion. That may very well still be the last stop.

Senator HUMPHRIES—On a different tack again, has the commission received any complaints from any individuals alleging a breach of their human rights with respect to the exercise of the ministerial discretion under the two sections of the subject of this inquiry?

Mr Duffield—I can answer that. As you are undoubtedly aware, after the High Court decision in Brandy, we were required to separate our functionality. The complaints handling section runs completely separately from the policy unit, which we are from, so I would not be aware of any specific complaints that relate to the matter that you have raised, other than when the matter reaches report to parliament. There is no report to parliament that we are aware of that would refer to this matter.

Senator HUMPHRIES—Thank you.

CHAIR—Would you like to put the complaints handling question on notice to the tribunal as well, just to examine that area for us.

Mr Duffield—Sure.

CHAIR—With regard to matters regarding human rights that are appealed to the UN, do any of those matters relate to 417 or 351 applications?

Ms Newell—I am not sure how much you are aware of the various conventions, but under CAT—

CHAIR—I understand, but if they are under CAT, if they are under ICCPR, if they are under CRC, they have to be met by the RRT in the sense that they do not meet it, it is only met by ministerial discretion.

Ms Newell—The UN committees consider whole state reports and make comments on systems but also have the ability in certain committees to look at individual cases. The CRC, the children's committee, does not have that optional protocol. However, the convention against torture does and so does the ICCPR, the human rights committee. They do receive individual communications which are about non-refoulement cases and in the case of CAT there have been several individual communications made by people in Australian jurisdiction who have been about to be removed—there may even have been cases where they have been removed—and have put in a communication to the committee against torture alleging that if that happens, if they are removed, then they will be likely to suffer torture once they are returned.

CHAIR—Do you monitor those cases?

Ms Newell—We do not monitor them in any systematic way but we look at those communications occasionally and they come to our attention through various news and information things that come to us. A famous case I suppose you are aware of that was mentioned in the *Sanctuary under review* report is the case of Mr E or Mr SE—

CHAIR—Mr SE.

Ms Newell—He is an example of somebody who put in numerous 417 applications and nonetheless was about to be removed from Australia back to his homeland of Somalia.

CHAIR—I am familiar with the matter.

Ms Newell—That is an example where he put in a communication to CAT and they actually determined that he was admissible for a start and that it was likely there were substantial grounds for believing that he may face torture if returned. That was communicated back to the Australian government.

Mr Duffield—To follow up on that, we are not part of that. The thrust of your question may have been, are we formally involved in that process. The answer is no, but we do often become aware, by virtue of advocates ringing us seeking some advice or whatever, that that may be proposed.

CHAIR—The latter is as I understood what your involvement might be. Are you effectively suggesting that the section 417 power is not been used to implement Australia's human rights obligations by the very nature of the existence of those cases such as Mr SE and subsequent cases?

Ms Newell—We do not have any examples of cases where those violations have occurred. We do not as an organisation monitor what has happened to people once they have been returned and whether or not any persecution they might have suffered was foreseeable, if you like, by the Australian government and hence may have been a violation of those particular conventions. We do not monitor that. One of the problems is that it is difficult to tell whether or not we have actually violated some of those articles. However, we are concerned that there are not effective remedies in place to ensure that that does not occur. As we say in the submission, article 2.3 of the ICCPR specifies that you have to have in place effective remedies, not only administrative and disciplinary measures, to ensure that the rights within that convention are not violated. That includes future violations as well. Hence we feel that the system itself is a violation of that particular article of the ICCPR, even though we cannot say that there has definitely been a breach of article 6 on the right to life or article 7 on the right against torture under the ICCPR.

CHAIR—So do you say that it is an adequate means to meet our international obligations by the use of section 417?

Ms Newell—The government would say that section 417 is us meeting our obligations. We say it is not adequate. That is right.

Senator WONG—The thrust of your submissions is that we have certain obligations—particularly, non-refoulement obligations—under the three conventions to which we are signatories, and that the only mechanism whereby we can say that we comply with those is section 417. Are you saying that that system is insufficient to ensure our compliance with those international obligations?

Ms Newell—That is right. Part of the extradition agreement talks about not refouleing, under CAT, people who might suffer torture on return.

Senator WONG—Which extradition agreement is that?

Ms Newell—I am not sure. But there is a piece of legislation that deals with extradition generally. I do not know much about it. I am just warning you that it is not the only means. The government may argue that it is the primary means by which we—

CHAIR—There is the Extradition Act.

Ms Newell—It must be the Extradition Act.

Senator WONG—But that only refers to circumstances of extradition. We are talking about people who are here and who assert that, if they are returned, their rights would be breached under either the Convention Against Torture, the International Covenant on Civil and Political Rights or the Convention on the Rights of the Child. The only way that we as a nation can say we are meeting these obligations is via the minister's discretion, which is supposed to deal with it.

Ms Newell—That is right.

Senator WONG—I have asked the department about this at length, because it is our answer to our obligations under these conventions. I have asked whether anyone has actually done an analysis looking at grants under section 417 against the circumstances of the applicants and come to some sort of legal view about whether those circumstances give rise to a reasonable case for non-refoulement. It is never done; nobody does that. Does that cause you some concern?

Ms Newell—Yes. One of the primary concerns is that it is not a transparent process, so it is impossible to analyse. There are two points. Firstly, there are no clear criteria in the process in order to assess those criteria for each individual. Secondly, as the system operates now, it is impossible to tell whether that occurs, even if they say that it does, because it is not done in a systematic and transparent way.

Senator WONG—It is not appropriate to ask you whether people complain to you, because people may be returned, in breach of these obligations, and you would not necessarily know about it unless it is brought to your attention by the applicant or by their representative.

Ms Newell—That is correct.

Senator WONG—We have had quite a lot of evidence about this issue from refugee advocates and groups. An example that has said some media attention—which I think is the subject of the next submission—is that of a Russian woman who alleges that she was subject to sexual violence and rape as the result of having witnessed a crime and that, if she is returned, something similar will happen to her. She falls outside the refugee convention because it does not extend to gender persecution, and she is not of a particular political philosophy which is the basis of the persecution. It is asserted that she is clearly someone who ought not be returned, but she falls outside the refugee convention, so our system has no answer for her unless the minister intervenes. Do you have any comment on that?

Ms Newell—I do not know the full details of the case, but I know the case you are referring to. It is probably one of a number of cases that may fall outside the definition of 'refugee' in the refugee convention.

Mr Duffield—On that point, as the committee clearly appreciates, section 417 is fine as far as it goes; it is just that we believe that the lack of criteria and lack of transparency—the lack of a clear system to deal with the non-refugee cases—leaves the Australian government exposed on that issue. Your example—the next submission—is possibly a good example of how that operates in practice.

Senator WONG—Is there anything in our law that would be of assistance to a woman claiming persecution on the basis of gender if she returned to her country of origin?

Ms Lesnie—It is not an issue that this unit has spent a lot of time on. In fact, there is a sex discrimination unit in the Human Rights and Equal Opportunity Commission which follows this issue more closely. I believe that there are some cases currently coming before the courts which are exploring this issue in particular. They are exploring whether or not persecution on the basis of gender is `membership of a social group' and, therefore, may fall within the Refugee Convention. So it is possible that that group of people will, now or in the future, be recognised as refugees. But, apart from that—

Senator WONG—Unless that happens, the current law is that women are not a particular social group. They would fall outside the refugee convention, so they would have to find some other basis on which to press their claim. Is that not right?

Ms Lesnie—I would have to take that on notice, because I believe that there are some new cases coming up that may have already found that it is `membership of a social group'.

Mr Duffield—However, on that point, the Migration Act is a particularly powerful instrument. The Family Court, for instance, has found great difficulty in certain cases where the Convention on the Rights of the Child was used in an attempt to produce a certain outcome as far as remaining in Australia was concerned. On balance, the Family Court has found that the overriding nature of the Migration Act is predominant. That goes a little to what you are talking about.

Senator WONG—Is antidiscrimination legislation generally applicable to the exercise of discretionary powers, such as 417?

Ms Lesnie—I would have to take that one on notice.

Ms Newell—We would have to take that on notice. In the human rights unit we only deal with discrimination in terms of employment matters on specific grounds.

Senator WONG—The reason I ask that is that we have had some evidence in which people have asserted that applicants with biological Australian children had a very good chance of having the former minister exercise discretion in their favour. But that benefit, on these people's evidence, did not extend to people with Australian stepchildren. It has been a while since I have done discrimination law, but I seem to recall that we are not supposed to discriminate on the basis of previous or current marital status and so forth. It would seem to me on face value that, if that were true, it would be discriminatory.

Ms Newell—That would be something to fall under the sex discrimination act. If you like, we could explore it with the sex discrimination unit and get back to you.

Senator WONG—In your submission you reiterate your support for the 2000 report of the Senate Legal and Constitutional References Committee. Amongst other things, it suggested:

> … the … Department … examine the most appropriate means by which Australia's laws could be amended so as to explicitly incorporate the *non-refoulement* obligations of the CAT and ICCPR into domestic law.

I wonder whether we might have moved on from that. Clearly, the department and the government have not taken that recommendation up. There has been no movement in relation to picking up those non-refoulement obligations. Do you have any other more specific recommendations about how we might incorporate those obligations into the system we have?

Ms Newell—Not other than what I have already explained, and not at this stage, though I think it is fairly specific to say that the way that the refugee convention deals with refugees is a good starting point. I think that that is quite specific, considering that set criteria, a specified

process and a particular visa are specified in the Migration Act. Other than that, no, we do not have an alternative model or something like that to present to the committee.

Senator WONG—But your submission would support another class of visa being established that related to these obligations.

Ms Newell—That would seem—

Senator WONG—logical.

Ms Newell—to be a logical outcome.

Senator WONG—I asked DIMIA about findings against Australia by UN committees regarding breaches of our international human rights obligations. Do you monitor such cases?

Ms Newell—Senator Ludwig asked the same question. No, we do not do a systematic monitoring of them but they do come to our attention. As I said, we are aware that there have been several under CAT and there have been cases under the ICCPR as well. I do not think that cases on refoulement come only from Australia.

Senator WONG—Are you able to provide us at some point with the number of cases that you have been aware of?

Ms Newell—The ones under the Convention Against Torture? Yes, we can get back to you about that.

Senator WONG—Any of the three conventions.

Ms Newell—We can have an investigation if you like.

Senator WONG—Thank you, that would be useful.

CHAIR—Could you also tell us whether there has been any response from Australia in respect of those UN committees. The second and third reports in respect of CRC have been delivered but that is about where we are at, are we not?

Ms Newell—Yes, with respect to the CRC State reports.

Senator HUMPHRIES—In your submission, you say that Australia's obligations under those conventions—CAT and so on—are non-discretionary and that, because the exercise of the minister's discretion is by its nature discretionary, that is a breach of our international obligations. Are you saying that if a person applies to Australia for protection and can successfully invoke a breach of one of those conventions by another country—if, say, they claim that if they return to country X they will be subjected to torture—Australia has an obligation to grant that person protection?

Ms Lesnie—Australia has an obligation not to send them back to that country. That does not necessarily impose on Australia an obligation to grant a visa or something like that. It is like the

refugee convention—we cannot send them back to that country if we are aware that that would occur. I think what you are referring to is that there is a difference between Australia being in breach of, for instance, the right to be protected from torture and Australia being in breach of, for instance, article 2 of the ICCPR, which says that we need to have a system in place to make sure that that does not happen. The opposition between it not being a discretionary obligation but the only remedy available being the minister's discretion is where the breach lies, not in the torture article itself.

Senator HUMPHRIES—But, if the minister has the option of granting or not granting a visa or authorising some other action to facilitate that person's not being returned to the country where their rights will be at risk, presumably Australia's obligations are being met. The exercise of discretion either way does not breach Australia's obligations, does it?

Ms Lesnie—What that means is that there will be no breach of, for instance, the right to be protected from torture. However, because there is no system in place to make sure that that does not happen, there is a continuing breach of the international obligation to make sure that there is a system in place. If the discretion is exercised there will be no breach of the right to life in the specific circumstances. But the fact that there is no system in place to make sure that that breach does not occur is a continuing breach of, for instance, article 2 of the ICCPR.

Senator HUMPHRIES—Is that an assessment HREOC has made of the law based on an opinion? Is that your reading of the law of the international obligations or is there a legal opinion you can point to that supports that view?

Ms Newell—It is our reading of the jurisprudence of the UN committees dealing with those particular conventions.

Senator HUMPHRIES—It seems to me to have, potentially, some curious implications.

Mr Duffield—The whole issue of how to interpret the relevant provisions of international conventions is a very difficult area. As you would be aware, HREOC frequently finds itself in a different interpretive position to the government. Short of a High Court decision or an external body that would have jurisdiction in Australia, there is no real way to finally answer that contradiction. It is like getting two senior counsels' opinions, which are both extremely valid but have a different read of the same situation. I am putting that in a more general context. It is not unusual for us to reach a conclusion that the government, with the best legal advice, would strenuously resist—where our read is wrong and their read is right.

Senator HUMPHRIES—So there is no authority or opinion from an eminent QC or someone who could give more weight to your view on this matter?

Ms Newell—Not at this stage.

Mr Duffield—We believe that HREOC and its legal department represent a very fine repository of jurisprudence in this area, but it still ends up being our considered opinion, which will be very respectfully but firmly challenged by the government.

CHAIR—There are considerable documents and writings on this issue, aren't there?

Ms Newell—There is plenty of writing on the interpretation of the covenants. I am not aware of any writing that has directly applied the section 417 discretion in that context. There could be, but there is none that I am aware of.

CHAIR—And the department has never provided any legal advice to support their view?

Ms Newell—Not to us.

CHAIR—We might ask that at some time.

Senator WONG—My recollection, from a number of submissions and some of the footnotes in yours, make it quite clear that what is required under ICCPR and the specific non-refoulement obligations in CAT is a system that ensures we do not send people back when they are at risk of persecution or torture, for want of a better broad term. We do not have a system that ensures that—we have a discretionary system, which may result in protection and non-refoulement. One area I have neglected to ask about is the reference in 417 to public interest. Whenever I have asked the department about these issues and to explain why the minister might have granted a visa under the discretion in relation to this type of matter and not that type of matter, the answer has been that it is in the public interest, that ICCPR and CAT and the Convention on the Rights of the Child are only one aspect of public interest and that it is essentially a self-determining definition, because the public interest is what? The public interest is what the minister thinks it is. One just goes around and around. What do you think about the impact or the effect of having a public interest test as opposed to a test relating to our international obligations as the test for the minister exercising his or her discretion?

Ms Newell—We make mention of it in the submission.

Ms Lesnie—Our position is that the public interest criteria may well encompass the obligations that we owe, but they are not sufficient to protect them.

Senator WONG—And they may encompass other issues against granting of protection, such as a stated desire by the government to limit the number of protection visas issued. It may actually encompass issues antithetical to our obligations under those international treaties.

Mr Lesnie—That goes back to Senator Humphries point that their obligations are not discretionary but the remedy is, and the two really are not compatible with each other for fulfilling our obligations under international law.

CHAIR—Thank you for your evidence today. It has been helpful to the committee.

[2.15 p.m.]

MILNE, Ms Frances Lillian, Convenor, Coalition for the Protection of Asylum Seekers

CHAIR—Welcome. You have lodged a submission with the committee. Do you wish to make any amendments or alterations to that submission?

Ms Milne—Yes, there is just one amendment which has come to my attention. On page 4 of my submission, where I deal with out-of-time issues, I need to modify the statement that many asylum seekers who decide to make a claim under section 417 then can only take the option of applying to the High Court if they are refused and still feel there are errors of law they want to challenge. Since the 4 February S157 decision of the High Court, there is some consensus emerging amongst lawyers that the Refugee Review Tribunal decision can be appealed to the Federal Court, out of time, by leave of the Federal Court. This is not widely known among asylum seekers—it is a rather esoteric point, perhaps—but I thought, since it has now gradually come to my awareness, that I ought to modify my statement. Not the most important point but, nevertheless, I do not want leave an incorrect statement there.

CHAIR—Thank you very much. I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions in respect of your submission or your oral presentation.

Ms Milne—As I pointed out, the Coalition for the Protection of Asylum Seekers is an interfaith group, essentially, with other human rights groups represented as well. It represents the concerns, in particular, of Christian, Muslim and Jewish leaderships about the mounting evidence of people who have failed to be determined to be refugees and yet have been returned to countries where they have met very grave ends: some have been murdered, some have been imprisoned and some have disappeared. We put together case studies, launched those case studies and presented them to the minister. On the basis of these things, we felt that we had to be ongoing in bringing these issues to the fore for the Australian population to understand and, where we could, to monitor people who were returning and to seek that the minister would also do that.

CHAIR—Do you make representations on behalf of persons seeking ministerial intervention?

Ms Milne—I have included those in our—

CHAIR—Yes. I was just trying to work out whether they were ones where you sought intervention on behalf of those persons.

Ms Milne—Yes. As I pointed out, I cannot verify how many of the Iranians have done that. I know that everybody in Villawood detention centre has applied for a 417. I am assured that there are many Iranians around the country who have been given what I describe as a 28-day warning—either they had to decide to leave the country voluntarily or they would be under threat of forcible removal. My understanding, from talking to advocates around the country, is

that most of the Iranians under threat of forcible deportation at the moment have at some stage tried to put in a 417 application.

CHAIR—Do you make a representation to the minister with respect to any of these cases personally or on behalf of the coalition?

Ms Milne—Yes, we do. The coalition in its various component parts attaches support for application to the minister. In my particular situation, I am on that coalition representing the Uniting Church, so I do use Uniting Church advocacy in that respect.

CHAIR—So, to your knowledge, the cases that you have referred to in your submissions all have representation on your behalf, on behalf of the Uniting Church or on behalf the coalition?

Ms Milne—Or on behalf of members the coalition; yes.

Senator HUMPHRIES—I looked at the points you were making about what you call 'Access to fair and effective advocacy'. You seem to be saying there that the chance of success depends on the effectiveness of the advocate or the position of the advocate relative to the minister. In fact, you go so far as to say, on page 2 of the submission:

It is entirely a matter of whether an asylum seeker can obtain the support of some-one of sufficient influence that the Minister takes notice.

That is a fairly strong statement. That suggests that you have no chance of success without a particular sort of advocate behind you and, with simply a good argument but no particularly good advocate standing beside you, you have little or no chance of success. I assume that is not what you are saying.

Ms Milne—It is probably being a little absolute using the word 'entirely'. I might agree there, but I do not know of anybody who has simply put in a 417 application without support that has got the support of the minister. I know that enormous amounts of effort are put into getting support from groups in the community in order to make as good an application as is possible. People may take years to put together a 417 application.

Senator HUMPHRIES—What is the alternative to allowing people to advocate on behalf of asylum seekers or people seeking a visa? Indeed, as you say, your church does that and others in your coalition do that. I think we can be sure that, if the minister said, 'I am not going to speak to anybody on these subjects; I am going to only read the submission and speak to nobody,' there would be howls of outrage. Given that we presumably agree that it should appropriate and possible in a democracy for people to put forward a point of view on somebody's behalf, how can the present system be better structured?

Ms Milne—I have always put that criticism—it may look like a criticism—in the context of the absolute necessity of having a humanitarian category. Therefore, I expect that most of the people that are presently going up under a claim under 417 as their only recourse would automatically fall into humanitarian categories of much wider application. This would therefore leave the minister to have extraordinary situations to deal with and he would not have to deal almost routinely with people who cannot get a hearing in any other way.

Senator HUMPHRIES—Presumably, there would still be unsuccessful applicants under those humanitarian grounds, and they would make applications under the system you proposed to the minister.

Ms Milne—Yes.

Senator HUMPHRIES—In those circumstances, is there anything wrong with the discretion being exercised in the light of people's or organisations' advocacy and support to the minister?

Ms Milne—I am not against advocacy and support by organisations that are prepared to help the settlement of those people into the community in some way. That is the context in which most of us are going. We are not just advocating, we are offering particular sorts of services and supports that we can give that person. I am not opposed at all because I would hope that the humanitarian process, with a full judicial review—which we hope for the ordinary process as well under the refugee convention—would be adequate to make fair assessments. Therefore, the minister would have only extraordinary cases to look at. Yes, advocacy might still be needed, but at the moment we are advocating on behalf of people that belong to a broad category of people, and we are trying to make an extraordinary claim. They are extraordinary because we believe they will be facing torture and other forms of persecution when they go home. That is the reason that we are advocating so fiercely on their behalf—because there is not a humanitarian category.

Senator HUMPHRIES—Okay. You also criticise the lack of clarity or transparency in the reasons for exercising his discretion that the minister gives in the statements that he has to table in parliament. What would you hope to gain from having more expansive statements and more information in the statements?

Ms Milne—It would give people an indication of what the minister considered to be extraordinary about the case. Again, I am setting this in the context of having a complementary stream of assessment for humanitarian cases. That would give people some idea of the sorts of situations that would make it worth while to put a lot of time and effort into a claim against a 417 application and would make it clear that, if it were a claim made as a last ditch stand by somebody who just hoped to stay in the country, it would have little chance of success. I expect it would not gain a lot of support.

Senator HUMPHRIES—Can you tell me what sorts of people are members of the Coalition for the Protection of Asylum Seekers? Are they only organisations, such as church groups, or are they individuals?

Ms Milne—No. I will quickly run through them, and I am quite happy to table a list of those in the group. The coalition includes representatives of the Jesuit Refugee Service; lots of different Catholic orders, including the Mary McKillop Institute; the liaison person for Archbishop Peter Jensen; Temple Emanuel at Woollahra; Just and Fair Asylum, a general humanitarian group; myself, representing the board of UnitingCare—the New South Wales Synod of the Uniting Church; Justice and Peace Promoter—the Catholic Archdiocese, Sydney; various Moslem groups, including the Australian Moslem Women's Association; the Edmund Rice Centre; and the National Council of Churches of Australia. We also have various people in consultancy roles. Amnesty International would often come for a particular meeting. When I put out minutes, the Human Rights and Equal Opportunity Commission would often come back to

help. Some people would be more in the role of a consultant, while others were working very hard on the declaration and on monitoring the case studies. About 25 different groups attend the meetings.

Senator WONG—I am not going to ask you where you got attachment 5 to your submission, but it appears to be an internal minute in DIMIA regarding negotiations between the Australian government and Iran on the deportation of Iranian asylum seekers. You have also included a draft memorandum of understanding. This has previously been before the Senate, and none of us has managed to get a copy, so congratulations on obtaining it. Anyway, I will leave it at that. I assume you have read these documents.

Ms Milne—Yes.

Senator WONG—I do not know the status of these documents, but in neither of them is there any reference to any undertakings being sought by Australia from Iran regarding the welfare or non-persecution of returned asylum seekers.

Ms Milne—Yes, that is a very big worry.

Senator WONG—What do you have to say about that?

Ms Milne—We took this issue to the minister but not in this form. Mainly as the coalition, we took to the minister our concerns about people who had been returned and had met a terrible end. The minister's attitude was that once people have been removed from Australia and have been returned to their own countries he has no further jurisdiction in those matters. We asked him to monitor the ongoing destiny of those people. He said he was not able to do that, and that Australia was not entitled to interfere in the domestic affairs of another country.

Senator WONG—We just had some evidence from the Human Rights and Equal Opportunity Commission . Ms Milne, I am not sure whether you were here.

Ms Milne—I heard the last part of it.

Senator WONG—Their submission speaks at length about our obligations not to refoule or return persons to circumstances where they may be persecuted, under various international obligations. In your discussions with the minister, were those issues raised?

Ms Milne—Certainly, and in the context of two people in particular that stimulated me to convene this group. One was the death of a young Pakistani on removal from Villawood detention centre back to Pakistan and another was of a Colombian returned from Australia. The minister denied that the Pakistani man died of anything else but heart failure. We said that we had other evidence beyond what our first intimations were, but he said he had evidence from his embassy that the young man at 18, who had no previous concerns about heart failure, had died of heart failure. I had facetiously on a more recent occasion told the minister that we all die of heart failure; very few people ever get buried, I should think, with their heart beating. But the issue in this case was other evidence that had been presented to the minister about how he died and how he had been murdered. I have to get used the idea of talking about how he had been murdered. The minister did not accept that explanation.

Senator WONG—Is this document genuine? I mean the minute.

Ms Milne—I cannot say whether it is genuine or not except that it has come into our hands, and the way in which the threats to the Iranians have come into force echoes to some extent the detail of the strategy here: the credible threat being set up; people being given 28 days notice; the level of harassment of people in detention that they had to make a decision because they would be forcibly removed irrespective if they did not make a decision and decide to go voluntarily with a $2,000 package. That was very soul destroying, particularly for people in detention centres like Port Hedland and Baxter where there is less access for community groups to go in and be seen to be supporting and aware of what was going on. Villawood was destabilised enough by that the sort of threat. We feel the cruelty involved in that is enormous, and it is the sort of thing that was referred to here in this document.

Senator WONG—There is then an information sheet for Iranian detainees which appears to set out essentially the same package and the same views that are suggested in the minute.

Ms Milne—That is the information sheet?

Senator WONG—Yes.

Ms Milne—I do not have one with me, but it would be possible to get the eventual letter that was given that does follow, as I recall, very closely to this minute.

Senator WONG—Have you obtained this information sheet because it was provided to various Iranian detainees? It is at the back.

Ms Milne—Yes, I have got it. I have a little note on the bottom. I must say my memory does fail me a bit, but the fact that I have got 'Received Friday, 21 March 2003' indicates that that is exactly what it was: it was the first warning that this was about to come into implementation. The next letter, from my understanding, was a much more specific one to each detainee.

Senator JOHNSTON—Does the coalition actively assist applicants for visas?

Ms Milne—For 417 applications?

Senator JOHNSTON—Yes.

Ms Milne—I would think many members do. As I say, the people in the coalition came together to put a broad statement—take a broad position. Many of us are regular visitors to Villawood detention centre.

Senator JOHNSTON—So the coalition is not a tightly knit organisation that does things on a constant basis. Do you meet once or twice a month or something like that?

Ms Milne—It would be no more than once a month, usually around a particular issue.

Senator JOHNSTON—I understand.

Ms Milne—The issues in this case of course were the deaths of people. We decided to pool together all our knowledge of the cases that had been removed.

Senator JOHNSTON—Does the coalition, using its full title, support applications and send letters to the minister for 417 applications?

Ms Milne—No, it does not, because that would require calling the whole body together. What happens is that many members of the body will ring up and say: 'Can you get your organisation to support us? What can you do?' For instance, ours would say, 'We have a network of doctors that can give support that might be required during the application period,' and so on.

Senator JOHNSTON—You say at the bottom of the first page of your submission, in the second last paragraph:

We—

and I take it that you mean your coalition members—

are ... completely unsurprised at the allegations of Bruce Haigh that the Minister interferes in the decision making process to the detriment of applicants.

Was this a matter of a minute of one of the meetings?

Ms Milne—What I did was draft this letter, send it around all the members asking them to please check it and see that they were happy for it to go forward, and then send it in. It was done in haste. Ours is a very active coalition in terms of the membership being involved with individuals. There is not a lot of time to write submissions, and it was a rather hasty submission. I felt confident of simply putting that anecdote in because of the sort of criticism that has come across the tables of many people who are involved in our agency as to what happens within the RRT.

Senator JOHNSTON—You are aware of Mr Haigh, are you? Do you know him?

Ms Milne—I am aware of him; I do not know him. That is a press report, as you will see.

Senator JOHNSTON—The next line is:

Bruce Haigh was a Refugee Review Tribunal member for five years from 1995, and a former diplomat.

That is just a paraphrase of the second paragraph of the newspaper report, attachment 2. Do you have any additional information, save for that reference to the *Sydney Morning Herald* article of 29 June, to support the contention that the minister interferes with the tribunal?

Ms Milne—No, I do not have that. What we do have is criticism of the inconsistencies in the tribunal findings.

Senator JOHNSTON—Sure. The allegation you have made on the front page is that the minister interferes with the tribunal. That is a very serious allegation, I would have thought. To

support that contention you are using a newspaper report. In the newspaper report Mr Bruce Haigh is put forward as a tribunal member. Would you be interested to know that in 1999 Mr Haigh made five referrals to the department for 417 type intervention but since that time has made no referrals? Would that surprise you?

Ms Milne—I do not know enough about him to say whether or not that would surprise me. In that article he is speaking out about his experience on the tribunal.

Senator JOHNSTON—Would it surprise you to know that he probably has not been a tribunal member since 1999-2000—that for the last 3½ years he has not been a tribunal member?

Ms Milne—Isn't that what was said—that his time on the tribunal was prior to that?

Senator JOHNSTON—So you understand that he has not been a member for the last 3½ years?

Ms Milne—Yes. I do not know his life story. I do not know his CV and I do not know what he has been doing since then. From the way in which the tribunal's findings come through, we feel that the tribunal itself either directly or indirectly picks up the flavour of the deterrence policy, which seems to us to be—

Senator JOHNSTON—I am very pleased to hear you say that because that is a significant departure from the type of flavour that you have put into your submission. What you have just said is totally different to being unsurprised that the minister interferes in the decision making process. You see, Mr Haigh does not even say that. The article you have quoted says:

Bruce Haigh, a Refugee Review Tribunal member for five years ... and a former diplomat, said there was no directive issued to members of the statutorily independent board, but members would be told if "the [Immigration] minister ... wasn't happy" about certain decisions.

Do you not see any problems with the tenor of that statement as something that you would rely on to assert the minister directly interferes with the tribunal?

Ms Milne—I can see your point, but it is a very serious point to make.

Senator JOHNSTON—You are alleging that the minister interferes in an administrative judicial process.

Ms Milne—I do not know that that happens, but I am unsurprised because of the style of decisions that come from it.

Senator JOHNSTON—So you are prepared to rely upon the words, the tenor and the vagueness of this statement in the *Sydney Morning Herald* article? That is the only bit of support you have for your statement in your submission, is that right?

Ms Milne—I would have to ask around my group, but, yes. That was the insert that I put in, but there was no challenge to that at the time.

Senator JOHNSTON—Do you not see it as important that, when Mr Haigh allegedly makes these allegations, he does not talk about himself? In the next line he says:

Pressure was exerted through informal "chats" and meetings with the tribunal's senior member after meetings with Mr Ruddock ...

But he does not talk about it as if it has ever happened to him.

Ms Milne—Yes, that is right.

Senator JOHNSTON—Is there not a problem with that hearsay on hearsay in these sorts of allegations? They make good reading but they do not have much factual support.

Ms Milne—I can see your point, certainly.

Senator JOHNSTON—Another part of the article reads:

"There has been corruption in the department forever."

Do you have any evidence to support that allegation?

Ms Milne—I want to take that on notice because I want to ask my team about that.

Senator JOHNSTON—But in writing your submission, there was nothing that you had in the forefront of your mind before you got here this afternoon that supported the contention, which you have impliedly got through your attachment 2, that there has been corruption in the department forever?

Ms Milne—'Corruption in the department forever' is a long statement.

Senator JOHNSTON—I am glad you agree with me.

Ms Milne—I have been in contact with the department for 30 years now.

Senator JOHNSTON—That is very interesting. Have you known any corruption over that time where money has changed hands for someone to breach their duty?

Ms Milne—No, I have never known money to change hands, apart from the allegations in the press that no doubt brought this into being. I suppose corruption comes at different levels. I just cannot answer your question.

Senator JOHNSTON—The tenor of my questioning is that you appear to have swallowed this article whole, if you will excuse that vernacular. Do you not see some sort of problem in that when you pause to look at some of the broad issues?

Ms Milne—Now that you bring all of those sorts of arguments to my attention, I can see that that is a problem. However, what I am saying—and why I did not spend too much time even

thinking about inserting that—is that the number of issues that come up from the failure to have a right process within the RRT are, I would have thought, sufficient. That is why, perhaps without sufficient examination of the way that this article had been put together, I felt that it did in fact reflect the tenor of what people's feelings were about the sorts of decisions made by the Refugee Review Tribunal. There is a strong perception within our group that it is not an independent tribunal.

Senator JOHNSTON—You are relying and basing that perception upon attachment 2. I would love you to tell us anything more that you have at your fingertips.

Ms Milne—I have a number of reports about what is seen as the failure of the RRT in its findings coming in right now for another reason. If that is of interest to you, I can forward them after we have sufficient numbers of those.

Senator JOHNSTON—But when you wrote the submission—

Ms Milne—I have not asked for the evidence with regard to this submission. I have asked for it now, in terms of something else that is happening.

Senator JOHNSTON—You are aware of the terms of reference for this committee.

Ms Milne—Yes.

Senator JOHNSTON—Do you think that it would have been important that people who made the sorts of allegations that you have in your attachment 2 appear before this committee? Would you expect them to appear before this committee and substantiate the sorts of claims that you make here?

Ms Milne—In attachment 2?

Senator JOHNSTON—The article.

Ms Milne—No, I have not had time to bring anybody before the committee.

Senator JOHNSTON—But you would expect people who had made that sort of allegation to come before this committee. You know what the article—your attachment 2—actually says. It alleges corruption in the department and it alleges interference by the minister. You would expect that, if there were some substance to those sorts of allegations, this committee would hear of them, wouldn't you?

Ms Milne—I have not asked for anybody to come with me, but—

Senator JOHNSTON—What I am saying is: is it enough to have an article floating around without anybody coming along, as you have today, giving us some supporting evidence? Because we have heard none to support those contentions. Does that surprise you?

Ms Milne—You have heard nothing from anybody else on this matter?

Senator JOHNSTON—No.

Senator HUMPHRIES—Except hearsay.

Senator JOHNSTON—You are the first person that has put this article before us and used it to support the contention that the minister interferes. I am saying that the article does not disclose any evidence, and I am saying to you that there has been no evidence to support the contentions, the innuendoes and the insinuations contained in the article. Would you expect there to be evidence to a committee such as this, given the terms of reference? I suggest the answer would be, yes, you would, and you would be surprised.

Ms Milne—I think I have already described that I have had very little time to put this together. No, I had not sat down and thought, 'What would this committee like to hear?' I had thought, 'What should we respond, given that we have got a concern about what is happening in this whole area?' What I have put together has been put together hastily and briefly, and certainly I did not stop to think about what this committee would want in terms of evidence. I could think of other areas that maybe would demand more evidence—for instance, the case studies of people that have been removed. I would have thought that was of a great deal more concern. I do have that sort of thing. I did not bring people along to talk about it; I have got those case studies.

Senator SHERRY—I wanted to go into a little detail on the issue of the Russian woman. I read with interest—and, I must say, a fair bit of horror—your in camera evidence, and there is some detail in an article in the *Sydney Morning Herald* which is attached to your submission. I am just wondering if you are aware of why the refugee tribunal did not find that she was a refugee, given the circumstances contained in the statement.

Ms Milne—I cannot comment because I have not seen that Refugee Review Tribunal decision, but she does not belong to one of the groups, I assume. There are certain groups that have to be proven—national, religious, racial or social groups or groups that have a political opinion—but she was one person who saw a particular event and, from then on, has been in danger for her life, according to her affidavit, and that does not put her in a convention group.

Senator SHERRY—I note that the *SMH* have an understandably brief story, but her circumstances are effectively political—to do with the corruption, in this case, in the government in Vladivostok—and the failure of the authorities to both protect her and investigate the shooting that she witnessed while she was employed as a dealer at a casino. What you are saying is that those sorts of criteria—

Ms Milne—I cannot say that is why the RRT rejected her submission. I am sorry, I can't comment on that.

Senator SHERRY—And then the subsequent refusal of the authorities to protect her from her employer, who is a former KGB agent.

Ms Milne—I would prefer that those details of the affidavit she put in were not dealt with in that manner. What I was trying to do with examples of this kind was to say, 'This is an example of why we need a complementary humanitarian category.'

Senator SHERRY—It seems to me that if her circumstances do not fit into an ethnic or religious category, you could argue a political aspect. She is not being persecuted for her political beliefs, but she is certainly being threatened and not protected because of a corrupt political system—in Russia in this case.

Ms Milne—I can't comment.

Senator SHERRY—If those circumstances are not included as grounds for a successful application, they seem prima facie to present a humanitarian/compassionate set of circumstances that should be considered. Do you agree with that?

Ms Milne—Yes. For instance, I notice the guidelines for a 417 under 4.2.8 read:

Strong compassionate circumstances such that failure to recognise them would result in irreparable harm and continuing hardship to an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident) ...

So there are things in a 417 that would ostensibly apply, but she is not being granted a 417.

Senator SHERRY—Yes, I noted that. She has an Australian born child who is living with the Australian father, as I understand it. Is the child still living with the Australian father?

Ms Milne—Yes; she has the child three days a week in Villawood.

Senator SHERRY—Yes, that was reported in the *SMH* article as well. Has he been deemed to be a fit and proper father?

Ms Milne—I can't comment on that, sorry.

Senator SHERRY—You can't comment.

Ms Milne—Well, I would rather not comment on those areas.

Senator SHERRY—That is okay. In the confidential affidavit I read that the issue of her coming to Australia from Thailand arose because Australia was first on the alphabetical list of embassies. I say this somewhat facetiously, but perhaps if we want to deter refugees we should change our listing in the phone book.

Ms Milne—Or perhaps start with Zimbabwe and work backwards.

Senator SHERRY—It seems overwhelmingly logical to me. Is her case to go back before the new minister for a further consideration on compassionate or humanitarian grounds?

Ms Milne—I assume it will go back to the new minister—yes, it is still before the minister.

Senator SHERRY—In this case I hope the minister, as a female, is a little bit more understanding of the circumstances.

Ms Milne—Yes, I hope so.

Senator SHERRY—Thank you.

CHAIR—Thank you; that seems to have concluded the questions from the committee. I think you were going to take a couple of matters on notice from Senator Johnston.

Ms Milne—Yes. I will look through the material I have to find that sort of evidence for you.

Senator JOHNSTON—If you have it.

Ms Milne—Yes. I am asking for those in another context and they do not come to mind readily at the moment. I suppose it was an unexpected volley from that direction, since my own direction and thrust is about outcomes of removal.

CHAIR—I understand that numerous organisations form the Coalition for the Protection of Asylum Seekers and you may need to consult with those.

Ms Milne—Yes, and in particular about our concerns about the independence of the tribunal—and of course Senator Johnston made some salutary comments about my perhaps hanging far too much on one article without having the evidence and the representation here that you might have expected on that issue.

CHAIR—Thank you. I will mark that list of coalition members as supplementary submission 29A.

Ms Milne—Do you want anything more on that?

CHAIR—No thank you. If I heard correctly, you also mentioned that you were looking into cases from the RRT.

Ms Milne—Case studies?

CHAIR—Yes.

Ms Milne—We have case studies that we published at the time. I can table those right now if you want.

CHAIR—I am happy to take that on notice. You can send it to the secretariat.

Ms Milne—All right.

CHAIR—Then you can maintain your original copies and any notes you may have put on them. You mentioned the Pakistani person and the Columbian person, but could you also ask your coalition members whether or not they have done any case studies in relation to the fate of any other returnees.

Ms Milne—Of course you have seen the Edmund Rice Centre material. That has been published fairly widely, I think. We worked very closely with them in getting case studies published in manageable form. That included the Syrian passports issue. Do you want those studies?

CHAIR—Yes please. It would be helpful for the committee to be aware of that information. Thank you for your representations and submissions today.

Proceedings suspended from 3.01 p.m. to 3.39 p.m.

FERGUS, Mr Paul, (Private capacity)

CHAIR—Welcome. You have lodged submission No. 4 with the committee. Do you wish to make any amendment or alterations to that submission?

Mr Fergus—No.

CHAIR—I now invite you to make a short opening statement.

Mr Fergus—Thank you. I might first apologise to the committee for being somewhat late. Unfortunately I did not receive the information about the venue today, and I went to Parliament House expecting it to be there.

CHAIR—We extend our apologies to you as well.

Mr Fergus—I thought about what I had written, because it is now quite some months since I wrote it, and I wondered whether I ought to add anything to what I said. I decided not to do so. My approach to the terms of reference was to consider from a more strictly legal point of view whether there were reasons for maintaining the discretion. As my submission points out, I think there are very strong reasons for maintaining the discretion. I think it is a discretion that needs, however, to be more open than perhaps it is at the moment. Thinking about the sorts of letters you receive from the minister for citizenship or the minister for immigration in response to requests that you might make on behalf of a client under section 351 or section 417, they really do not tell you anything apart from the fact that the request has been received and that it is being processed first of all within the department. Subsequently, you get a letter from the minister saying that he is pleased to consider whether to exercise his powers.

CHAIR—Thank you. Do you make ministerial intervention requests?

Mr Fergus—Yes, I do. I checked my own records of those. I have made about 20 ministerial requests—and, when I say ministerial requests, I mean often for family units—in a period of about four years. Of those, approximately half have been successful.

CHAIR—When you determine that you will make an intervention, how do you choose? Is it first cab off the rank? Is it anyone who comes into your office? Do you choose which ones will be represented or do you go through a winnowing process?

Mr Fergus—Striving to be a responsible solicitor and migration agent, I and everyone else in the firm where I have been working to date try to be frank with our clients about whether they have any chance of success. Indeed, I have told clients on a number of occasions that I was not prepared to make submissions on their behalf, simply because I could not see that they had any prospect of success at all. Having said that, because this power is a final chance for your clients, you do, I think, have some obligation to put it forward for ministerial consideration if there is any prospect that you can see under which the minister might be prepared to grant the person a visa.

Senator SANTORO—Even though it may be small?

Mr Fergus—Even though it may be small, yes.

CHAIR—How long does the process—for you to get your first letter back or an indication that you have been successful—usually take?

Mr Fergus—It is a two-stage process. The first stage is a letter from the Minister for Citizenship and Multicultural Affairs, usually, saying that your request has been received. I am meticulous about sending my requests to the minister at Parliament House in Canberra. I believe other migration agents and solicitors in fact send them to the department here in Sydney. I think, since it is a request of the minister, it should be made personally to the minister, and that is the reason for my practice.

CHAIR—Does that seem a reasonable length of time to you?

Mr Fergus—Generally speaking, I could not criticise the length of time. As I said, the factor that seems most to delay the process is the complexity of the issues that you, as an adviser, have put forward to the minister for his or her consideration. Those issues can be very complex in some cases; in other cases they are much cleaner and clearer, so that the department does not need such a long lead time to process its submissions to the minister.

CHAIR—Do they come back earlier and let you know they are being processed or do they take the same amount of time?

Mr Fergus—I am sorry; I do not understand what you mean.

CHAIR—You said there are less complex cases. Do they still take the same time?

Mr Fergus—No, they do not take the same time.

CHAIR—They are quicker.

Mr Fergus—That is the point I am making: that they will be processed much more quickly, usually.

CHAIR—So the length of time is dependent, in your view, on the complexity of the matter?

Mr Fergus—So far as I can judge from my side of the table, yes.

CHAIR—Do you make direct representations to the minister about the particular case in respect of which you might be seeking intervention?

Mr Fergus—Almost always I write, saying that I am instructed by the client to make these representations on his or her behalf, and then I will try to address all the guidelines that I think are relevant. If I think there are other important considerations that might not be addressed in the guidelines, I will try to bring them up as well. My submissions usually run to about three or four pages—sometimes more, very rarely less—because, by the time you address each of the relevant

guidelines and set out the arguments for why in your view the minister should exercise the power, you really do need to devote some time and care to the presentation of those ideas.

CHAIR—Do you then follow it up with the minister's office with one of the department's liaison officers or do you contact the minister separately to see where it is in the queue—whether it has been put before the minister for consideration?

Mr Fergus—No, having presented it and having got the acknowledgement of the presentation from the Minister for Citizenship and Multicultural Affairs, I then wait to hear from the minister. Sometimes, if your submission has been rejected by the minister—or, for that matter, rejected within the department without being given to the minister, which is a quite separate issue—you will not get a chance to make further submissions. You might be then put in a position where you have to make a second submission if you think there are significant matters that you have not brought to the minister's attention.

CHAIR—You are aware that others take up ministerial intervention personally with the minister. We have heard submitters who have said that people approach the minister to pursue a ministerial invention personally. Do you have a view about that?

Mr Fergus—By way of background, I probably come at it as a former public servant responsible for making submissions to the minister. Perhaps I am a bit naive in this, but I do expect that the departmental staff will present my ideas and my submissions fairly to the minister, as I would have been expected to do when I was a public servant. I suspect that other people who do not have that sort of background probably feel that they do need to be much closer to the minister, if you like, in the way the ideas are presented to the minister.

CHAIR—You do not feel disadvantaged as a consequence?

Mr Fergus—Well, where about half of my clients have got up in respect of the presentations I have made to the minister, no, I do not feel disadvantaged and I do not think my clients have been disadvantaged, either. But other people might disagree with me in that. If they do disagree, I am perfectly happy to acknowledge that.

Senator SANTORO—Probably the 50 per cent who did not get up!

Mr Fergus—Well, sometimes you have to say to your clients—and I think you are a lawyer as well—

Senator SANTORO—I am not suggesting that they have reason to be dissatisfied, because obviously the merits or otherwise of the individual case are what I believe influence the minister.

Mr Fergus—I am not close to the minister's mind in that way, but I would say this: as an adviser, you do have to be prepared to be frank with your clients. Sometimes you will be saying to your clients, 'Look, I don't think you've got a strong case.'

Senator SANTORO—I think that is a refreshing attitude. Chair, could I follow up?

CHAIR—Yes, I had concluded.

Senator SANTORO—You have opened up an interesting line of questioning that I wanted to continue. Mr Fergus, how familiar are you with the minister?

Mr Fergus—I have never met the minister. Sorry, that is not true. I have met the current minister in the days when I worked in the human rights branch of Attorney-General's and she, at that stage, was prominent in the opposition.

Senator SANTORO—What about the former minister?

Mr Fergus—No, I have never met the former minister.

Senator SANTORO—Therefore, your high success rate could in no way be claimed to have been influenced by a familiarity or personal contact, or any other liaison, with the former minister.

Mr Fergus—I do not believe so. It is fairly obvious—

Senator SANTORO—I was just trying to draw out a reason for your success. I congratulate you on your 50 per cent success rate, even though you have put up a relatively small number of cases. Nevertheless, it indicates that the issues are judged on their merits—and I make that gratuitous comment for the record. What sorts of cases do you mainly put up? When I interjected before, I asked about cases with a small chance of success. I wanted to know how many cases you would put up with a five, 10 or 20 per cent chance—in other words, almost hopeless cases. With most of the cases that you put up that get rejected, what chance of success had you given them—just a gut feeling?

Mr Fergus—I did not look to try to make a judgment about that, but I think probably with 10 per cent or 20 per cent of my cases that have been rejected I would have said to the client that I did not think they had a particularly strong case. I can think of two or three other clients who I did advise that I thought they had a strong case and they were rejected. The balance of my cases would fall into whatever percentage is left.

Senator SANTORO—I tried this morning to get the Migration Agents Registration Authority to tell me what in their view makes for a successful case. I must admit that I was impressed by the evidence you gave this afternoon when you talked about your experience as a public servant, the way to prepare submissions, and the way that you hoped public servants would handle your submissions. If you had to summarise what it was that makes you successful as a person practising—

Mr Fergus—The first and obvious thing is the strength of your case. The second thing has to be the way you present your arguments. Without wanting to draw invidious comments about other migration agents, let me say that I recently managed to succeed in convincing the minister to consider a Filipino family for the exercise of his discretion, and that is being processed now. In that particular case, when the documents came to me the previous agent had written a one-and-a-half-page letter, which was just one paragraph, not very clearly drawing out any of the ideas as to the reasons why the minister ought to exercise his discretion and not clearly identifying what power the minister should be using—whether it was the 351 power or the 417 power or one of the powers relating to the AAT. None of that was clearly drawn out for the

minister's benefit. It was no wonder that the minister at that stage had said no, because what was he being asked to deal with?

Senator SANTORO—As I say, there is no success without a plan. How many of the failures of your colleagues within your industry have you managed to fix up? How many submissions have come to you after they have been not successful at the hands of other people in your industry?

Mr Fergus—Probably not more than about three or four family units.

Senator SANTORO—Have you generally been successful when you have taken up those three or four?

Mr Fergus—Certainly in one case and maybe in two, but I would not have thought in more than about two cases. Perhaps one reason why legal firms are less often approached and given instructions in these sorts of matters may be the fact that we do charge more than other people and, naturally enough, people are reluctant to pay the sorts of fees a solicitor feels they are entitled to ask for.

Senator SANTORO—In your case it seems that you get what you pay for.

Mr Fergus—The firm has always prided itself on trying to achieve good results for reasonable pay.

Senator WONG—You make the point in your submission that you see as problematic the precondition of a review decision before the ministerial discretion is enlivened. You give two reasonably compelling examples in which it was clear that these people were not going to succeed at the tribunal level but they had to be put to the expense and time of going through that process before they could even get to the discretion process.

Mr Fergus—Yes, and since I wrote that there have been two or three other cases in the same class.

Senator WONG—Evidence about that is something we have tried to elicit from previous witnesses—to what extent it is unnecessarily burdensome to certain applicants to have to go through that process before they can even get to seeking the discretion.

Mr Fergus—Our approach has been to try to reduce the burden on clients—

Senator WONG—I appreciate that, in terms of the procedure you undertake.

Mr Fergus—Yes. Under the present arrangements, the way we try to reduce the burdens is to say to clients: 'We don't think you've got any chance of succeeding at the tribunal stage. However, it is an essential precondition to the exercise of the minister's powers.' If we have assessed the client as having an arguable, particularly a strongly arguable, case for the exercise of the ministerial discretion we will sometimes explain to them the risk of not presenting an argument to the tribunal but simply asking the tribunal—whichever one it is—to make a decision

on the papers and explain that the reason we are asking for that is for the exercise of the ministerial discretion.

Senator WONG—I think other lawyers have made submissions which indicate that process as well.

Mr Fergus—It is actually one that was first suggested to me by one of the senior members of the MRT here in Sydney. I have never heard anyone in the RRT, member or otherwise, suggest that it is a good approach, but I have used it with the RRT as well.

Senator WONG—But it obviously requires a reasonably competent and ethical practitioner to suggest that—competent because you have to make a reasonable assessment of the chance of their success at the tribunal and have them accept that advice, and ethical because you could obviously make more money if you put them through the hearing process. Is it your view that there should be a different sort of process available? In other words, is it your view that rejection by a tribunal should not be a prerequisite for the minister's discretion to be enlivened in all cases—that there might be some cases in which there are compelling humanitarian or other considerations which it ought to be possible to access without having to go through an MRT or RRT process?

Mr Fergus—That is my view, but I would have to concede that it can be difficult to identify those cases. You also have to ask yourself what happens to the person concerned if the minister for some reason decides not to exercise his or her power. Given the strict time limits that operate under the Migration Act, if a person does not apply to the relevant tribunal within the specified time after the departmental decision they lose their right to a review by the tribunal. It is conceivable that in certain cases the minister might not be prepared to exercise his powers but a tribunal might nevertheless make a favourable decision. If the person concerned was put in that situation, it would be somewhat invidious if delay caused by a request to the minister were to have the effect of removing the possibility of review by the tribunal.

Senator WONG—We are descending into a bit more detail than I was trying to clarify with you. Your evidence is that you have had at least two clients in the submission and subsequent to that submission an additional two clients where it was, in your view, unfortunate that they had to go through the MRT or RRT process.

Mr Fergus—Definitely.

Senator WONG—In your comments on public interest, you make the point that you think the reference to public interest as guiding the discretion is good because it refers to, amongst other things, Australia's obligations under other international treaties. We had some evidence earlier today—in fact we have had quite a lot of evidence but certainly from the human rights commission—that made the point that we are party to at least three other treaties besides the refugee convention: the International Covenant on Civil and Political Rights, the Convention Against Torture and the Convention on the Rights of the Child, all of which either explicitly or implicitly have non-refoulement obligations attached to them. Those obligations are not discretionary. The point the human rights commission makes is that a discretionary system such as we have does not adequately ensure we comply with our non-refoulement obligations. That is the first point. The second is that, in our questioning of the department about what public interest

means, essentially it is a self-defining category. The public interest is what the minister decides is the public interest. In those circumstances, do you not see any concern at all in having a very broad public interest test as being the sole criterion for the exercise of discretion?

Mr Fergus—I think that a lawyer who has worked in this area would regard the public interest as encompassing at least those four treaties referred to. The advantage of a public interest test, without trying to pin it down more than that, is that in those cases where an adviser is prepared to turn his or her mind to the issues that the minister might want or need to grapple with, it gives the adviser, along with the minister, a lot of flexibility on those issues. So far as the issue of non-refoulement goes, for a number of years I was the director of the treaties section in foreign affairs before I came to the Refugee Review Tribunal here in Sydney. In that position, it was always in the forefront of my mind and the minds of the people who worked with me that the foreign minister has a responsibility to ensure proper regard be given by the Australian government to all its international obligations.

Senator WONG—The foreign minister has nothing to do with the grant of a 417 application.

Mr Fergus—I am not suggesting he has, but as the foreign minister he has a responsibility, in my view at least, for ensuring Australia's compliance with international obligations. I am suggesting that a foreign minister well supported by his own department will be alert, and should be alert, to the practical application of these sorts of requirements of international law, and consult in appropriate cases with other ministers.

Senator WONG—I am not sure that is really an answer, but anyway—

Senator SANTORO—It sounds like question time in parliament!

Senator WONG—Were you a member of the Refugee Review Tribunal?

Mr Fergus—I was a member of the tribunal for four years.

Senator WONG—It is not in your submission, but there were some rather strong allegations made by Mr Bruce Haigh. Are you familiar with those?

Mr Fergus—I worked with Mr Bruce Haigh in foreign affairs as well as on the tribunal.

Senator WONG—He made a number of allegations, and this is on the public record, and one of them was that RRT members were subject to an informal quota system. He commented earlier this year in the paper that if you went over 20 per cent of people that you granted visas to you would be counselled. Do you have a comment on that?

Mr Fergus—All I can say is that I never felt that I was under that sort of pressure. At times, in fact, I felt that there was too little guidance given to members. As an example, I was the member who decided the Jong Kim Koe matter, which was the one of the East Timorese-Portuguese nationality cases. I was the first member to decide that East Timorese could be Portuguese nationals as well as Indonesian nationals. At the time of taking that decision, I did actually seek some guidance from the principal member in the sense of sitting down and discussing the issues as I saw them. I thought the principal member at that stage was almost unhelpful in the sense

that he really conveyed to me that he did not want to put himself in a position of appearing to influence me one way or the other.

Senator WONG—Do you have any knowledge from the time you were there of members of the tribunal being counselled or having pressure exerted upon them because they had granted too many applications?

Mr Fergus—No member ever told me that they were approached in that way and I was not approached in that way.

Senator WONG—Thank you, Mr Fergus.

Senator HUMPHRIES—Senator Wong put to you before the argument that has been put to us today that the nature of the minister's discretion under section 417 is inconsistent with Australia's obligations under those various treaties that were referred to. Do you also take that view or do you think that the discretion as framed is consistent with our obligations under those treaties?

Mr Fergus—I think it is consistent with Australia's obligations under the treaties. A distinction needs to be drawn between a power standing by itself and the exercise of that particular power. In some cases, the decision maker can act in contravention of a legal obligation—we know that as lawyers. That really is what I was driving at. When I tried to answer Senator Wong's question, I was driving more at that question of the practical application of the power in a particular case.

Senator HUMPHRIES—But the existence of a discretion to deal with those sorts of obligations is not inconsistent with the treaties as far as you are concerned?

Mr Fergus—Not so far as I am concerned, no. I do not know of any recognised commentator on international law who would argue that a discretion is inconsistent with an international obligation. Nevertheless, the decision in a particular case can be inconsistent with the obligation. That is where the responsibility of the foreign minister becomes particularly important—to be prepared to step in and say to his or her colleague, 'You can't do this.'

Senator HUMPHRIES—You make the very valid point in your submission where you say:

> … the discretion should be kept as free as possible. Provisions in the Act or the Regulations constraining the Minister would run the risk of creating another source of rigidity and hardship for individuals.

That is a very simple point. It is a point that, with respect, I think many people who have made submissions to this committee have overlooked. In terms of explaining the circumstances where the minister exercises his or her discretion, the former minister, Mr Ruddock, chose to put a set of guidelines on the table to explain the circumstances where he would exercise the discretion. Others have argued that there should be more information in the statement which is laid before parliament as each discretion is exercised. What do you think is the better balance? Should there be more information in guidelines, in statements, or in both places?

Mr Fergus—I do not think one is inconsistent with the other. Indeed, I agree with both propositions. I did attempt to hint at that in that I think there has to be more transparency in what the minister decides to do and the reasons why he or she decides to do it. As I said to the chairman in answering his questions, it really does seem to me that some sort of arrangement between the minister and his or her shadow—whereby they consult in some way about what is intended—ought to provide some assurance to the public and to parliament that the minister is acting in a proper way in the difficult task of taking these decisions.

Senator HUMPHRIES—Thank you very much.

CHAIR—Thank you, Mr Fergus, for your assistance to the committee's deliberations today. I thank Hansard, Broadcasting, the senators and the committee secretariat for their good work and appearance here today.

Committee adjourned at 4.16 p.m.