

GOVERNMENT RESPONSE TO

SENATE COMMITTEE REPORT

**SENATE SELECT COMMITTEE
ON MINISTERIAL DISCRETION IN
MIGRATION MATTERS**

MARCH 2004

**Department of Immigration and Citizenship
April 2011**

The Government welcomes the Senate Select Committee's Report on Ministerial Discretion on Migration Matters (the Report).

The Migration Act 1958 (the Act) provides the Minister for Immigration and Citizenship (the Minister) with discretionary, non-compellable, and non-delegable powers to resolve cases, if it is considered in the public interest to do so. Therefore, Ministerial Intervention (MI) processes differ from those in the codified visa framework.

The Report identified a number of issues for reform of MI under the Act, including the need for greater accountability, transparency and procedural fairness. It also recommended regulation changes allowing greater access to the migration visa framework, thereby providing access to review and reducing the number of MI cases.

In 2008, the government commissioned Ms Elizabeth Proust to provide advice to the Minister on arrangements for the exercise of the Minister's public interest powers. The Proust Report, released in July 2008, reiterated a number of issues outlined in the Senate Select Committee's Report. It recommended that, to the extent MI was retained, it should be very limited and subject to strict guidelines.

Both Reports supported the retention of MI to deal with cases which are unable to be resolved within the codified visa framework in the Act but which, nevertheless, require a migration outcome.

Taking into account the views of the Committee and the Proust Report, the government and the Department of Immigration and Citizenship (DIAC) are engaged in ongoing reform of MI, with a number of significant changes already implemented.

Following are DIAC's responses to the Committee's 21 recommendations.

Chapter 3 – Patterns of use of ministerial discretion

Recommendation 1 (3.54)

The Committee recommends that the Minister require DIMIA to establish procedures for collecting and publishing statistical data on the use and operation of the ministerial discretion powers, including (but not limited to):

- *the number of cases referred to the Minister for consideration in schedule and submission format respectively;*
- *reasons for the exercise of the discretion, as required by the legislation;*
- *numbers of cases on humanitarian grounds (for example, those meeting Australia's international obligations) and on non-humanitarian grounds (for example, close ties);*
- *the nationality of those granted intervention;*
- *numbers of requests received; and*
- *the number of cases referred by the merits review tribunals and the outcome of these referrals.*

Government Response

DIAC collects and reports on most of the information covered by the recommendation and is working to increase its capacity to record and report on a broader range of MI issues¹. Key statistics on MI under section 417 is published in the DIAC annual report and will henceforth be available quarterly on the DIAC website.

A significant proportion of MI requests exhibit circumstances which may meet more than one of the grounds for referral, making identification and recording of any one specific ground problematic.

¹ Refer to Government Response to Recommendation 5 regarding review tribunal referrals.

Chapter 4 – Development of ministerial guidelines and the exercise of the Minister’s discretionary powers

Recommendation 2 (4.67)

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

Government Response

Since the tabling of the Ombudsman’s report, DIAC has strengthened arrangements for supporting the Minister in the use of his powers.

To ensure consistency in assessments, decision-making and referral of MI requests to the Minister, changes have been made to DIAC’s guidelines on the administration of ministerial powers. DIAC has implemented an analysis-based approach for all information provided by clients seeking the exercise of the Minister’s public interest powers. New templates for submissions and schedules have been developed which support a comprehensive analysis of the case and provide a preferred option in all cases that are referred to the Minister for consideration.

In line with evidence-based decision making principles and to ensure timely case processing, DIAC has conducted extensive training for staff involved in assessing MI requests.

A quality assurance process has been developed and implemented to review MI processes under section 417 of the Act, in line with DIAC’s National Quality Assurance Framework. The process monitors whether quality controls such as templates, guidelines and training are effective.

Recommendation 3 (4.70)

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

Government Response

The Government notes that it is a matter for the Office of the Commonwealth Ombudsman to determine whether to carry out such an audit and, if so, the timetable, priority and focus of such an audit. DIAC would cooperate fully and provide support in any such audit.

Recommendation 4 (4.84)

The Committee recommends that the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) standardise their procedures for identifying and notifying DIMIA of cases raising humanitarian and compassionate considerations.

Government Response

The Migration Review Tribunal (MRT)'s and Refugee Review Tribunal (RRT)'s standard procedures for identifying and notifying DIAC of cases raising humanitarian and compassionate considerations are set out in "*Tribunals' Policy and Procedures Guideline 1/2010 – Referrals for Ministerial Intervention*" (issued on 4 February 2010).

The guideline contains standardised procedures for identifying and notifying DIAC of those cases considered by Tribunal members to exhibit unique or exceptional circumstances, including compassionate and humanitarian grounds, which the Minister may wish to consider in accordance with sections 351 or 417 of the Act.

Recommendation 5 (4.85)

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

Government Response

The MRT and RRT keep statistical records of cases referred to DIAC and records of the grounds for referral.

DIAC provides monthly advice to the Tribunals of cases in which the Minister has intervened under sections 351 or 417 in a format which enables the matching of outcome of referrals with the relevant Tribunal's records.

