SENATE
SELECT COMMITTEE
INQUIRY INTO
MINISTERIAL DISCRETION
IN MIGRATION MATTERS

Submission by the
Office of the Commonwealth Ombudsman

August 2003

Summary of main points in submission

- The safety net discretion conferred upon the Minister by ss 351 and 417 to make a favourable decision on a visa application "in the public interest" is a beneficial and necessary feature of the statutory scheme of visa determination and migrant entry.

- A precondition to the exercise of the Minister's power, that a less-favourable decision on a visa application was earlier made by a Tribunal, is a problematic restriction; consideration should be given to widening the circumstances in which the Minister's discretion is exercisable.

- The integrity of Ministerial decision-making under ss 351 and 417 depends to an important extent on the preliminary administrative actions of the Department; it is important that this aspect of the scheme be kept under scrutiny.

- The office of the Commonwealth Ombudsman is the main external oversight mechanism concerning Departmental administration of ss 351 and 417.

1. Terms of Reference

1.1 On 19 June 2003 the Senate agreed that a Select Committee, to be known as the Select Committee on Ministerial Discretion in Migration Matters, be appointed to inquire into and report, by 3 November 2003, on the following matters:

> 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 provisions by ministers, in particular what criteria and other considerations applied where ministers substituted a more favourable decision; 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.

1.2 The office of the Commonwealth Ombudsman was invited to make a submission by the Committee Secretariat.

2. Role of the Ombudsman in investigating migration complaints

2.1 The office of Commonwealth Ombudsman is established under the *Ombudsman Act 1976* and has responsibilities under that Act and the *Complaints (Australian Federal Police) Act 1981*, as well as smaller roles under other Commonwealth legislation. The Ombudsman is also the

Ombudsman for the ACT. The Ombudsman is assisted by a Deputy Ombudsman and a staff of about 80, and operates through a national office in Canberra and offices in all States and the Northern Territory.

2.2 The Ombudsman and migration: an overview

2.2.1 The Ombudsman receives complaints and conducts investigations into administrative actions in most areas of Commonwealth administration, including the conduct of the migration and related programs.

Year	Total complaints	Migration* complaints	Proportion#
1998-1999	21,780	1,072	4.9
1999-2000	19,172	1,043	5.4
2000-2001	20,805	1,052	5.1
2001-2002	18,124	1,143	6.3
2002-2003	19,983	893	4.7

** refers to complaints concerning the Department of Immigration, Multicultural and Indigenous Affairs and its predecessors; and the Migration Review Tribunal and Refugee Review Tribunal.*

 # percentage that migration complaints form of the total of all complaints made to the Commonwealth Ombudsman

2.2.2 Migration complaints are received and handled by each of the Ombudsman's offices, and most of the Ombudsman's investigation staff would, over time, deal with migration complaints. The more complex investigations are usually handled in Canberra by the Ombudsman's Major Investigations Unit, which has acquired a degree of expertise in dealing with migration matters. As well as handling complaint investigations, the Unit has also conducted some investigations on an "own motion" basis (ie without a complaint) and has published reports that appear on the Ombudsman's website. Another function discharged principally at the national office in Canberra is extensive liaison with the Department to facilitate the efficient discharge of the Ombudsman's investigation function.

2.2.3 The investigation of migration complaints is, by comparison with investigations undertaken in other areas of government, typically more complex and time-consuming. There are a number of reasons for this:

- the complexity of migration legislation, policy and administrative decision-making: it is not uncommon for people to feel in need of professional assistance in this area, even in making a routine application;
- the difficulties faced by complainants to the Ombudsman, arising from language and cultural differences;
- the importance of the issues at stake for those adversely affected by a migration decision; and
- the limitations imposed on judicial review and tribunal review, for example, concerning the time limit for initiating review, and the denial of tribunal review in many overseas visa matters.

2.2.4 The Migration Review Tribunal and the Refugee Review Tribunal are each "prescribed authorities" for the purposes of the Ombudsman Act, meaning that the Ombudsman has jurisdiction to investigate complaints about the administrative actions of those tribunals. However, the exercise of that jurisdiction by the Ombudsman is attended with doubt, because the Migration Act provides in ss 373, 435 that a member of either Tribunal has the same protection and immunity as a member of the Administrative Appeals Tribunal, who in turn has the immunity and protection of a Justice of the High Court of Australia. As a matter of practice, the Ombudsman would commonly decline to investigate a decision of the Tribunal that can be the subject of an application for judicial review by the Federal Court, pursuant to a discretion to that effect conferred on the Ombudsman by s 6(3) of the Ombudsman Act.

2.3 The Ombudsman and Ministerial decisions

2.3.1 The subject of the present inquiry is the discretionary power conferred (in similar terms) upon the Minister by ss 351 and 417 of the Migration Act, to substitute a more favourable decision than that made by the Migration Review Tribunal or the Refugee Review Tribunal. It is a power – often dubbed a public interest discretion, or a safety net discretion – that can be exercised by the Minister personally, is non-compellable, and is not subject to review by a court or a tribunal.

2.3.2 The exercise of that discretion by the Minister cannot be the subject of investigation by the Commonwealth Ombudsman, consistently with s 5(2)(b) of the *Ombudsman Act 1976* (Cth) which provides that "*the Ombudsman is not authorised to investigate … action taken by a Minister*". Section 5(2)(b) does not, however, preclude the Ombudsman from investigating action taken by a Department in relation to a Ministerial decision: see s 5(3A), providing that "*action taken by a Department …. shall not be regarded as having been taken by a Minister by reason only that the action was taken by the Department … in relation to action that has been … taken by a Minister personally*". Thus, for example, in relation to decisions made by the Minister under ss 351 and 417, the Ombudsman is able to investigate:

- action taken by the Department in identifying cases where the Minister's powers might be exercised, and in providing a briefing and advice to the Minister;
- (probably) action taken by Ministerial staff related to Ministerial functions[1]; and
- action taken by the Department following any decision or refusal to make a decision by the Minister.

2.3.3 There are no separate statistics available to show the number of complaints that have been investigated by the Ombudsman, concerning DIMIA action that is related to an exercise or non-exercise by the Minister of a power conferred by ss 351 or 417. Broadly, a complaint to the Ombudsman can arise at any stage of the process, stretching from the notification of a

[1] See Ombudsman Act, subsection 3(4)

Tribunal decision to a person, to the notification of the outcome of an approach to the Minister.

3. Issues arising from investigations undertaken by the Ombudsman

3.1 An attachment to this submission contains three case studies of investigations that have been undertaken by the office of the Commonwealth Ombudsman. These are a small sample of the much larger number of applications handled by the Department and the Minister. While the case studies are unlikely to capture the diversity of issues that arise under ss 351 and 417, they do provide a practical illustration of issues and problems. They will be highlighted in a general way in this submission, drawing not only from the case studies but also from the general experience of the Ombudsman in complaint investigation.

3.2 The firm impression arising from Ombudsman investigations is that safety net discretions such as ss 351 and 417 are a key part of the Migration Act. They play an important role in permitting or facilitating action that tempers the harsh, unpredictable or unintended effect that can arise occasionally in the administration of a heavily codified system of rules of the kind found in the Migration Act and Regulations. In an area such as migration decision-making, where the decisions can markedly affect the living situation not only of those about whom a decision is made, but also their relatives and accomplices in Australia, it is vital that a safety net scheme of this kind is preserved in some form or another.

3.3 Developments in Australian migration law and policy over the last couple of decades nevertheless demonstrate the sensitivity that can surround the administration of such a scheme. One observable trend is that discretionary powers of this kind are apt to attract a great deal of public, media, legal and political attention. The reason, in part, is that many applicants recognize that the favourable exercise of a safety net discretion provides their last hope or chance of making a successful visa application. The breadth of the discretion, to make a favourable decision where “it is in the public interest to do so”, provides succor to that hope.

3.4 On the other hand, in the context of a scheme of visa entitlement as detailed and specific as that in the migration legislation, a safety net discretion is not intended to provide an alternative scheme of entitlement or to overshadow the importance of the mass of specific rules. In a broad sense, the safety net discretion is intended to deal with exceptional cases. This is reflected in the terms of ss 351 and 417, which confine the circumstances in which the power can be exercised, and preclude judicial or tribunal review of any exercise or non-exercise of the power. On the face of the matter, it is understandable that there is no right of external review attached to the operation of ss 351 and 417. The limited purpose of both provisions is to empower the Minister to provide a more favourable outcome to a person who was less successful in an earlier tribunal application. It would be a circular

irony if the subsequent action or inaction of the Minister enlivened a fresh round of tribunal review.

3.5 Those restrictions, however, pose problems of another sort. There is a risk that the restrictions will exclude cases that are equally deserving but that fail to meet the preconditions for a decision being made under ss 351 or 417. The absence of judicial or tribunal review also removes an important mechanism of external oversight that applies in other areas of executive decision-making. Sections 351 and 417 contain a substitute mechanism, requiring the Minister to table a statement in the Parliament each time a decision in favour of an applicant is made under either section. Important though that mechanism is, a parliamentary statement can be a blunt instrument of transparency and accountability compared to other methods of administrative law review. Moreover, a statement by the Minister is required only when a favourable decision is made: there is no comparable mechanism applying to other administrative steps encompassed by ss 351 and 417, notably the rejection of an application by the Minister or the failure of the Department to refer a matter to the Minister.

3.6 In those circumstances, two other mechanisms for controlling administrative discretion become especially important. The first is the administrative guidelines and policies that guide the administration of those provisions within the Department. The second is the oversight of Departmental administration undertaken by the Ombudsman. The function discharged by the Ombudsman is episodic in the sense that it usually occurs only when a relevant complaint is received, but it is nevertheless important in providing a measure of external oversight that would otherwise be lacking.

3.7 The Ombudsman's office is therefore well-placed to offer a view, albeit partial, on the operation of ss 351 and 417. The general experience of the office, noted above, is that these safety net discretions play a key role in the operation of the migration legislation. True it is that their operation can attract both controversy and unfulfilled hope, but the migration legislation is nevertheless better for containing discretionary powers of this kind. This is apparent from the three case studies in the attachment to this submission, which illustrate deserving cases that would have escaped the Minister's consideration but for the intervention of the Ombudsman.

3.8 The importance of ss 351 and 417 is highlighted also by Migration Series Instruction 225, issued by the Minister as "Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s 345, 351, 417, 454 of the Migration Act 1958" (issued May 1999). MSI 225 lists a number of situations in which it may be appropriate for a case to be placed before the Minister. They include: where there is a *"significant threat to a person's personal security, human rights or human dignity on return to their country of origin"; "substantial grounds for believing a person may be in danger of being subject to torture if required to return to their country of origin"; circumstances that could invoke the operation of Australia's obligations under the international covenants relating to children and civil and political rights;*

"circumstances that the legislation could not have anticipated"; "clearly unintended consequences of legislation"; "particularly unfair or unreasonable consequences of legislation"; the integration of a person in the Australian community; and the age, health or psychological state of a person. Each of those categories individually provides a compelling reason for the presence of ss 351 and 417 in the Migration Act.

3.9 MSI 225 anticipates also that the trigger for a matter being placed before the Minister can be a recommendation to that effect made by a Tribunal. That is a valuable mechanism for integrating external review and executive practice in the operation of the migration legislation.

3.10 Given thus the important role played by ss 351 and 417, it is imperative that they are both well framed and expertly administered. The remainder of this submission takes up that point, by looking at three features of the scheme: the terms in which both sections are framed; MSI 225, which provides guidance to Departmental officers on the administration of both sections; and the soundness of the Departmental administration of the legislation and policy.

4. An evaluation of ss 351 and 417

4.1 Sections 351 and 417 pivot on three features: the power to make a decision is bestowed on the Minister personally and is non-delegable (sub-s (3)); the statutory criterion for exercising the power is the Minister's evaluation of "*the public interest*"; and the precondition for exercise of the power is that a less-favourable "*decision*" was earlier made by the Migration or Refugee Review Tribunals.

4.2 This office has little to say about the first feature, other than to note that in earlier times the comparable discretion to grant a visa where there were "*strong compassionate or humanitarian grounds*" (former 6A(1)(e) of the *Migration Act*) was exercisable more widely by delegates of the Minister. Government concern at the tendency for decisions made under s 6A(1)(e) to be the subject of judicial review proceedings under the *Administrative Decisions (Judicial Review) Act 1977* apparently lay behind the conferral instead of a non-reviewable power upon the Minister personally.

4.3 The importance of the "public interest" criterion in ss 351 and 417 lies in the breadth of discretion it confers upon the Minister. It has customarily been noted by courts that the phrase "public interest" confers an unconfined discretion on a decision-maker, comprehending all relevant matters of advantage or disadvantage (eg, *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216). It is important accordingly that both sections are administered with an eye to the unconfined breadth of the discretion. Although the Minister has issued MSI 225 to provide guidance on the circumstances in which the Minister will be disposed to exercise the power to substitute a new decision, at the end of the day the scope of the power is governed by the statutory terms in which it is framed. As noted below and in the case studies in the

attachment, it is a particular concern of the Ombudsman to ensure that this principle is uppermost.

4.4 From the perspective of this office, the main difficulty with ss 351 and 417 lies in the fact that the power cannot be exercised unless there was an earlier and less-favourable decision of a tribunal. The evident reasons for this restriction are to limit the number of cases that can be placed before the Minister, and to limit the opportunity available to applicants to prolong the visa determination process. While those reasons are readily understandable from a policy perspective, the Ombudsman's office is aware of the problems to which the precondition can give rise. Chief among them is that a person who, through mistake, mishap, experience, or impecuniosity, has not lodged an effective appeal to a tribunal within the rigid appeal period, loses as well the opportunity to seek the dispensation of the Minister under the safety net discretion. Another problem, arising from the interpretation placed upon ss 351 and 417 by MSI 225, is that the power cannot be used where a decision of a tribunal "*is quashed or set aside by a Court and the matter is remitted to the decision maker to be decided again … as there is no longer a review decision for [the minister] to substitute*" (para 3.2). The only option for a party in those circumstances is to pursue proceedings to their finality in the tribunal before making an application to the Minister. In the same vein, a person whose circumstances might deserve consideration on "public interest" grounds will first have to commence proceedings in the tribunal in order to access the Minister's safety net discretion. Other restrictions on the right to seek merit review by a tribunal (eg, the applicant must be in Australia) also rebound on the opportunity to access the Minister's power.

4.5 The view of this office is that some consideration should be given to defining an additional or alternative mechanism for activating the Minister's consideration under ss 351 and 417. Bearing in mind the circumstances defined in MSI 225 that would justifiably attract the exercise of the Minister's discretion – such as unanticipated, unintended, unfair and unreasonable consequences of legislation – it seems anomalous that the application of those criteria should be confined to such a narrow band of cases. The Ombudsman's office has dealt with a number of cases which arguably warranted consideration under those criteria, but which did not meet the statutory precondition for referral to the Minister.

4.6 An alternative mechanism, which would preserve the intent of ss 351 and 417, would be to confer a discretion upon the Department to refer a case to the Minister if, notwithstanding that the person did not lodge an appeal with a tribunal, there were "exceptional circumstances" that warranted the referral. Another alternative would be to provide that a matter could be referred to the Minister upon the recommendation of the Ombudsman. However, a mechanism in those terms would have potentially significant resource implications for the Ombudsman's office, by reason that people may complain purely in order to qualify for a referral to the Minister.

5. An evaluation of MSI 225

5.1 The Ombudsman's office is keenly aware of the value to public administration played by an executive policy such as MSI 225. Such a policy, whether issued as a Ministerial guideline or otherwise, usefully provides a structure and guidance for the exercise of a brief but broadly-expressed power of the kind found in ss 351 and 417. There is always a risk that an executive policy will confine the breadth of a power of a public interest kind, but MSI 225 overcomes that risk by noting the Minister's instruction that "*My ability to exercise my public interest powers is not curtailed in a case brought to my attention in a manner other than that described above*" (para 6.7). Para 4.2 similarly spells out that that the criteria for "*unique or exceptional circumstances*" spelt out in the Guidelines are not exhaustive, and that each case "*will depend on various factors and must be assessed by reference to the circumstances of the particular case*".

5.2 There is an equal risk that a guideline such as MSI 225 will be interpreted too narrowly or followed too slavishly without adequate regard being had to the breadth of the power that the guideline is informing. As discussed below, it has been a concern of the Ombudsman's office that this risk has at times befallen the administration of ss 351 and 417. The office has written to the Department pointing to the importance of ensuring that guidelines provided to staff concerning the administration of the Minister's safety net discretions should preserve the intent of the legislation in ensuring that deserving cases receive the Minister's attention. This consideration is reinforced by the Public Service Commissioner's Directions, which provide in para 3.1 that *"both Agency heads and employees must ensure that advice provided to the Government is frank, honest, comprehensive, accurate and timely, and is based on a full understanding of all relevant issues and options, the Government's objectives and the environment in which it operates, taking into account resource and time constraints"*.

6. An evaluation of Departmental administration relating to ss 351 and 417 and MSI 225

6.1 Although ss 351 and 417 confer power on the Minister personally, it is the prior administrative action of the Department that is of greater importance to many applicants. Officers of the Department evaluate all applications according to their terms and under MSI 225, and formulate a recommendation and supporting explanation to go to the Minister. If the officer forms the view that the case presented by an applicant does not come within the guidelines, the most that is required is "*a short summary of the case in a schedule format*" to bring it to the Minister's attention (para 6.5). If the officer is of the view that the case falls within the guidelines, the officer is to prepare a submission that will necessarily highlight the strengths or weaknesses of the application as assessed by the officer. And, if the officer decides that there is no correspondence between a person's situation and the scope of ss 351 and 417, the matter will never even make it to the "short summary" stage.

6.2 The office of the Commonwealth Ombudsman has a long-standing interest and also concern with the administrative actions of the Department.

The issue was first taken up in the Commonwealth Ombudsman *Annual Reports* for 1995-96 (p 144) and 1996-97 (pp 204-5). The Ombudsman was there critical of a practice that has since been changed by MSI 225, namely that at that time the Minister's senior adviser effectively decided whether a matter would be placed before the Minister.[2] However, other points made by the Ombudsman in the 1996-97 report retain their importance – specifically, whether the guidelines are being correctly applied by officers in the preliminary evaluation of cases, the need for transparency in the evaluation process, and the need for clear and prompt processes.

6.3 The case studies in the attachment to this submission highlight some of the issues and problems that can beset the administration of ss 351 and 417. Cases that arguably warranted personal consideration by the Minister were overlooked or prematurely screened out. Decisions on whether to refer a matter to the Minister were not based on all relevant information, or reflected insufficient inquiry. At the same time, members of the public were heavily reliant on the assessment of their cases by individual officers.

6.4 Other cases that have come before the Ombudsman include those in which a tribunal has suggested that a case might warrant the Minister's discretionary consideration but have been endorsed by the Department as "did not fall within the guidelines". In some instances the visa applicant has not been invited to put in up-to-date information about matters that might be relevant to the Minister's decision. Visa applicants have also been told incorrectly that their situation has been put before the Minister. Generally, there have been a number of cases in which the Department, following an Ombudsman investigation, has accepted either that a case should have been identified for consideration by the Minister, or that a submission was not accurate, complete and comprehensive.

6.5 The risk of administrative error or oversight is heightened by other features of the administrative framework. Some of the criteria in MSI 225 that are inherently ambiguous are not further defined or explained by example (eg, "*particularly unfair or unreasonable consequences of legislation*", and "*health and psychological state of the person*"). A great deal therefore turns on an individual officer's understanding of a criterion and evaluation of the facts. There is a vulnerability to inconsistent decision-making. Another risk, in theory at least, is that a government agency whose decision adverse to a person has withstood challenge in a tribunal, may not be instinctively disposed to supporting a later administrative application for Ministerial substitution of a more favourable decision.

6.6 These points underscore the importance of establishing a professional administrative structure within the Department to handle all matters that warrant consideration in relation to ss 351 and 417. The pillars of such a

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[2] The 1996-97 Annual Report refers to a draft report being provided to the Department (it is was in fact titled an "Issues Paper". Some interim comments on the paper were received from the Department, but the project was taken no further and the paper was not published. In important respects the issues raised in the paper have now been overtaken by other legal and administrative developments.

structure are by now familiar, and include staff training, policy guidance to officers, full documentation of decisions, transparency, and reasoned decision-making. Investigations by the Ombudsman's office point as well to a few other matters that are raised for consideration at this stage:

- In light of the variety of different substantive and procedural criteria listed in MSI 225, some consideration should be given to preparing a non-exhaustive checklist of factors to be considered by an officer in evaluating whether to prepare a submission for the Minister's consideration. This would also add to the transparency of the process and to the ease of explaining to applicants how a case has been analysed.

- As a matter of principle it would be desirable that each applicant be shown a draft of any submission to be placed before the Minister, to enable the applicant to comment on the comprehensiveness of the submission and to obviate later disputation. There is admittedly a risk that this could prolong the process of consideration of some cases unless a tight time frame was established, but equally there is a greater risk of delay arising subsequent to an ill-prepared submission.

- The officer responsible for considering a case should have access to all Departmental files relating to the applicant. This is especially important in relation to applicants who are in detention. The records that relate variously to their visa processing, detention, and medical assessment may be held in different locations. The lack of easy access of those in detention to independent legal or other assistance in preparing an application can compound the risk of administrative error. An interview with the applicant prior to finalisation of a submission would be one way of reducing that risk.

- A cyclical audit of a sample of cases and decisions made in this area could be undertaken, to gauge how and whether the criteria in MSI 225 are being applied, whether decision-making is based on all relevant information, and whether there is inconsistency between the approach of different officers.

- The transparency of the system would be enhanced if the Minister's notification statement to the Parliament under ss 351 or 417 indicated briefly the path by which a case came to the attention of the Minister – by an approach from the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the Department, or in some other way. Over time, this would enable a better picture to be drawn of the manner in which this important aspect of the migration scheme is operating.

6.7 A final matter that again bears emphasis is the important role that independent investigation of migration decision-making by the Commonwealth Ombudsman can play in enhancing the integrity of administrative decision-making. The administration of ss 351 and 417 is not subject to judicial or tribunal review. The Ombudsman provides the only systematic external oversight of this aspect of the Migration Act. A great deal of attention has thus

been given by Ombudsman staff to ensuring that they understand the issues and that the office has a good working relationship with the Department. A reciprocal point is that the Ombudsman thus relies heavily on other elements of the governmental system to ensure that the Ombudsman is adequately supported and resourced to maintain its oversight role.

ATTACHMENT: CASE STUDIES

1. 2003-1978069

Mr and Mrs C had been granted a visa as secondary applicants on their son-in-law's Long Stay Business visa in 1996. The visa had been renewed in 1997 but expired in September 2001. Mr and Mrs C applied for a further renewal in September 2001 but withdrew the application in November when they were advised by the Department that they could not be considered as dependents of their son-in-law (despite the fact that their previous visas had been issued on this basis). They immediately lodged an application for a Visitor visa but this was refused by the Department as their application had not been lodged within 28 days of the expiry of their substantive visa.

The Migration Review Tribunal affirmed the decision of the Department to refuse the Visitor visa applications, noting that in the circumstances there was no alternative as the applications had not been lodged within the 28 day limit. A referral to the Minister was not initiated by the Department at that stage.

When the applicants submitted their own written request for the Minister to consider their case, the Department made an assessment that there were no 'unique or exceptional circumstances' and consequently the matter was not referred to the Minister. The applicants were however advised by a standard letter that their case had been referred to the Minister and that the Minister had decided not to exercise his discretion.

Contrary to the Department's initial view, the applicants' case arguably qualified for consideration under para 4.2.7 of MSI 225: *'Intended, but in the particular circumstances, particularly unfair or unreasonable, consequences of legislation'*. The circumstances that arguably brought the case within that criterion were that the Department had acted wrongly in granting the original visa in 1996, in renewing it in 1997, but then taking more than 28 days in November 2001 to inform them that their latest renewal application was to be rejected. The delay in 2001 prevented them for applying for any substantive visa. The comment made by the MRT, that there was 'no alternative' but to affirm the decision under review, might have caused the case officer to examine the circumstances of the applicants in more detail.

These circumstances, cumulatively, should have caused the Department case officer to consider whether the case fell within para 4.2.7 of the guidelines (unfair or unreasonable consequences of legislation). The circumstances of the applicants arguably warranted consideration also under paras 4.2.10 (time in Australia), 4.2.11 (the age of the person) and 4.2.12 (the health and psychological state of the person).

By the time a decision was made within the Department not to refer the application to the Minister, the son-in-law and daughter had applied for permanent residency. They were granted permanent residency only a few

days after the decision not to refer the case to the Minister was made. This fact does not appear to have been considered by the case officer.

Following the Ombudsman's investigation, the Department acknowledged the errors made in the processing of the original visas and has advised that the matter would be referred to the Minister for consideration.

2. 2002-1851449

Mr S held a Student Visa that was automatically cancelled in August 2001. In March 2002 the Department decided not to revoke the cancellation. By the time the MRT decided to set aside the Department's decision in July 2002, Mr S's substantive visa had expired and he immediately became an unlawful resident. As such, he could not lodge a valid application for a Graduate Skilled visa.

Investigation of the complaint by the Ombudsman's office has established that such situations are not uncommon.

When Mr S submitted an application for a Graduate Skilled visa he was advised that the application was invalid. The Department did not initiate a referral of the case to the Minister for consideration under s 351, based on criterion 4.27: 'Intended, but in the circumstances, particularly unfair or unreasonable, consequences of legislation'. Nor did the Department advise Mr S of his right to request such a consideration by the Minister.

The Department agreed with the Ombudsman's office that the matter should be referred to the Minister and Mr S has since been grated a Graduate Skilled visa.

3. 2003-1937166

Ms K and two of her nephews arrived in Australia unlawfully by boat on 1 January 2001 and were detained at Woomera. The Refugee Review Tribunal affirmed the decision of the Department to refuse their application for a Protection Visa but did acknowledge that Mandaens in Iran may attract unwanted attention due to their dress, they may have limited access to public service employment and higher education, and they may face some discrimination.

By the time the RRT decision was made the Department was also aware of serious health problems faced by Mr K and of concerns for the wellbeing of the second nephew who was only 13 years old. Even so, the Department did not initiate a referral to the Minister at this stage, endorsing the file that there were 'no unique or exceptional circumstances'.

The applicants applied to the Federal Court against the Tribunal's decision but the matter could not be considered as the application had not reached the Court within the statutory time limit. The Court noted in its record of decision

that it ‘expressed sympathy’ for the situation of the applicants, as through no fault of their own their application had not been lodged in time.

Once again, there was no referral of this case to the Minister by the Department, notwithstanding the comments made by the Court, the acknowledged role of the Department in contributing to the application not being lodged in time, and the documented continuing concerns for the health of Mr K and the wellbeing of the younger nephew.

The applicants requested consideration of their case under s 48B of the Act and provided additional information about restrictions imposed on Mandaens in Iran. The Department submitted the matter to the Minister and the Minister himself identified that relevant information about the nature of the application to the Federal Court had not been included in the submission for his consideration. When the matter was the resubmitted by the Department, the Minister decided not to exercise his discretionary powers to allow a further application for a Protection visa.

After some months, the applicants requested that the Minister consider exercising his discretion under s 417. At this time, the case officer obtained some information about the applicants’ medical conditions from the detention centre and the case was referred to the Minister. The submission failed to include significant relevant information about the history of the applicants’ visa applications, to provide current information about Mr K’s medical treatment, to highlight the age of the youngest applicant, or to provide information about Ms K’s current medical treatment. In addition, while the lawyer representing the applicants requested that each applicant be considered individually as well as together, the submission presented the applicants only as a ‘family unit’. The Minister was not requested to consider each applicant separately. The Minister decided not to exercise his discretion in this case.

Investigation of the complaint by the Ombudsman indicated that at the time the applicants’ files were returned from the RRT and the Federal Court, the case officer did not have ‘all relevant information’ at hand, yet made an assessment that there were not any unique or unusual circumstances. Nor was the process of obtaining information from elsewhere in the Department free of blemish. Rather than the complete files being requested for consideration (eg the medical records from the detention facility), the case officer relied on another officer to identify and forward ‘any relevant information’.

Following initial contact between the Ombudsman’s office and the Department, the youngest nephew has now been released to the care of relatives in the community. Other issues raised by the case are still under consideration.