



**Australian Government**

**Migration Review Tribunal · Refugee Review Tribunal**

**TRIBUNAL GUIDELINE – 1/2010**

**[Date of issue: 4/2/2010]<sup>1</sup>**

Tribunal Guideline – 1/2010 was previously referred to as Tribunal Policy and Procedures Guideline 1/2010 (in effect from 4 February 2010, replacing TPPG 1/2009) and was re-named ‘Tribunal Guideline’ on 29 September 2011. This guideline applies to both the Migration Review Tribunal and the Refugee Review Tribunal.

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**REFERRALS FOR MINISTERIAL INTERVENTION**

**Introduction**

1. Under sections 351 and 417 of the *Migration Act 1958*, the Minister may substitute for a decision of the tribunal another decision that is more favourable to the applicant, if the Minister thinks that it is in the public interest to do so. These powers only exist where the tribunal has made a decision in relation to a valid application for review.
2. Sections 351 and 417 confer discretionary powers on the Minister. The powers may only be exercised by the Minister personally. The Minister does not have a duty to consider whether to exercise the powers.
3. The Minister issued new guidelines on ministerial intervention powers in December 2008. The guidelines were re-issued in September 2009 and thereafter in November 2011. The guidelines apply to ministerial intervention requests received on or after 5 November 2011 (see attached).
4. The ministerial guidelines state that, if the tribunal refers a case to the department, the department will assess the person’s circumstances under the guidelines and provide a submission to the Minister.
5. In this guideline, ‘the tribunal’ means the Migration Review Tribunal or the Refugee Review Tribunal or both.

**Referral of cases to the Department**

6. Members should have regard to the ministerial guidelines when considering whether or not a case should be drawn to the attention of the Minister.

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<sup>1</sup> Updated on 20 January 2012 to amend paragraph 3 and replace the attached Minister’s guidelines with those re-issued on 5 November 2011.

7. The types of circumstances where the Minister considers it generally inappropriate for him to consider a case are set out in the guidelines. One such circumstance is where it may be open to a person to make a valid application for a Partner visa onshore, as prescribed under regulation 2.12(1). If it appears to the tribunal that a pathway may exist for an applicant to apply for a further visa as prescribed under regulation 2.12(1), the tribunal member may suggest to the applicant that he or she seek migration advice.
8. Pursuant to the Minister's guidelines, when a member considers that a case should be brought to the Minister's attention, the member may refer the case to the department. The member's views will be brought to the Minister's attention by the department under the guidelines. The member may refer a case to the department on the basis that the member considers that there are facts or circumstances warranting further investigation by the department before referral to the Minister.
9. The circumstances which the member considers warrant the case being brought to the Minister's attention should be set out in the member's statement of decision and reasons and may also be set out in the referral letter to the department.
10. If an applicant requests a member to refer a case to the department and the member decides not to do so, the member should refer to the request in the statement of decision and reasons and note that the applicant may make a request directly to the Minister.
11. If an applicant indicates that he or she does not wish to attend a hearing in the course of the conduct of a review but will be seeking Ministerial intervention, the member should note this in the tribunal's decision and leave it to the applicant to seek such intervention.
12. If the tribunal has no jurisdiction to conduct a review, the Minister has no power under section 351 or section 417 to intervene. In such circumstances, the case should not be referred to the department.

### **Administration of referrals**

13. A registry officer will prepare and send the referral letter to the department in accordance with any instructions provided by the member.
14. A record will be kept of all cases that applicants have requested be referred to the department, and of all cases which are referred to the department. Statistics on requests and referrals will be included in monthly reports to the Senior Management Group and the Management Board.
15. The tribunals and the department may agree arrangements for the provision by the tribunals of lists of cases of tribunal referrals (e.g. on a monthly basis).
16. More detailed procedural information and guidance is set out in the Standard Case Procedures.

## **Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J)**

### **PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J)**

#### **ABOUT THIS INSTRUCTION**

##### **Contents**

This policy instruction, which provides guidance on the ministerial intervention powers under [s345](#), [s351](#), [s391](#), [s417](#), [s454](#) and [s501J](#), comprises:

- [Introduction](#)
- [The powers available under legislation](#)
- [When the powers are not available](#)
- [Cases which are to be brought to my attention](#)
- [Other relevant information](#)
- [How cases will be brought to my attention.](#)
- [Minister's consideration.](#)

##### **Related instructions**

Nil.

##### **Latest changes**

###### Legislative

Nil.

###### Policy

This instruction, which is part of the centralised departmental instructions system (CDIS), was reissued on 5 November 2011.

These Guidelines were approved by the Minister on 14 September 2011. [Section 2 Referral to the Parliamentary Secretary](#) is new.

##### **Owner**

International Obligations & Intervention Support Section, Onshore Protection Branch, Border Security, Refugee and International Policy Division, National Office.

##### **Contents summary**

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## **INTRODUCTION**

This Part comprises:

- section 1 Purpose of these guidelines
- section 2 Referral to the Parliamentary Secretary.

## **1 Purpose of these guidelines**

The purpose of these guidelines is to:

- explain the circumstances in which I may wish to consider exercising my public interest powers under [s345](#), [s351](#), [s391](#), [s417](#), [s454](#) or [s501J](#) of the Act to substitute for a decision of a review tribunal a decision which is more favourable to the visa applicant(s)
- explain how a person may request my consideration of the exercise of my public interest powers and
- inform departmental officers when to refer a case to me so that I can decide whether to consider exercising such powers in the public interest.

## **2 Referral to the Parliamentary Secretary**

In some instances, cases that meet the criteria in these guidelines for referral to the Minister may be referred to the Parliamentary Secretary for consideration. As a portfolio minister, the Parliamentary Secretary may exercise the Minister's public interest powers under the Act.

## **THE POWERS AVAILABLE UNDER LEGISLATION**

This Part comprises:

- [section 3 Public interest powers](#)
- [section 4 Review tribunals](#)
- [section 5 Powers are non-compellable](#).

## **3 Public interest powers**

Under [s345](#), [s351](#), [s391](#), [s417](#), [s454](#) and [s501J](#) of the Act, I have the power to substitute, for a decision made by one of the review tribunals, a decision that is more favourable to the visa applicant(s), if I think it is in the public interest to do so. In these guidelines, these powers are referred to as my public interest powers.

## **4 Review tribunals**

These public interest powers are available in respect of decisions that have been taken by the following review tribunals - the:

- former Migration Internal Review Office (MIRO - ceased operation on 31 May 1999)
- former Immigration Review Tribunal (IRT - ceased operation on 31 May 1999)
- Migration Review Tribunal (MRT - commenced operation on 1 June 1999)
- Refugee Review Tribunal (RRT) and
- Administrative Appeals Tribunal (AAT).

## **5 Powers are non-compellable**

My public interest powers are non-compellable: that is, the powers are available to me, but under the legislation, I do not have a duty to consider whether to exercise those powers (see [s351\(7\)](#), [s454\(7\)](#), [s391\(7\)](#), [s417\(7\)](#) and [s501J\(8\)](#)).

## **WHEN THE POWERS ARE NOT AVAILABLE**

This Part comprises:

- [section 6 Only a more favourable decision](#)
- [section 7 When powers are not available](#)
- [section 8 Cases which may be finalised without further assessment](#)
- [section 9 Court proceedings - use of public interest powers.](#)

## **6 Only a more favourable decision**

As my public interest powers only allow me to substitute a more favourable decision for a decision of one of the review tribunals (see section 3 Review tribunals), I am not able to use these powers until after a decision has been made by the relevant review tribunal.

## **7 When powers are not available**

These public interest powers are not available:

- if the primary decision was not reviewable by the relevant tribunal or
- if no review decision has been made or
- the review decision was made prior to 1 September 1994 or
- if the review tribunal has made a decision to remit the matter to the department and a departmental decision-maker has made a subsequent decision on the case or
- if the review tribunal has made a decision to set aside a cancellation decision or
- once I have intervened in a case (my power is exhausted unless enlivened by another review tribunal decision).

## **8 Cases which may be finalised without further assessment**

I consider the following types of cases inappropriate to consider:

- repeat requests where there is migration-related litigation that has not been finalised, unless the case has been referred to my department by a tribunal for my attention
- where it may be open to a person to make a valid application for a Partner visa onshore, as prescribed under regulation [2.12\(1\)](#)
- where an application for a Partner visa onshore, as prescribed under regulation [2.12\(1\)](#), has subsequently been refused

- where there is another visa application concerning the person ongoing with my department or a review application in relation to a visa application ongoing with a review authority
- where there is an ongoing ministerial intervention request under a different public interest power covered by these guidelines
- where there has been a remittal or a set aside from a review authority or from a court and a subsequent decision has not yet been made by the department or review tribunal
- which were decided by MIRO and are now at the MRT and
- where the request is made by a person who is not the subject of the request or their authorised representative.

Generally, these cases should not be brought to my attention and may be finalised without further assessment. The department should reply on my behalf that I do not wish to consider exercising my power.

## **9 Court proceedings - use of public interest powers**

Because it may affect the exercise of my public interest powers, case officers must, when referring a case to me, inform me of any court proceedings challenging a decision in relation to a case which has commenced at time of referral to me, including any outcome which may arise prior to my consideration of the case.

## **CASES WHICH ARE TO BE BROUGHT TO MY ATTENTION**

This Part comprises:

- [section 10 Public interest](#)
- [section 11 Referral by a review tribunal](#)
- [section 12 Unique or exceptional circumstances.](#)

## **10 Public interest**

The public interest may be served through the Australian Government responding with care and compassion where an individual's situation involves unique or exceptional circumstances.

I may only exercise my public interest powers if it is in the public interest to do so in each case. What is and what is not in the public interest is a matter for me to determine. This will depend on various factors, which must be assessed by reference to the circumstances of the particular case.

I will generally only consider the exercise of my public interest powers in cases which are referred to the department for my consideration by a review tribunal or which exhibit one or more unique or exceptional circumstances. Where a person is in the community (that is, is not in immigration detention), however, I generally do not wish to consider their case unless they hold a bridging or other visa, or have an application for a bridging visa before the department.

## **11 Referral by a review tribunal**

When a review tribunal member considers a case should be brought to my attention, they may refer the case to my department and their views will generally be brought to my attention using the process outlined in:

- [section 16 Requests for the exercise of my public interest powers](#) and
- [section 17 Initial requests for the exercise of public interest powers](#). The exception to this is where the client may be eligible to lodge a valid application for a Partner visa onshore, as prescribed under Regulation [2.12\(1\)](#).

In this case, the request will generally be finalised without further review, as outlined in [section 8 Cases which may be finalised without further assessment](#).

## **12 Unique or exceptional circumstances**

The following factors may be relevant, individually or cumulatively, in assessing whether a case involves unique or exceptional circumstances:

- particular circumstances or personal characteristics of a person which provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity should they return to their country of origin. This may include:
  - circumstances where persons who have been or may be individually subjected to a systematic program of harassment or denial of basic rights available to others in their country, but where such mistreatment does not amount to persecution under the Convention relating to the Status of Refugees 1951, as amended by the Protocol relating to the Status of Refugees 1967 (Refugees Convention) or has not occurred or is not likely to occur for a Convention reason
  - persons who may have been refugees at time of departure from their country of origin, but due to changes in their country, are not now refugees, and it would be inhumane to return them to their country of origin because of their subjective fear. For example, a person who has experienced torture or trauma and who is likely to experience further trauma if returned to their country
- substantial grounds for believing that a person may be in danger of being subject to torture if returned to their country of origin, in contravention of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
  - Article 3.1 of the CAT states:  
*"No State Party shall expel, return ("refoule") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."*
  - torture is defined by Article 1.1 as:  
*"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a*

*public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”*

- circumstances that may bring Australia’s obligations as a party to the International Covenant on Civil and Political Rights (ICCPR) into consideration. For example:
  - a non-refoulement obligation arises if the person would, as a necessary and foreseeable consequence of their removal or deportation from Australia, face a real risk of violation of his or her rights under Article 6 (right to life), or Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) of the ICCPR, or face the death penalty (no matter whether lawfully imposed);
  - issues relating to Article 23.1 of the ICCPR are raised. Article 23.1 provides: “The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State.”
  - issues relating to Article 23.1 may be balanced against other considerations, including countervailing considerations.
- circumstances that may bring Australia’s obligations as a party to the Convention on the Rights of the Child (CROC) into consideration.
  - Article 3 of the CROC provides: “*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*”
  - While the best interests of the child must be treated as a primary consideration, this may be balanced against other primary considerations.
- circumstances that the legislation does not anticipate
- clearly unintended consequences of legislation
- circumstances where the application of relevant legislation leads to unfair or unreasonable results in a particular case
- strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident)
- circumstances where exceptional economic, scientific, cultural or other benefit to Australia would result from the visa applicant being permitted to remain in Australia
- the length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community
- compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person; or
- where the department has determined that the person, through circumstances outside their control, is unable to be returned to their country/countries of citizenship or usual residence.

I generally expect persons making a request to provide appropriate documentation to support their claims. All requests should be accompanied by supporting documentation, unless there are compelling reasons why it cannot be provided and the department considers it is not reasonable for the person to do so.

## **OTHER RELEVANT INFORMATION**

Cases identified as involving unique or exceptional circumstances will sometimes raise other issues that I may wish to take into account, in considering whether to exercise my public interest powers.

While I regard the following issues as relevant, officers should bring to my attention any information that they consider may be relevant to my consideration.

### **13 Other relevant information**

Where cases are assessed as involving unique or exceptional circumstances and are referred to me, the following other information, if relevant, should be brought to my attention for consideration:

- whether the continued presence of the person in Australia would pose a threat to an individual in Australia, to Australian society or security, or may prejudice Australia's international relations
- whether there are character concerns in relation to the person, particularly in relation to criminal conduct
- information regarding any offence or fraud against the migration and citizenship legislation should be specifically brought to my attention
- whether Australia's international obligations in relation to matters of extradition, or other relevant multilateral or bilateral agreements may be engaged
- where the person is likely to face a significant threat to their personal security, human rights or human dignity if they return to a particular area in their country of origin but they could safely and reasonably relocate elsewhere within that country
- whether the person would not be required to return to a country where a significant threat to their personal security, human rights or human dignity has occurred or is likely to occur, because they are able to enter and stay in another country and
- the degree to which the person has failed to comply with any conditions of their visa

## **HOW CASES WILL BE BROUGHT TO MY ATTENTION**

This Part comprises:

- [section 17 Minister's instruction](#)
- [section 15 Following a decision by a review tribunal](#)
- [section 16 Requests for the exercise of my public interest powers](#)
- [section 17 Initial requests for the exercise of public interest powers](#)
- [section 18 Repeat requests.](#)

### **14 Minister's instruction**

The procedures set out below are to be followed, in order to ensure the efficient administration of my public interest powers.

### **15 Following a decision by a review tribunal**

Action to be taken

When a case office receives notification of a review tribunal's decision to affirm a primary decision, they may assess the visa applicant's circumstances against these guidelines, and if the case falls:

- within the ambit of these guidelines, bring the case to my attention in a submission, so that I may consider exercising my public interest powers or
- outside the ambit of these guidelines, write a file note to that effect.

When a review tribunal member holds the view that a case should be brought to my attention, they may refer the case to my department and their views will be brought to my attention using the process outlined in:

- [section 16 Requests for the exercise of my public interest powers](#) and
- [section 17 Initial requests for the exercise of public interest powers](#).

The exception to this is where the client may be eligible to lodge a valid application for a Partner visa onshore, as prescribed under Regulation [2.12\(1\)](#). In this case the request will generally be finalised without further review, as outlined in [section 8 Cases which may be finalised without further assessment](#).

## **16 Requests for the exercise of my public interest powers**

A request for the exercise of my public interest powers can be made only by a person who is the subject of a request or their authorised representative or can be initiated by my department. Requests must be made in writing or by electronic transmission. Information provided by supporters will be taken into account where a request has been made.

A request will be initiated by the department where a tribunal has referred a case for my attention.

The department may initiate or refer a request at any time, particularly where I have not previously considered a case. I may also consider the use of my public interest powers in cases which do not fall within the ambit of:

- [section 10 Public interest](#)
- [section 11 Referral by a review tribunal](#) and
- [section 12 Unique or exceptional circumstances](#)

of these guidelines if I consider this to be in the public interest.

## **17 Initial requests for the exercise of public interest powers**

If a request for me to exercise my public interest powers in respect of a person is received and I or another Minister has not previously considered the exercise of the public interest powers (whether in a schedule or as a submission) in respect of that person (whether in respect of the person's present or any previous visa application) an officer is to assess that person's circumstances against these guidelines and:

- for cases which fall within the ambit of:
  - [section 10 Public interest](#)
  - [section 11 Referral by a review tribunal](#) and

- [section 12 Unique or exceptional circumstances](#)
- of these guidelines, bring the case to my attention in a submission so that I may consider exercising my power, or for:
- cases falling outside the ambit of [section 10 Public interest](#), or
- cases which fall outside the ambit of both:
  - [section 11 Referral by a review tribunal](#) and
  - [section 12 Unique or exceptional circumstances](#)

of these guidelines, bring the case to my attention through a short summary of the issues in schedule format, so that I may indicate whether I wish to consider the exercise of my power.

If I do not wish to exercise, or consider exercising my power, the department should reply on my behalf that I do not wish to exercise my power.

Where a case is in the process of being litigated, the following approach should be adopted depending on the circumstances - where:

- a visa applicant has started litigation, and it is a repeat request for ministerial intervention, I generally consider it inappropriate to consider as specified in [section 8 Cases which may be finalised without further assessment](#)
- there is a Bridging E visa refusal, the case officer may use their discretion to process the request if it falls within these guidelines.

In all circumstances, where a case is referred to me and is in the process of being litigated, case officers are to advise me of the status of the case.

## **18 Repeat requests**

If a request for me to exercise my public interest powers in respect of a person is received and I or another Minister has previously considered the exercise of the public interest powers (whether in a schedule or as a submission) in respect of that person (whether in respect of the person's present or any previous visa application), all subsequent requests in respect of that person are considered to be "repeat" requests.

I generally do not wish to consider a repeat request. Where I or a previous Minister has declined to intervene in a case, I generally expect that person to depart Australia.

In limited circumstances, a repeat request may be referred to me where the department is satisfied there has been a significant change in circumstances which raise new, substantive issues not previously provided or considered in a previous request, and which, in the opinions of the department, falls within the ambit of:

- [section 10 Public interest](#),
- [section 11 Referral by a review tribunal](#) and
- [section 12 Unique or exceptional circumstances](#).

For other cases, the department should reply on my behalf that I do not wish to consider exercising my power.

## **MINISTER'S CONSIDERATION**

This Part comprises:

- [section 19 Outcome of Minister's consideration](#)
- [section 20 No limitation to minister's powers](#)
- [section 21 Removal policy](#).

### **19 Outcome of Minister's consideration**

If I choose to consider a case for substitution of a decision for that of a review tribunal, I may ask that health, character or other assessments be carried out, or some form of surety is arranged before I determine whether or not I wish to substitute a more favourable decision.

If I choose to consider a case for substitution of a decision, I may choose not to substitute a more favourable decision for that made by a review tribunal.

If I choose to substitute a more favourable decision for that of a review tribunal by granting a visa, I will grant what I consider to be the most appropriate visa.

Every person whose case is brought to my attention is to be advised of the outcome of their request.

### **20 No limitation to minister's powers**

These public interest powers exist whether or not a case is brought to my attention in the manner described above (providing that a review tribunal decision has been made and continues to exist, for example, the review decision has not been set aside by a court).

Where I consider it appropriate, I will seek further information to enable me to make a determination on whether to consider application of my public interest powers, or whether to consider the exercise of my public interest powers.

### **21 Removal policy**

Section 198 of the Act, broadly speaking, requires the removal of unlawful non-citizens in immigration detention who have exhausted all available visa application and merit review entitlements. See: [PAM3: Act - Compliance and Case Resolution - Case resolution - Removal from Australia](#).

A request for me to exercise my public interest powers is not an application for a visa and, unless the request leads to grant of a bridging visa, such a request has no effect on the removal provisions.

Minister for Immigration and Citizenship  
14 September 2011