

Inquiry into allegations concerning the inappropriate exercise of ministerial powers, with respect to the visa status of au pairs, and related matters.

Submission from Nelson Quinn

This submission is based on long experience in public administration with the Commonwealth and with international organisations, on long personal experience as a citizen interacting with public officials and Ministers, and on doctoral research on improving the exercise of discretions from the perspectives of decision makers, clients and those expected to comply with widely drawn laws (in a quite different, but equally sensitive, context – biosecurity).

This submission recommends that the Minister provide detailed reasons for his decisions, that guidance be developed and promulgated to increase transparency and accountability in the system and that the Migration Act be amended to increase certainty for all.

A difficulty for the Minister in this case is the apparent absence of any comprehensible understanding of how and why decisions are made under the relevant, very widely drawn, legislation. My submission on that point in this case is simply that there seems to be no information enabling a judgement to be made about the propriety of these particular decisions compared with those for other applicants, whether favourable or not. The Committee should recommend that the Minister provide detailed reasons for his decisions, and how these cases differed from others that have been refused.

Regardless of the judgements made in this case by the Committee, the fundamental problem of opacity of the decision making process will remain unless further action is taken. The Migration Act processes could involve the ‘best practice’ approach in other parts of the Commonwealth administration of issuing guidance about how discretions will be exercised.

Widely drawn laws with discretionary powers inevitably involve tension between flexibility and predictability of decisions and uncertainty, costs and possibly forgone opportunities for those affected by the decisions – the apparently wide discretion versus the desirability of consistency and adherence to principle, and helpfulness to clients.¹ One way to deal with this issue is to provide guidance about

¹ See, eg, Hart, H, *The Concept of Law* (Oxford University Press, 3rd ed, 2012, first published in 1961) 128; Wolff, L-C, ‘Law and Flexibility - Rule of Law Limits of a Rhetorical Silver Bullet - ‘ (2011) *The Journal Jurisprudence* 549; Doremus, H, ‘New Forest Service planning rule highlights the tension between flexibility and accountability’ (2012) *Legal Planet* (Berkeley Law UCLA) <http://legal-planet.org/2012/03/27/new-forest-service-planning-rule/>; Schultz, C, T Sisk, B Noon and M Nie,

how the discretions are to be administered, whether by Ministers, statutory officers or delegates.

It is desirable for those affected by decision making to have understanding of the processes – transparency.² A transparent approach can help overcome uncertainty about how laws may be administered, and about what is needed to comply with them. Guidance on how discretions are administered and a transparent approach should reduce the potential for patterns of decision making that seem to depart from initial intentions, or involve decisions that the public cannot understand.³

Issuing guidelines to help administrators (whether Ministers, statutory officers or delegates) and to provide some transparency for the public and clients is a ‘best practice’ approach in public administration.⁴ The Commonwealth Ombudsman advises that those who exercise coercive powers and who are involved in complex decision making (both apply in migration administration) should be given proper training, guidance and support.⁵

The Australian Taxation Office provides an example of the guidance approach aimed at consistency in decision making:

We produce law administration practice statements (LAPS), to provide direction and assistance to our staff on approaches to take when performing duties involving the laws we administer.

LAPS are published on our [Legal Database](#).

LAPS are not laws and are not public rulings. They are not intended to provide interpretative advice, but technical issues may be discussed in LAPS in the course of providing directions to our staff.⁶

‘Wildlife Conservation Planning under the United States Forest Service’s 2012 Planning Rule’ (2013) 77(3) *The Journal of Wildlife Management* 428.

² Mulgan, R, *Transparency and public sector performance* (Office of the Information Commissioner Queensland and the Australia and New Zealand School of Government, 2012) https://www.oic.qld.gov.au/_data/assets/pdf_file/0019/7651/93_1-Mulgan-Transparency-and-Public-Sector-Performance_0.pdf; Ombudsman Western Australia, *Guidelines: Exercise of discretion in administrative decision making* (2009)

<http://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Exercise-of-discretion-in-admin-decision-making.pdf>.

³ See, eg, the analysis of how decision making under Queensland’s planning laws has maintained uncertainty about outcomes in England, P and A McInerney, ‘Anything goes? Performance-based planning and the slippery slope in Queensland planning law’ (2017) 34 *Environmental and Planning Law Journal* 238.

⁴ See, eg, Ombudsman Western Australia, *Guidelines on Decision Making* (2009) 3 <http://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Binder-Decision-Making.pdf>; Australian National Audit Office, *Administering Regulation: Achieving the Right Balance* (Commonwealth of Australia, 2014) 21.

⁵ Commonwealth Ombudsman, *Lessons for public administration* Report No. 11/2007 7, 21.

⁶ Australian Taxation Office, *Law administration practice statements* (2016) <https://www.ato.gov.au/General/ATO-advice-and-guidance/ATO-guidance-products/Law-administration-practice-statements/>.

The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) provides an example of guidance as a tool of communication with its clients and to provide transparency.⁷ The Authority states:

This guideline sets out the considerations of NOPSEMA in making decisions in accordance with the legislated criteria for acceptance of an EP. It aims to provide insight into NOPSEMA's decision-making in support of transparency. The objectives of this guideline are to:

- communicate NOPSEMA expectations for EP content in relation to the criteria for acceptance
- provide a tool for titleholders and stakeholders to understand regulatory decisions
- provide transparency to all stakeholders on why and how regulatory decisions are made.⁸

These examples illustrate that there is nothing unusual about issuing guidelines to help those administering laws and those affected by the laws and by decisions taken under them.

The proposal for Migration Act administration is that guidelines be developed to provide a basis for decision making by authorities with the same characteristics as the above examples, that is, they: provide an insight for clients and the public about how the migration system operates and about the framework within which discretions will be exercised; generate a consistent approach across decision making regardless of the specificity of the issue or the technical base of the decision maker; and increase the likelihood that decisions will have regard to wider considerations as well as the specific issue at hand.

The cases in question also highlight the desirability of law reform to remove the apparently unfettered discretion of the Minister and provide the elements to be considered in applying a public interest test so that the purposes of the provision and the processes involved in its administration are clearer. It would be better if the Minister's power was about being satisfied on reasonable grounds taking account of broad elements (to be generically defined) that the decision should be (yes or no). Simply providing that a decision can be based on what a Minister (or any other official) 'thinks' is not good enough.

Recommendations: That the Committee recommend that:

1. The Minister provide detailed reasons for his decisions in the cases in question
2. Best practice be adopted by developing and promulgating guidance about the operation of the provisions to provide boundaries for decision makers and transparency for those affected by decisions, and
3. Law reform be undertaken to ensure that purposes of the provision and the

⁷ National Offshore Petroleum Safety and Environmental Management Authority, *Environment Plan decision making* GL1721 Rev 3 May 2017.

⁸ Ibid 3.

processes involved in its administration are clearer.