Chapter 1

Introduction and background

1.1 On 23 August 2018, the Senate referred allegations concerning the inappropriate exercise of ministerial powers, with respect to the visa status of au pairs, and related matters to the Legal and Constitutional Affairs References Committee (the committee) for inquiry and report by 11 September 2018.[1] On 11 September 2018, the Senate agreed to extend the reporting date to 19 September 2018.[2]

Background

1.2 The inquiry relates, in the first instance, to two interventions by the then Minister for Immigration and Border Protection, the Hon Peter Dutton MP, under section 195A of the *Migration Act 1958* (the Act). The interventions occurred in two separate cases where an individual had been detained under section 189 of the Act, after Australian Border Force officers formed the view that those individuals intended to work as au pairs while in Australia.

1.3 Following the publication of media reports on 26 March 2018, the intervention by Minister Dutton, in what was later referred to as 'the Brisbane case', became a matter of public comment.[3] On the same day during Question Time in the House of Representatives, Minister Dutton revealed that there was a separate matter where a person had entered Australia on a tourist visa and he had intervened.[4]

> There were two young tourists who had come in on a tourist visa and declared in an interview with the Border Force officers at the airport—I was advised—they were here on a tourist visa but intended to perform babysitting duties while here. The decision that was taken, I was advised, was that the tourist visas would be cancelled, that those two young tourists would be detained and that they would be deported. I looked into the circumstances of those two cases and I thought that inappropriate. I thought if they gave an undertaking they wouldn't work while they were here, I would grant the tourist visas and they would stay, which they did. They didn't overstay; they returned back home.[5]

1.4 Further questions relating to these respective matters were pursued during the Budget Estimates and spillover hearings of the Legal and Constitutional Affairs

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1 *Proof Journals of the Senate*, No. 113, 23 August 2018, p. 3609.

2 *Proof Journals of the Senate*, No. 115, 11 September 2018, p. 3684.

3 Ms Lisa Martin, 'Peter Dutton defends his decision to grant visa to detained au pair', *Australian Associated Press*, 26 March 2018, https://www.theguardian.com/australia-news/2018/mar/26/peter-dutton-defends-decision-to-intervene-and-grant-visa-to-detained-au-pair, (accessed 7 September 2018).

4 The Hon Peter Dutton MP, *House of Representatives Hansard*, 26 March 2018, p.2680.

5 The Hon Peter Dutton MP, *House of Representatives Hansard*, 26 March 2018, p.2680.

Legislation Committee (Legislation Committee) on 21 May 2018, 22 May 2018 and 3 August 2018, respectively.[6] During the Legislation Committee's Budget Estimates hearings, a series of questions relating to this matter was taken on notice by the Department of Home Affairs (the department), which have been answered and are available on the Australian Parliament's website.[7] The department took more related questions on notice during the Legislation Committee's spillover hearing, which are also available on the committee's website.[8]

First instance ('the Brisbane case')

1.5 Questions regarding the potential inappropriate exercise of Minister's Dutton's ministerial powers first arose in relation to a case hereafter referred to as the 'Brisbane case'. The Brisbane case involved the arrival of a non-citizen at Brisbane airport on 17 June 2015.[9] The non-citizen held an eVisitor visa, which was valid for three months.[10]

1.6 Documents tabled during the Legislation Committee's Budget Estimates spillover confirm that a brief was prepared by the department at the request of Minister Dutton's office.[11] On 17 June 2015, the same day as the non-citizen in question was detained, Minister Dutton exercised his powers under section 195A of the Act and granted the person a Visitor visa (subclass 600) for three months.[12]

Second instance ('the Adelaide case')

1.7 The second reported case, hereafter referred to as the 'Adelaide case', involved the arrival of a non-citizen at Adelaide airport on 31 October 2015.[13] The non-citizen also held an eVistor visa, which was valid for three months.[14] She was questioned by Australian Border Force officers, who formed the view that she was intending to work in breach of her tourist visa. The visa was subsequently cancelled and the women was placed in immigration detention.

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6 *Committee Hansard*, 21 May 2018, pp. 74–75; *Committee Hansard*, 22 May 2018, pp. 102–107; *Committee Hansard*, 3 August 2018, pp. 18–21 and 23–28.

7 https://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legcon

8 https://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legcon

9 Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Proof Committee Hansard*, 5 September 2018, p. 2.

10 Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Proof Committee Hansard*, 5 September 2018, p. 2.

11 Legal and Constitutional Affairs Legislation Committee, Budget Estimates 2018-19, Senator Murray Watt, Two submissions for decision released under FOI, (tabled 3 August 2018).

12 Legal and Constitutional Affairs Legislation Committee, Budget Estimates 2018-19, Senator Murray Watt, Two submissions for decision released under FOI, (tabled 3 August 2018).

13 Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Proof Committee Hansard*, 5 September 2018, p. 2.

14 Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Proof Committee Hansard*, 5 September 2018, p. 2.

1.8 Similarly, a departmental brief was provided to Minister Dutton at the request of his office.[15] On 1 November 2015, Minister Dutton intervened under section 195A of the Act and granted the person a Visitor visa (subclass 600) for three months.[16]

1.9 Further information about the two interventions by Minister Dutton will be outlined in chapter two of this report.

Conduct of the inquiry

1.10 Details of the inquiry were advertised on the committee's website, including a call for submissions to be received by 31 August 2018. The committee also wrote directly to a number of individuals and organisations inviting them to make submissions.

1.11 The committee received ten submissions, including two accepted in confidence, which are available on the committee's website. A list of all submissions received is at appendix 1 of this report.

1.12 The committee held a public hearing in Canberra on 5 September 2018. At the hearing the committee heard evidence from:

- the Department of Home Affairs;
- Mr Gillon McLachlan and Ms Jude Donnelly who reportedly had requested Minister Dutton to intervene in the Adelaide case; and
- migration agents and lawyers who provided evidence pertaining to their experience in seeking Ministerial interventions pursuant to section 195A of the Act.

1.13 A full list of all witnesses who gave evidence to the committee at this hearing is at appendix 2 of this report.

1.14 It should be noted that on 29 August 2018, the committee extended an invitation to the Hon Peter Dutton MP, Minister for Home Affairs, to appear at the hearing. The committee received no response.

1.15 The committee also invited several members of Mr Dutton's staff to appear at the hearing, including his Chief of Staff, Mr Craig Maclachlan. On 4 September 2018, Mr Craig Maclachlan advised the committee secretariat that he would be declining the committee's invitation to appear.

1.16 The committee appreciates the evidence provided by the department at the hearing on 5 September 2018, including the time set aside by the Secretary of the department, Mr Michael Pezzullo, and the Australian Border Force Commissioner, Mr Michael Outram, to appear before the committee. However, the committee also notes that it had invited the department to make available certain officers who would

15 Legal and Constitutional Affairs Legislation Committee, Budget Estimates 2018-19, Senator Murray Watt, Two submissions for decision released under FOI, (tabled 3 August 2018).

16 Legal and Constitutional Affairs Legislation Committee, Budget Estimates 2018-19, Senator Murray Watt, Two submissions for decision released under FOI, (tabled 3 August 2018).

have direct knowledge of the matters under consideration, and the department declined to make those officers available. While the committee accepts that it is generally the prerogative of the secretary of a department to determine who should represent the department, it nonetheless considers that the presence of the requested officers might have helped shed further light on the matters in question.

1.17 Additionally, the committee notes that despite the inquiry's terms of reference being clearly articulated in the title of the inquiry, the department appeared ill-prepared to properly answer specific questions asked by the committee. This included not being prepared to discuss the ministerial intervention submissions made by Minister Dutton, pursuant to section 195A of the Act, where a tourist visa was granted. The committee also notes the answers to questions on notice also contained a number of errors or omissions, including the department needing to correct the number of ministerial interventions that were granted by Minister Dutton and relating to a tourist visa multiple times.

1.18 The committee also notes that during the hearing on 5 September 2018, the department was unable to answer questions relating directly to the use of ministerial intervention powers, taking 24 questions on notice.

Summary of the Minister's power

1.19 Ministerial intervention powers have existed in the migration legal framework since the early 20th century. Both the *Immigration Restriction Act 1901* (Cth) and the subsequent *Immigration Act 1940* (Cth) both enabled the Minister or an authorised officer to grant a person a 'certificate of exemption', which enabled the person to remain in the Commonwealth.[17] The majority of ministerial discretionary powers in the current Act were enacted as a result of legislative reforms in 1989.[18] Mr Pezzullo explained the relevant changes:

> In 1989, the Hawke government comprehensively overhauled the statutory basis for regulating entry into Australia, and the foundations of the modern act were laid down through these reforms. These reforms included the creation under law of a non-compellable discretion for the minister to intervene personally. These powers built flexibility into an otherwise highly prescriptive visa process.[19]

17 Liberty Victoria, *Playing God: the Immigration Minister's Unrestrained Power*, 2017, p. 6. Also see: *Immigration Restriction Act 1901*, s. 3; *Immigration Act 1940*, s. 4.

18 Senate Select Committee on Ministerial Discretion into Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters*, March 2004, pp. 15–16.

19 Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Proof Committee Hansard*, 5 September 2018, p. 2.

Ministerial powers under the Act

1.20 The current Act contains a number of provisions to empower ministers to intervene in migration cases at their discretion, otherwise known as ministerial intervention powers.[20]

1.21 This inquiry focusses particularly on section 195A of the Act, which applies specifically to persons in detention under section 189 of the Act. [21] Section 195A provides that the Minister may grant a visa of a particular class to a person if the Minister thinks that it is in the public interest to do so.[22]

1.22 Ministerial interventions made in accordance with this section are not bound by Subdivision AA, Subdivison AC, Subdivision AF, of Division 3 of Part 2 of the Act, which relate to applications for visas and the granting of visas; nor are they bound by the *Migration Regulations 1994* (the Regulations), but are bound by all other provisions of the Act.[23]

1.23 The Minister's intervention power in section 195A is non-delegable and non-compellable. Further, the Minister is not under a duty to consider whether to exercise his or her power under subsection 195A(2).[24]

1.24 However, the Minister is required to provide a statement to the Parliament, noting the Minister's decision to grant a visa and the Minister's reasons for granting the visa, and referring in particular to the Minister's reasons for thinking that the grant is in the public interest.[25]

1.25 Additionally, the 'Guidelines on Minister's detention intervention power – section 195A of the *Migration Act 1958*' (the Guidelines) set out procedures for the assessment and application of ministerial intervention. These guidelines provide guidance regarding the circumstances in which the Minister may choose to consider exercising his or her power under section 195A of the Act, and explain when officers of the Department of Home Affairs (previously the Department of Immigration and Border Protection) should refer a case to the Minister for consideration of exercising ministerial power under section 195A.[26]

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20 Some examples of ministerial intervention powers contained in the *Migration Act 1958*, include sections 46A–46B, 48B, 72, 91F, 91L, 133A, 133C, 137N, 197AB, 198AB, 198AE, 339, 411, 473BD, 336L, 351, 417, and 501J.

21 *Migration Act 1958*, s 195A(1).

22 *Migration Act 1958*, s 195A(2).

23 *Migration Act 1958*, s 195A(3).

24 *Migration Act 1958*, s. 195A(4).

25 *Migration Act 1958*, s. 195A(6).

26 Department of Home Affairs, Procedures Advice Manual 3: Act - Compliance and Case Resolution - Case resolution - Minister's powers – Minister's detention intervention power, accessed via LEGENDcom (accessed on 11 September 2018).

1.26 Ministerial intervention powers are not subject to judicial or tribunal review. Oversight is provided either by parliamentary scrutiny of the statements referred to above, or by the Commonwealth Ombudsman which can investigate departmental action on ministerial interventions.[27]

1.27 The Minister for Immigration and Border Protection holds the highest number of intervention powers across all portfolios. A Liberty Victoria report notes that, at the time of its publication, the Minister for Immigration and Border Protection administered 20 Acts which contained 47 ministerial intervention powers exercisable in relation to 'public interest' or 'national interest' considerations.[28] This was contrasted with other portfolios, such as the Attorney-General's portfolio which administered 152 Acts which contained 38 ministerial intervention powers, and the Defence portfolio which administered 21 Acts which contained two ministerial intervention powers.[29]

Ministerial Guidelines

1.28 The Guidelines contain advice and a number of procedures for the exercise of ministerial power under section 195A. The Guidelines include the criteria for cases that may be referred to the Minister for consideration, the information required to be presented in referred cases, and who may make requests of the Minister to exercise the intervention power.[30]

1.29 The Guidelines were originally put in place to assist departments in assessing which cases should be referred to the Minister for consideration of ministerial intervention, in addition to the types of matters to be considered and the detail that should be provided to the Minister when assessing cases.[31] The types of matters that may be referred to the Minister include:

- the person has individual needs that cannot be properly cared for in a secured immigration detention facility, as confirmed by an appropriately qualified professional treating the person or a person otherwise appointed by the Department.
- there are 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 permanent resident), or there is an impact on the best interests of a child in Australia.

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27 Senate Select Committee on Ministerial Discretion into Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters,* March 2004, p. 22.

28 Liberty Victoria, *Playing God: the Immigration Minister's Unrestrained Power*, 2017, p. 4.

29 Liberty Victoria, *Playing God: the Immigration Minister's Unrestrained Power*, 2017, p. 4.

30 Department of Home Affairs, Procedures Advice Manual 3: Act - Compliance and Case Resolution - Case resolution - Minister's powers – Minister's detention intervention power, accessed via LEGENDcom (accessed on 11 September 2018).

31 Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Proof Committee Hansard*, 5 September 2018, p. 2.

- the person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable…
- there are other compelling or compassionate circumstances which justify the consideration of the use of my public interest powers and there is no other intervention power available to grant a visa to the person.[32]

1.30 However, it is noted in the Guidelines that the Minister is not bound by any of the Guidelines nor is he or she required to consider any of the factors for consideration when assessing applications for ministerial intervention outlined in the Guidelines.

Public interest test

1.31 While Ministers are required to base their decision to intervene in a case under section 195A on the 'public interest', this concept remains unclear and is not defined in the Act or in the Regulations.

1.32 Case law over time has determined that the concept of the 'public interest' requires a discretionary value judgement dependent on the context of the situation and the scope and purpose of the relevant Act. Court decisions have also consistently noted that the public interest test is a matter for the relevant Minister.[33]

Purpose of the Minister's power

1.33 The purpose of ministerial intervention powers has generally been considered to be for use in situations in which the strict application of provisions in the Act may produce an unjust outcome.[34]

1.34 The Senate Select Committee on Ministerial Discretion into Migration Matters (Senate Select Committee) recommended in its report that ministerial intervention powers be used sparingly as the 'last resort to deal with cases that are truly exceptional or unforeseeable'.[35]

1.35 The section 195A power has been recognised by observers to be critical in situations where a person seeking asylum is able to find safety in Australia. A report by Liberty Victoria into the subject states that, while relying heavily on the Minister's discretion, the power is 'essentially a beneficial power that allows the Minister to give protection, rather than to withhold it'.[36] Ms Helen Duncan similarly expressed the

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32 Department of Home Affairs, Procedures Advice Manual 3: Act - Compliance and Case Resolution - Case resolution - Minister's powers – Minister's detention intervention power, accessed via LEGENDcom (accessed on 11 September 2018).

33 For a discussion of case law regarding the public interest test, see: Liberty Victoria, *Playing God: the Immigration Minister's Unrestrained Power*, 2017, pp. 11–12.

34 Liberty Victoria, *Playing God: the Immigration Minister's Unrestrained Power*, 2017, p. 6.

35 Recommendation 20, in Senate Select Committee on Ministerial Discretion into Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters*, March 2004, p. xxv.

36 Liberty Victoria, *Playing God: the Immigration Minister's Unrestrained Power*, 2017, p. 13.

view that the power for the Minister to intervene was important for people whose situations are unusual or exceptional, and that the power should remain.[37]

Concerns regarding the Minister's power

1.36 Ministerial intervention powers have long been considered to be a controversial aspect of the migration framework. The powers have been criticised as being extremely broad, generally non-compellable and non-reviewable.[38] Concerns have also been raised that the powers are not subject to natural justice, and that '[p]eople's rights and interests are being harmed and inadequate, unfair decision-making process that lead to harm are being kept secret'.[39]

1.37 This issue was recognised when the legislation was first considered by the Parliament. When debating the legislation in the Senate in 1989, Senator Robert Ray expressed concern about the potential operation of the Minister's discretionary powers into the future:

> What I do not like about [ministerial intervention powers] is access. Who has access to a Minister? Can a Minister personally decide every immigration case? The answer is always no. Those who tend to get access to a Minister are members of parliament and other prominent people around the country. I worry for those who do not have access and whether they are being treated equally by not having access to a Minister.[40]

1.38 As Minister for Immigration, Senator Ray sought to remove all ministerial discretion from the Act, stating:

> The wide discretionary powers conferred by the Migration Act have long been a source of public criticism. Decision-making guidelines are perceived to be obscure, arbitrarily changed and applied, and subject to day-to-day political intervention in individual cases.[41]

1.39 In 2004, the Senate Select Committee noted in its report that consideration of the proposed 1989 bills in the Senate reflected the highly contentious nature of the powers.[42] In its report, the Senate Select Committee concluded that the powers were of concern, forming the view that:

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37 Ms Helen Duncan, private capacity, *Committee Hansard*, 3 September 2018, pp. 48–49.

38 Liberty Victoria, *Playing God: the Immigration Minister's Unrestrained Power*, 2017, p. 1.

39 Liberty Victoria, *Playing God: the Immigration Minister's Unrestrained Power*, 2017, p. 1.

40 Cited in Senate Select Committee on Ministerial Discretion into Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters*, March 2004, p. 17.

41 Cited in Liberty Victoria, *Playing God: the Immigration Minister's Unrestrained Power*, 2017, p. 2.

42 Senate Select Committee on Ministerial Discretion into Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters*, March 2004, pp. 16–17.

> …vesting a non-delegable, non-reviewable and non-compellable discretion with the immigration minister without an adequate accountability mechanism creates both the possibility and perception of corruption.[43]

Statement of Ministerial Standards

1.40 Since 1996, ministers and assistant ministers have been required to comply with the Statement of Ministerial Standards (Ministerial Standards), issued by the Prime Minister of the day. The underlying principles are set out in paragraphs 1.1 and 1.2 within the Ministerial Standards:

> 1.1. The ethical standards required of Ministers in Australia's system of government reflect the fact that, as holders of public office, Ministers are entrusted with considerable privilege and wide discretionary power.
>
> 1.2. In recognition that public office is a public trust, therefore, the people of Australia are entitled to expect that, as a matter of principle, Ministers will act with due regard for integrity, fairness, accountability, responsibility, and the public interest, as required by these Standards.[44]

1.41 The Ministerial Standards go on to state:

> (i) Ministers must ensure that they act with integrity – that is, through the lawful and disinterested exercise of the statutory and other powers available to their office, appropriate use of the resources available to their office for public purposes, in a manner which is appropriate to the responsibilities of the Minister.
>
> (ii) Ministers must observe fairness in making official decisions – that is, to act honestly and reasonably, with consultation as appropriate to the matter at issue, taking proper account of the merits of the matter, and giving due consideration to the rights and interests of the persons involved, and the interests of Australia.[45]

Structure of this report

1.42 This report consists of two chapters, including this introductory and background chapter.

1.43 Chapter 2 details the actions and decisions that were taken with respect to the Brisbane and Adelaide cases, outlines the issues raised by participants in the inquiry, and sets out the committee's views and recommendation.

Note on terminology

1.44 The terms 'tourist visa', 'visitor visa', and 'subclass 600 visa' relate to the same type of visa and are used interchangeably in this report.

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43 Recommendation 21, in Senate Select Committee on Ministerial Discretion into Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters*, March 2004, p. xxv.

44 The Hon. Scott Morrison MP, Prime Minister, *Statement of Ministerial Standards*, 30 August 2018.

45 The Hon. Scott Morrison MP, Prime Minister, *Statement of Ministerial Standards*, 30 August 2018, para 1.3.