

Our reference: 03-0265-01BL

Mr Alistair Sands
Secretary
Senate Select Committee
(Ministerial Discretion in Migration Matters)
Parliament House
Canberra ACT 2600



Dear Mr Sands

Re: Inquiry into Ministerial Discretion in Migration Matters

I write in response to your letter of 28 November 2003, requesting advice on privacy issues relating broadly to the transparency and accountability of Ministerial decision making under s.351 and s.417 of the *Migration Act 1958*. These issues have arisen through submissions to, and hearings of, the Senate Select Committee on Ministerial Discretion in Migration Matters. Thank you for providing the range of background materials regarding this matter and for highlighting relevant extracts.

Background

To assist the Committee, and to provide some important context for our advice, it is worth reflecting on elements of the *Privacy Act 1988* (the Act). The Act protects personal information by regulating its handling by, amongst others, Australian Government agencies (including the Department of Immigration, Indigenous and Multicultural Affairs, DIMIA). In s.6 of the Act, it states that the term 'agency' includes Ministers and Departments. The Act, however, does not regulate the activities of the Parliament, for instance those activities undertaken subject to the discretion provided to Members and Senators through parliamentary privilege.

Personal information is defined, also in s.6 of the Act, as 'information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can be reasonably ascertained, from the information or opinion'. Consequently, personal information can be information about an individual that does not include 'obvious' identifying information (such as a name and/or address), but information from which the individual's identity can be reasonably ascertained, given such things as the person's circumstances and to whom (or the context in which) the information is disclosed.

Ministerial statements and the names (and other identifying details) of individuals

The Act would appear to apply to the exercise of powers, by the Minister, pursuant to s.351 and s.417 of the Migration Act. Though by virtue of this legislation (at s.351(5) and s.417(5)), it is clear that the Minister is generally precluded from naming individuals when exercising these powers through tabling statements in the Parliament.

The current legislation intends that those applying for Ministerial intervention in their cases should, if successful, be assured of an appropriate degree of privacy, specifically by not being named when decisions relating to their cases are tabled in the Parliament.

If these settings are to be altered, then in the context of migration policy, it is for Government and the Parliament to determine whether the current scope of the powers, and their accountability framework, remain appropriate. Change would appear to require amendment to s.351 and s.417 of the Migration Act. If amendment of the provisions is contemplated, it is important (as discussed below) to distinguish between the need for identifying individuals (when tabling statements about the decisions underpinning particular matters) from the aim of improving transparency and reporting on the reasoning that underpins Ministerial exercise of these powers, generally.

Transparency, accountability and reporting


The present parliamentary reporting requirements and Ministerial guidelines aim to provide transparency about the current process. Information arising through the Inquiry, however, seems to indicate that the broadness of the term 'public interest', combined with the intent of the provisions to cover '...circumstances that the legislation could not have anticipated ... or clearly unintended (or particularly harsh) consequences of the legislation' ^[1] render somewhat complex the development of criteria for reporting on cases for which these powers are used.

The issues arising from submissions and during hearings, about the perceived lack of transparency and accountability in current processes, do not appear to make a clear case for the naming of (or inclusion of related, identifying personal information about) those who have been granted visas in Ministerial statements issued for this purpose. For instance, there are comments reflecting the lack of readily available statistics on the use of these discretionary powers, which in turn adversely affects the migration advocacy community's ability to provide assistance. Perhaps this issue could be addressed, but without identifying individuals.

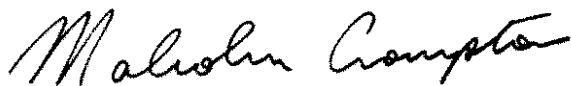
The need appears to be to assist other interested parties to gain an understanding of how the Minister's discretion is exercised overall. This might include, for instance, identifying the factors that go to make up the 'public interest' grounds for approval/rejection of requests made to the Minister, the number of such visas issued, the countries of origin of successful and unsuccessful applicants, and the types of representative advocacy that are most effective. Natural justice considerations would seem to require that there be adequate explanatory material to assist individuals, and the advocacy community, to make better representation under these provisions. Furthermore,

it is legitimate to track and analyse the effectiveness and efficiency of such powers, as suggested by the Commonwealth Ombudsman, Professor John McMillan ^[2].

It maybe, therefore, that there are other means to effectively provide the necessary reporting information and to improve transparency, such as by developing criteria for the annual (or more regular, if appropriate) publication of de-identified, aggregated statistics on the use of these powers by the Minister. In our view, it is vital to consider these approaches carefully, before looking to amend the legislation to name individuals.



Yours sincerely



Malcolm Crompton
Federal Privacy Commissioner

23 December 2003

^[1] DIMIA submission to the Inquiry, Aug 2003, p. 52

^[2] Senate Hansard, 18 November 2003, MDMM8