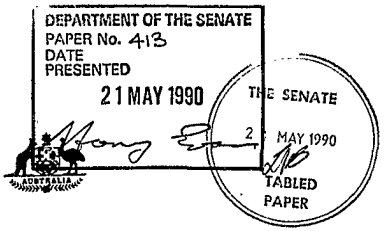


JOINT SELECT COMMITTEE ON MIGRATION REGULATIONS

FIRST REPORT TO THE
MINISTER FOR IMMIGRATION,
LOCAL GOVERNMENT AND ETHNIC AFFAIRS

28 NOVEMBER 1989

TABLE OF CONTENTS

CHAPTER 1

OVERVIEW

Introduction

1.1 The Committee was established on 31 May 1989 to inquire into the extent to which draft regulations and tabled regulations under the Migration Act 1958 which relate to decision criteria for the grant of visas and entry permits:

(a) reflect current and announced policies in relation to the grant of visas and entry permits as at 1 June 1989; and

(b) are likely to achieve the goals of the policies referred to in subparagraph (a).[1]

1.2 The resolution of appointment required the Committee to report to the Minister on 21 November on regulations received before 31 October 1989. For regulations received after that date

---

1. 1. Appendix A

the Committee has 56 days to report to the Minister, unless the Minister deems the regulations urgent, in which case the Committee has 28 days to report.

1.3 Initially, it appears that the intention was to provide the regulations at regular intervals. However, it soon became obvious that this would not be possible and that it would be necessary for the draft regulations to be considered as a whole. The Committee received an incomplete and unfinished draft of the regulations on 31 October 1989.

1.4 The Committee is concerned at the lack of time available for its deliberations. The Committee has had less than four weeks to consider a major and incomplete body of legislation, the implementation of which may have serious consequences for people wishing to migrate to Australia.

1.5 Given the wording of the Committee's resolution of appointment, the receipt of the regulations on 31 October 1989 placed the Committee in a position where it was not clear by which date a report to the Minister was required.[2] The Committee has therefore decided to report to the Minister as soon as possible, notwithstanding the size of the task and the limited time in which to complete it.

1.6 The Committee is very concerned at the enormous potential for problems if the regulations are implemented in their present form. The view of the Committee is that there are fundamental problems with the regulations, both as to the extent to which they reflect current and announced Government immigration policy and also with regard to technical problems within the regulations.

1.7 A further problem has been the incompleteness of the regulations. The draft provided by the Minister on 31 October was in itself unfinished. However, the more serious omission is

---

2. Appendix A

the absence of the review regulations from those provided to the Committee. The Committee considers that it was established to inquire into all regulations relating to the issue of visas and entry permits, which includes review regulations.

1.8 The Committee took a decision to circulate the draft regulations to a number of government bodies, legal groups and migration interest groups in order to obtain their comments. The Committee recognises that this consultative process was undertaken at its own initiative. However, notwithstanding this, the Committee considers that the lack of time it was able to make available to those groups wishing to make submissions has limited the contribution they could make to the report.

1.9 The Committee stresses that at no point were the Committee's deliberations delayed or prolonged because of the submission process.

Establishment of the Committee

1.10 The Committee was established on 31 May 1989 and first met on Thursday 15 June 1989. The Committee received its first briefing from officers of the Department of Immigration, Local Government and Ethnic Affairs at a meeting on 25 July 1989. The Department advised that it would make available to the Committee the draftsman's drafting instructions, in order that the Committee would be able to commence its deliberative process. At this stage the Committee expected to receive draft regulations by early September.

1.11 As indicated earlier in paragraph 1.3, an incomplete draft of the regulations was provided to the Committee on 31 October. Both the Department and the Minister had been advised previously by the Secretary and Acting Chairman that the

resolution of appointment did not specify a reporting deadline for regulations provided to the Committee on 31 October. Notwithstanding this advice, the regulations were provided on that date. However, given the urgency of the Committee's task and the Government's objective for the regulations to be in place by 19 December 1989, the Committee determined to report at the earliest practicable opportunity to allow the Minister to take the Committee's views into consideration, prior to tabling the regulations.

Reflection of current and announced policies

1.12 In the Minister's second reading speech he stated:

> I should emphasise that in drawing up these regulations I intend to reflect only current government policy, which in turn reflects the Government's public response to the CAAIP report, and the extensive community consultations which took place. In presenting this Bill I am not therefore, asking for a 'blank cheque' to place new policies into regulations, but a legislative base on which to order and rationalise existing policies.[3]

1.13 In the process of consideration of the regulations it became clear that they did not reflect accurately current or announced policy. Following lengthy (but incomplete) consultation with the officers of the Department of Immigration, Local Government and Ethnic Affairs, the Committee received a letter from the Minister foreshadowing his intention:

(1) to announce new policies and clarification of existing policies; and

(2) to amend certain draft regulations in response to some of the Committee's preliminary suggestions.

---

3. Senate Hansard, 5 April 1989, p. 923

1.14 The letter contained an attachment detailing 16 policy areas where such new policies or clarifications of policies would be made. The Committee agreed to take account of this information in its consideration of the draft regulations.

1.15 Notwithstanding this, however, the Committee is recommending to the Minister that further draft regulations should be formulated or changes to some draft regulations be made to ensure the implementation of policy. The Committee is also of the opinion that there were some previous practices which, although not stated policy, functioned as policy and which have now been omitted from the regulations. Given the Minister's undertaking in his second reading speech, the Committee takes the view that the Minister should not use the regulations to make new policy but should announce all new policies separately.

Ministerial discretion and administrative flexibility

1.16 The current legislation confers wide discretionary powers on administrators. The new system, including proposed changes, substantially restricts such discretion. It is the view of the Committee that, the policy should neither extend unfettered administrative discretion nor should it remove such discretion from the Minister.

1.17 The question of the lack of ministerial and administrative discretion concerns the Committee. The regulations as drafted mean that 'if you don't fit in, you don't get in'. There is virtually no capacity for a flexible approach to those cases which do not fit neatly into a specified visa category, but which, for substantial compassionate and humanitarian reasons, it would be unreasonable and may not be in the national interest to refuse the application. Such discretion as the draft regulations do contain almost always provides for additional power to refuse rather than to grant an application. An example is R.42 governing prescribed criteria for classes of entry permits.

1.18 It is claimed that S64U of the Migration Legislation Amendment Act allows the Minister to retain an overriding responsibility under the Act. However, it is envisaged that this section will be used only rarely. The use of S64U may also be impracticable if the case contains elements of urgency, given that the Minister would only be able to exercise his discretion after all the statutory appeal and review processes have been exhausted. This problem and others are discussed in chapter 2.

1.19 The Administrative Review Council's Report No. 25, Review of Migration Decisions, sets out proposals for structuring discretionary powers. The report describes 'structuring' as:

> 'the specification of principles and criteria relevant to the exercise of such powers so that their exercise is not open-ended and without guidance.[4]

1.20 The Report makes the following recommendations:

(1) In order to lay down identifiable principles and criteria applicable to the exercise of the discretionary powers conferred by the Migration Act and Regulations, those powers should be structured, wherever appropriate, by embodiment of such principles and criteria in legislative form, preferably in the Act or Regulations.

(2) Pending the completion of this task, the Minister should table in the Parliament succinct rules setting out the principles and criteria applicable to the exercise of discretionary powers in the area of migration, but not having legislative force.[5]

---

4. Administrative Review Council Report No. 25, Review of Migration Decisions, 1986, p. 42.
5. A ibid

1.21 The draft regulations as presented to the Committee go far beyond the ARC's recommendations for the exercise of structured discretionary powers. Virtually all opportunity for the exercise of discretion in an applicant's favour has been removed.

1.22 The problems raised above have been recognised by the Minister in his letter to the committee on 14 November 1989. The Minister said in that letter:

> 'I turn now to the question of a general discretionary provision for compassionate cases which do not fit the criteria.
>
> The proposed regulations do not put in place a rigid system in which there is virtually no discretion.
>
> The proposed regulations have attempted to leave room, within a structured approach, for judgement and for discretion. At times, it was necessary to translate open-ended waivers with a system of exceptions. At others, it was necessary to spell out the criteria for waiver.'[6]

The Minister went on to say:

> 'In translating migration policies in the regulations, it can be argued that the line in a specific class should be drawn here rather than there. I would consider carefully any observations of the Committee in this regard.'[7]

1.23 In view of the clarification from the Minister, the Committee has determined to suggest a number of changes in the draft regulations which would allow for greater administrative discretion.

---

6. Appendix C, p. 2
7. Appendix C, p. 3

Complexity

1.24 The draft regulations are many, complex and may be difficult to follow. For example, the regulations governing decision criteria run to approximately 180 pages, with more than 60 different classes of visa. There are different criteria for each class of visa, some of which are specified in the Act and others in the regulations.

1.25 The Committee found the complexity of the structure of the regulations to be exacerbated by insufficient cross-referencing. Many submissions also commented on the difficulty experienced in 'tracking' the effect of provisions of the Act and regulations on various classes of visas.

1.26 The Committee considers that the complexity inherent in the draft regulations could create problems in efficiently administering the immigration program.

1.27 The Department is in the process of preparing new manuals and guidelines for immigration officers. These documents already amount to more than 2,200 pages. The entry criteria regulations alone require 180 pages. Departmental officers must familiarise themselves with the content and operation of the new regulations and manuals prior to the commencement of the new Act and regulations on 19 December 1989. Given that the regulations have not yet been finalised and the manuals cannot be finalised until the regulations are ready, the Committee is concerned about the Department's ability to implement the new scheme effectively and efficiently on 19 December.

1.28 The Committee is concerned that the average person will have difficulty ascertaining rights and responsibilities, without having to resort to advice from experts who have a detailed knowledge of the Act and regulations.

1.29 The complexity of the regulations may disadvantage the individual applicant, initially in making application for a visa or permit and subsequently in seeking a review of the decision. A particular difficulty may be in ascertaining which visa or permit class an applicant qualifies for. For example, under S11S, if an applicant within Australia applies for a permit under a specified category and fails under that category, that applicant is not then permitted to reapply for a permit in a different category and for which s/he may be eligible. Under these circumstances, an applicant must not make a mistake in determining the category which would offer the best chance of success. In the Committee's view, ascertaining this will be extremely difficult, and even more so for those applying to change status from within Australia.

1.30 The Committee recommends that:

- **the Minister for Immigration, Local Government, and Ethnic Affairs considers the provision of a simplified guide to the regulations in order to deal with the problem of complexity.**

Regulations relating to the Review Process

1.31 The review regulations were made available to the Committee on Monday 20 November 1989. The Committee is of the opinion that since the review process exists in order to determine whether a prior decision to not approve an application should be either confirmed or overruled - that is, a review could result in the issuing of a visa - the review regulations are therefore an integral part of its deliberations.

1.32 The Committee can only make a preliminary assessment of the entry criteria, subject to a thorough examination of the review regulations. The Committee thus reserves the right to make further recommendations on entry criteria after fully considering the review regulations.

Regulations and Ordinances Committee Considerations

1.33 When promulgated, the regulations must be considered by the Senate Regulations and Ordinances Committee. The Committee's consideration of the regulations is not meant to preempt the findings of that Committee. However, it appears to the Committee that some of the provisions in the regulations might infringe the principles of the Senate Regulations and Ordinances Committee. For example, principle (c) states:

> (c) that [delegated legislation] does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

1.34 However, the draft regulations include provisions where the grant of a visa or entry permit depends on a decision of a third party, without providing that the decision is reviewable. Such regulations may infringe the principle outlined above.

Migration Act Commencement Date

1.35 During its meeting on 8 November 1989 the Committee discussed with the Minister a proposal that the implementation of the Migration Act and associated regulations be delayed for three months. In the view of some members such a delay is necessary for a proper consideration of the draft regulations. This would also allow for some consideration of problems identified by individuals and community organisations. The Committee regards public consultation as fundamental to its effectively discharging its duty to the Parliament. The time constraints the Committee had to impose on those it attempted to consult were necessary to meet the Committee's extremely tight reporting timetable. This made it impossible for a number of interested organisations to make submissions on the draft regulations.

1.36 Some Committee members proposed to the Minister that an amendment to the Migration Legislation Amendment (Consequential Amendments) Bill 1989 which is presently before the Senate would be a means of implementing the proposal for a delay.

1.37 The Minister responded that such a delay was not acceptable and confirmed this in his letter of 14 November 1989. In summary, his reasons were:

- despite the short timeframe the Department had put in a massive effort to get the job done and all was in readiness for a 19 December start;
- the Immigration Review Tribunal had already been established;
- a delayed start would have cost implications - for example, printing costs alone to be thrown away would be above $120,000;
- the delay would prejudice by premature disclosure the implementation of some policy changes which the Minister had planned to coincide with the commencement date; and
- the Minister did not regard the commencement date of the regulations as crucial to their refinement and that they would undergo necessary changes with administrative experience.[8]

1.38 Notwithstanding the difficulties raised above, the Committee agreed to proceed to report as soon as practicable so as to allow the Minister to implement the regulations on 19 December.

---

8. Appendix C

1.39 However, some Members of the committee are still strongly of the view that the matters mentioned are of significant complexity and difficulty, with potential to deny entry to numbers of individuals otherwise properly entitled. There are legal doubts as to the vires of particular provisions and uncertainty as to Senate Regulations and Ordinances Committee approval of some aspects. Further, there exists considerable doubt as to whether the regulatory scheme can be properly introduced in the time available, namely by 19 December next.

1.40 Thus, these members press the Minister to arrange this week for Section 4 of the principal Act to be amended, to allow postponement of the date of proclamation and thus the date of application of the regulations. This section could be altered to allow the implementation date to be a date to be proclaimed by the Minister. Thus greater public response could be achieved on the draft proposals and possible technical deficiencies could be addressed with more time. Proclamation would remain a matter for the Minister. An amendment to the Migration Legislation Amendment (Consequential Amendments) Bill now in the Senate could, it seems to some members, be amended and returned to the House for approval this week.

CHAPTER 2

COMPASSION AND THE EXERCISE OF DISCRETION

Introduction

2.1 As indicated in Chapter 1, the Committee is concerned about the extent to which current policy and practice have been reflected in the draft regulations, particularly with reference to the exercise of discretion in compassionate and humanitarian circumstances.

Proposals

2.2 The Committee has considered several proposals to remedy this. They are:

(a) an overriding ministerial discretion to deal with all compassionate cases;

(b) the 'compassionate door' approach, whereby there would be a class of visa especially for compassionate cases; and

(c) amendments to specified visa classes to add discretionary and compassionate elements.

2.3 Until the Committee received the Minister's letter of 14 November 1989[1], it had been the Committee's understanding, based on discussions with departmental officers, that (c) above, was not acceptable. The Department had argued that such amendments were not acceptable and would undermine the integrity of the amended Migration Act.

2.4 However, in his letter, the Minister rejected the approaches outlined in (a) and (b) and supported that described in (c).

2.5 In order to accommodate the Minister's views, the Committee has recommended a number of changes to definitions and to entry criteria which would take into account the more common instances of compassionate circumstances. These are discussed further in Chapter 3.

2.6 In preparing this report, the Committee was very disappointed with the failure of the Department to provide any information as to the kinds of compassionate circumstances considered in the past and especially on those cases considered favourably by the Immigration Review Panels. This was despite specific requests and an understanding that some material might be provided.

2.7 Although the Committee has expanded definitions and criteria to take some of these circumstances into account, the Committee still feels that the current practice encompassing discretion and compassion has not been adequately reflected even in the expanded draft regulations. The wide variety of human circumstances makes it impossible to foresee all possible circumstances which a reasonable person might assess as amounting to genuine compassionate grounds. The Committee has therefore made recommendations relating to the Minister's discretionary power under S64U.

---

1. Appendix C

Amendments to Specified Visa Classes

2.8 Incorporation of discretionary clauses into the regulations takes account of an unforeseen consequence of translating past policy into regulations. For example, definitions like 'balance of family' were previously drawn restrictively and many parents were excluded from entry by the rule. However, departmental officers had an overriding discretion to do justice in deserving or compassionate cases.

2.9 Such definitions have been faithfully transcribed into the regulations, but now have a different effect because there is no alleviating positive discretion to mitigate the rigidity of the rule. What was a sensible, narrow focus and achieved a just result in the past could be considered too restrictive and could result in injustice, which cannot be righted in the future.

2.10 Definitions such as 'adopted' and 'aged dependent relative' are examples of a more restrictive stance being taken in the draft regulations, than that which operates under present policy. These definitions are dealt with in Chapter 3.

2.11 The Department argued before the Committee that, whereas prior to the amended legislation there was no automatic right of entry to Australia, one of the effects of codification would be to grant an applicant such as a parent or a spouse a right of entry. This right of entry would therefore need to be restricted. However, the Committee argues that only Australian citizens have had and will continue to have a right of entry to Australia. The categories, parent or spouse, are mere descriptions of contending entry classes. In such classes control can be exercised by the use of exclusion criteria as in these regulations, and also by the exercise of positive discretion, so that an applicant to whom it would be desirable to grant entry is not disadvantaged.

2.12 For example, the provision in the British immigration rules for the entry of children is drawn very restrictively because of the perceived entry pressure from children left at home in some countries when their single parents emigrated to Britain. Rule 50 of the British Immigration Rules includes a compassionate discretion carefully defined to provide exceptions only where 'serious and compelling family ... considerations ... make exclusion undesirable'[2]. The clause has apparently given no difficulties to British immigration officers and has been subject to a very small number of legal challenges - and these only in the domestic Immigration Tribunal. The Committee argues that such careful, defined exceptions could be easily incorporated in appropriate instances in the draft regulations.

Section 64U

2.13 Section 64U of the 1989 Act confers limited residual positive discretion on the Minister, which can be exercised in the public interest, following a decision of the Immigration Review Tribunal. According to this section the Minister has the following power and must table an explanation in the Parliament:

> S64U.(1) Where the Minister thinks that it is in the public interest to do so, the Minister may set aside a decision of the Tribunal and substitute a decision that is more favourable to the applicant.
>
> (2) Where the Minister sets aside a decision of the Tribunal under subsection (1), he or she shall cause to be laid before each House of the Parliament, within 15 sitting days of that House after setting the decision aside, a statement that:
>
> (a) sets out the decision of the Tribunal;
>
> (b) sets out the decision substituted by the Minister; and

---

2. Appendix D

> (c) sets out the reasons for the Minister's decision, referring in particular to the Minister's reason for thinking that his or her actions are in the public interest.
>
> (3) A statement under subsection (2) shall not include:
>
> (a) the name of the applicant; or
>
> (b) where the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned - the name of that other person. (Migration Legislation Amendment Act 1989)

2.14 As indicated in the previous chapter, the Committee considers that this section in its present form is too narrow in that it does not deal with cases where there is an element of urgency. For that reason, delays of up to 18 months may take place, before a person has exhausted both the selection and review processes by the Department and review by the Tribunal and can then appeal to the Minister under S64U.

2.15 In certain circumstances where there are important emerging factors it is quite clearly desirable that the Minister should be able to consider such cases under S64U in a speeded up process.

2.16 In a letter to Mr Ruddock the Minister proposed a process to enable decisions to be fast tracked to the stage where a Minister could exercise powers currently contained in the new S64U of the Migration Act 1958. The Minister's proposal is to amend the Migration Act 1958 to enable a Minister to consider a case after the first tier internal review, but prior to review by

the Immigration Review Tribunal. Once the Minister has exercised his power under the new provision, it would not be possible for the applicant to lodge an application to proceed to review by the Tribunal.[3] It must be noted that in that letter the Minister rejected, the approach of fast-tracking the Departmental process.

2.17 However, the Committee recommends that:

- **in such urgent cases, there be put in place an administrative mechanism by which the Departmental processes of assessment and review can be speeded up.**

2.18 The Committee believes that such a process meets its requirements for those cases which contain an element of urgency.

2.19 However, the wider question of the Minister's discretionary power under S64U remains at issue. In particular, the Committee is concerned at the requirement that it be "in the public interest" to set aside a review of the Immigration Review Tribunal.

2.20 The Committee received legal advice on the interpretation of public interest. The advice stated:

> 'The concept of public interest is broad, involving in many cases, a balancing of competing interests'.
>
> 'The interest must be in the interest of the public and not mere individual interest'.

---

3. Appendix E, Letter of 23 November 1989 from Senator Ray to Mr Ruddock

> 'The public interest is an indivisible concept. The interest of a section of the public is a public interest, but the smallness of the section may affect the quantity or weight of the public interest'.[4]

2.21 In order that the Committee's concerns regarding interpretation of the "public interest" in S64U be addressed, the Committee recommends that:

- **the words 'in the public interest' in sub-sections (1) and (2)(c) of S64U be replaced by 'not contrary to the public interest'.**

2.22 Further, it is conceivable that there may be cases deserving of merit where a grant of visa or entry permit is clearly in the individual's own interest but which may not be in the public interest, i.e. there exists a conflict between the interests of the individual and the public interest. For this reason, some members of the Committee would prefer the words 'think that it is in the public interest' to be deleted from subsection (1) of S64U and replaced by the words 'sees fit' and in subsection 2(c) of S64U all words after 'decision' be deleted.

2.23 Finally, some members feel that reporting on individual cases rather than generally in the exercise of discretionary power makes it less likely that Ministers will be prepared to consider genuine compassionate cases. This requirement is more restrictive than the system of reporting now in place in criminal deportation cases. Thus, these members feel further amendment is required.

2.24 The Committee has considered a number of alternative formulations for providing an additional power in the hands of the Minister to deal with particularly difficult and

---

4. Sinclair v Mining Warden of Maryborough (1975) 5 ALR, p. 513

compassionate circumstances. One proposal was to look at a specific category which had not been allowed for in the various categories of the draft regulations and which it would not be practicable to attempt to codify because of the huge variety of compassionate circumstances.

2.25 The Committee has come to the view that if its proposals for S64U are acceptable to the Minister, then that should be sufficient for a Minister so minded to address all appropriate cases. Thus we have not made further recommendations to cover the number of specific alternative proposals that members of the Committee had in mind.

2.26 However, if the Minister rejects the proposals for S64U the Committee would again seek the opportunity to make further recommendations as to the way in which the particular cases members have in mind might be pursued, either through the provision of additional categories or through legislative or regulatory power to be put in the hands of the Minister.

Conclusions

2.27 The Committee believes that the proposals outlined here deal with the problems of compassion and discretion in such a way as to retain the essential integrity of the regulations system while at the same time giving powers to deal with specific cases which may not have been foreseen in the regulations or where an additional compassionate factor is required over and above the prescribed rules and criteria in the regulations.

2.28 Hence, under this system, the compassionate circumstances are incorporated as follows:

1. some compassionate circumstances will be incorporated in the descriptions of the particular categories themselves, such as in the case of preferential family category under which 'special need relative' are admitted. In these cases, a

person's compassionate circumstances may fall within the definition and criteria for a special need relative. There are several instances therefore, where discretion and a certain amount of compassion can be taken into account within the descriptions of the categories in Chapter 3;

2. in the case where a person fails to meet the criteria of a particular category or the points system, and/or has failed in an appeal to the Immigration Review Tribunal, s/he is able to appeal to the Minister for compassionate consideration under S64U if amended;

3. as we have already indicated in those circumstances where a person has been rejected under the selection procedure but believes that there are urgent circumstances which require a quick determination under S64U, there would be the provision of that fast track approach for those particular urgent cases which have failed the first tier review.

2.29 The Committee believes that these processes are consistent with the general approach in the Migration Act. They allow for the serious issue of the transformation of the current policy and practice into regulations to be dealt with, in a way which retains the general integrity of the program, while at the same time allowing for the compassionate spirit which existed under the earlier policy to be retained. We strongly urge the adoption of this approach.

CHAPTER 3

INTERPRETATION SECTIONS

Introduction

3.1 This Chapter deals with the interpretation sections of the draft regulations. These sections comprise regulations 2-9 inclusive and Division 7 of Part 2.

3.2 Generally speaking, the necessity to define terms which have not been previously defined has led to the imposition of stricter tests and more rigid rules than are in operation under the current policy. This has had an effect of changing policy. The Minister advised the Committee, in his letter of 14 November, that these changed policies were unannounced government decisions which were to be announced on 19 December.

3.3 Another comment of a general nature is the use of terms which are undefined or for which there is no guidance on how they should be interpreted; for example, under public interest criteria the words 'disruptive to' and 'violence threatening harm' are used. It could be argued that this use of terms which can be interpreted so widely will cause inconsistency and uncertainty in decision-making and result in increased litigation.

3.4 The Committee raised a number of its concerns relating to the interpretation sections with Departmental officers. Where the Department provided answers in writing, the Committee has noted the response.

Regulation 2

'adopted'

3.5 The word 'formal' in this regulation encounters the problem in that there are no formal arrangements in some countries (for example, Muslim countries) for adoption.

3.6 The Committee suggested that either the word 'formal' be deleted or that it be supplemented by the words 'or de facto or customary' and the appropriate consequential amendments are made to R.46. This would allow for the inclusion of the following 'compassionate' examples: where parents from Muslim countries who are unable to adopt at all could bring in genuine 'child of family' or an Australian working in Africa who has assumed parental responsibility for, but cannot adopt, an African child could bring in his/her child.

3.7 The Department has chosen not to amend the adopted child definition, but instead to amend the definition of 'dependent child'.[1] The Committee's views on this approach are covered in paragraph 3.16.

'aged dependent relative'

3.8 The definition of aged dependent relative has been defined as a relative who has been dependent for a period of not less than 3 years. Previously, if the period of dependency had been less than 3 years or the applicant was within 5 years of retiring age it was possible to grant a visa where compassionate circumstances existed. The new definition is therefore more restrictive as no flexibility is possible.

3.9 After discussion on this issue with the Committee, the Department has advised that the definition will be amended by

---

1. Appendix G

replacing the words 'for not less than 3 years' with the words 'for a reasonable period'.[2] This amendment is acceptable to the Committee.

'assisted student'

3.10 The definition of assisted student encompasses the term 'private student' and appears to be unnecessarily confusing.

3.11 The Department advises that the definition is being amended to read:

(a) a private student;
(b) a student under AIDAB scholarship.[3]

3.12 Nevertheless, the Committee believes that the definition remains unclear. There is no indication of either why an assisted student means a private student or how 'private student' is to be interpreted.

3.13 The Committee recommends that:

- **the meaning of 'private student' be clarified in the regulations.**

3.14 The question of non-reviewable third party decisions also arises in this section. In order to alleviate the Committee's concerns in this regard the Committee recommends that:

- **recognition of the person or organisation be by the Minister for Immigration, Local Government and Ethnic Affairs on advice from the Minister for Employment, Education and Training.**

---

2. Appendix G
3. Appendix G

'child for adoption'

3.15 Point (c) refers to the child welfare authorities of the overseas country. Some countries do not have child welfare authorities and the definition should be amended to read the 'relevant' authorities.

3.16 The Department has advised that the draftsman has been instructed to make this change.[4]

'dependent child'

3.17 The word 'custody' is inappropriate in the definition, given that, in law, the term custody refers only to persons who have not turned 18. The Department advises that clarification has been sought from the draftsman.[5]

3.18 However, the Committee recommends that this definition be amended to read:

> . means the natural or adopted child of a person (other than a child who is married or engaged to be married or a de facto spouse), being a child:
>
> (a) who has not turned 18; or
>
> (b) who has turned 18 and is (wholly or substantially) dependent on that person; or
>
> (c) who, being a dependent defined above, is wholly or substantially incapacitated for work because of a physical or mental impairment.

---

4. Appendix H
5. Appendix H

3.19 As noted in paragraph 3.7, the Department has already agreed to amend this definition to meet the Committee's perceived problems with the definition of 'adopted'. It will now include an alternative meaning to cover those children under 18 who are wholly or substantially in the custody of a person in loco parentis.[6] The Committee's view is that such an amendment will alleviate the concerns expressed in paragraphs 3.5 and 3.6.

'formal course'

3.20 The Committee recommends that this definition be amended so as to include approved primary or secondary schools. The Department has accepted the recommendation.[7]

'homosexual partner'

3.21 It is the Committee's view that the provision of a specific category of visa for homosexuals does not reflect current policy or practice. The Committee argues that, although homosexuals should not be discriminated against for migrant entry, neither should they be specifically advantaged. In the past in exceptional cases where an application is based on a relationship with a strong and compelling compassionate ground, or like grounds which apply to all relationships, entry has been allowed.[8]

3.22 S64U, if amended in accordance with the Committee's recommendations, would give the Minister an adequate discretion to admit those applicants who would have applied under this category.

---

6. Appendix G
7. Appendix H
8. House of Representatives Hansard, 11 May 1989, p. 2593

3.23 The Committee therefore recommends that:

- **the homosexual visa category and the consequential definition be deleted from the draft regulations.**

3.24 However, some members of the Committee are of the view that a general 'companionship' category should be provided where a sexual relationship is not necessarily involved. The exclusivity and duration of the relationship, its closeness and mutual dependency would be relevant considerations.

'humanitarian visa'

3.25 The International Commission of Jurists noted that the class of defined visas is closed and recommended that the regulation should include a reference to 'other situations as may be prescribed'.[9]

3.26 The Committee agrees and recommends that:

- **the humanitarian visa includes the reference to 'other situations as may be prescribed'.**

'orphan'

3.27 *If the definition remains in its present form there is* the possibility of orphaned children in some countries being disadvantaged. The definition fails to take account of situations where it would be in the best interests of the child to be cared for by relatives in Australia, even though an institution or individual elsewhere is capable of caring for the child and willing to do so.

---

9. Appendix E, submission No. 1, p. 6

3.28 The Committee argues that this definition would be improved, largely by substituting the words currently in the Migrant Entry Handbook. The Committee recommends that it read after (b):

- **.... and it is in the best interests of the child to settle with his/her guardian/relatives in Australia.**

3.29 The question is also raised of one parent being dead and one being mentally incapacitated and the necessity for flexibility in such situations. The Department has advised that the draftsman has been instructed to amend the definition to provide for the situation where both parents are incapable of caring for the child and it is in the best interests of the child to enter Australia.[10] *The Department is also looking* at accommodating the situation where the authorities of a foreign country assume care and control of orphans.[11]

'orphan relative'

3.30 The term 'usually resident in Australia' which qualifies the Australian citizenship requirement, could present a problem for Australian citizens returning from overseas. The Committee recommends that the words 'usually resident in Australia' be deleted after 'Australian citizen' and inserted after 'Australian resident'. The Department has accepted this recommendation.[12]

'public interest' criteria

3.31 A number of problems have been raised regarding aspects of this definition.

---

10. Appendix H
11. Appendix G
12. Appendix G

3.32 The definition of 'debt' in (b) has been broadened to include a debt to the Commonwealth, which previously seemed to be confined to deportation and detention costs. This is clearly an expansion of existing or announced policy. It is also noted that the clause is absolute and could cause hardship.

3.33 The Committee recommends that:

- **the definition of public interest include the capacity for Ministerial waiver of debts.**

3.34 The words 'disruptive to' in (c) could be interpreted very broadly. The Human Rights Commission commented:

> 'For example, the use of words such as "disruptive" and "undue" suggest there is some objective standard or meaning that an assessing officer might apply. There is no clause prescribing that these words be interpreted in a certain way eg. such words are to be interpreted according to their everyday meaning and usage.'[13]

3.35 The Department advises that paragraph (c) will be amended to place that judgement in the hands of the Minister.[14]

3.36 In the past children as well as spouses were exempted from the 'settlement test'. In (d), which appears to encompass the old settlement test, the spouse has been exempted, but not the natural or adopted child.

3.37 The Committee recommends that:

- **the regulation be amended to exempt natural and adopted children, as well as spouses and could read:**

---

13. Appendix E, submission no. 8, p. 1
14. Appendix G

> **'... (other than a person seeking to do so under a spouse, child, adoption visa) ...'**

'relative'

3.38 The definition of relative has been quite severely restricted. Previously, a relative was defined as being related by blood, by legal adoption or by marriage. It has now been defined to include only immediate family and the first extension of the family. The submission from the Immigration Advice and Rights Centre argues that, by changing the definition the policy relating to aged dependent relatives, orphaned unmarried relatives and special needs relatives is changed.[15]

3.39 The Department advised the Committee that the definition has been further restricted with the deletion of first cousin to reflect current policy. However, in the case of refugees the definition includes second cousins.

3.40 This could lead to unnecessary confusion and the Committee therefore recommends that:

- **the definition of relative be broadened to include second cousins; and**

- **where it is necessary to further restrict the definition of relative in any particular category, then the definition of relative as restricted is to be specified within each category.**

---

15. Appendix E, submission no. 4, p. 6

'sponsor'

3.41 Previously, it was possible for a minor child to sponsor the admission of parents, although the actual sponsorship came from a responsible adult citizen or voluntary agency. Under the new definition it appears this situation will no longer be possible.

3.42 The Committee recommends that:

- the definition of *sponsor reflect the existing* policy as spelt out in the Migrant Entry Handbook at 17.3.1:

> 17.3.1 To be able to sponsor, a person must be 18 years of age or older and an Australian citizen, or an Australian resident lawfully and permanently resident in Australia. In the rare instance where a minor child with resident status or Australian citizenship seeks to sponsor the admission of parents (or, in the case of an orphan under the guardianship of the Minister for Immigration, Local Government and Ethnic Affairs, another close family member capable of assuming guardianship) and reunion in the home country is not practical, a sponsorship from a responsible adult resident or voluntary agency lodged on the child's behalf may be considered.

3.43 The Department has advised that the definition will be amended so as to include a provision whereby a child may have an adult person or an organisation undertake a sponsorship on his or her behalf[16].

---

16. Appendix G

3.44 The period for which a sponsorship agreement was valid is limited to 2 years. Previously it was possible to extend that period. In order to accurately reflect the previous situation the Department has advised that the words 'not later than 2 years' will be replaced by 'not later than a reasonable period'.[17]

'sponsorship'

3.45 The definition of sponsorship has been broadened to include responsibility for all financial obligations incurred by an applicant arising out of his or her stay in Australia. This definition may be ultra vires the Act and is not, in any case, legally enforceable.

3.46 Thus, the Committee recommends that:

- the definition of 'sponsorship' be reviewed.

Regulation 2(2)

3.47 Regulation 2(2) appears to repeat the material contained in the definition for 'humanitarian visa'.

Regulations 2(3) and 2(4)

3.48 There appear to be errors of fact in these regulations. In regulation 2(3) 'items 1 to 7' should read 'items 1 to 8'.

3.49 In regulation 2(4)(a) the reference to regulations 102, 103 or 104 appears to be an error.

Regulation 4 - good character

3.50 The definition here is to broad and fails to accommodate the situation where an applicant may have been convicted of

---

17. Appendix G

criminal offences in another country through the exercise of basic human rights. The words 'at some time' appear to be unnecessarily restrictive and could mean an applicant who had, at some time, been convicted of a criminal offence but whose conviction had been quashed, could fail the good character test.

3.51 This regulation should be cross-referenced with regulation 143, which provides for ministerial waiver of the good character requirement.

3.52 Amnesty International Australia commented at length on the implications of R.4 for asylum-seekers. Amnesty's major concern is that where a person can reasonably expect to become a prisoner of conscience or face torture, extra-judicial execution or the death penalty, their lack of 'good character' should not be used to deny them Australia's protection.

3.53 The Committee recommends that:

- **the words 'at some time' be deleted from R.4(a)(ii) (A), (B) and (C); and**

- **the regulation is cross-referenced with R.143.**

Regulation 9 - Remaining relative

3.54 Regulation 9(2)(b) as it is written is overly restrictive. Under this rule, in theory, a person could be excluded if a Christmas card was sent each year, or once over the 5 years.

3.55 The Committee recommends that R.9(2)(b) be amended to read:

- **(b) the person (and any spouse) have had no substantial contact from such relatives during the period of 5 years preceding the day of the relevant application under the Act.**

CHAPTER 4

PROCEDURES FOR THE GRANT, REFUSAL AND CANCELLATION OF VISAS AND ENTRY PERMITS

- **Introduction**
- **The Classes of Visas and Entry Permits**
- **Visa Applications**
- **Permit Applications on Entry**
- **Conditions Attaching to Visas and Temporary Entry Permits**
- **Major Problems**

Introduction

4.1 This chapter of the report discusses the procedures set down in the migration regulations for the grant, refusal and cancellation of visas and entry permits. The Committee chose to concentrate on these aspects of the regulations because the mechanisms detailed there appear to be extraordinarily complex, with the relevant details scattered throughout the regulations and the substantive legislation. Many of these regulatory procedures are new and constitute a departure from existing policy and practice.

4.2 The regulations examined for the purposes of this chapter are in Part 2 of the draft regulations, Divisions 1, 2 and 4 and in Part 3, Divisions 1, 5 and 6.

4.3 Regulations 10-30 and 35-43 are concerned with the grant, the attached conditions and the operation and effect of visas and entry permits. Regulations 120-142 set down the requirements for extending stay or changing status, including the acquisition of resident status, within Australia. The classes of

visas are listed in Schedule 2; the classes of entry permits in Schedule 3, while Schedule 5 contains the mandatory conditions which are to be attached to certain classes of visas and entry permits.

The Classes of Visas and Entry Permits

4.4 Sections 11D(2)(a) and 11P(2)(a) of the Act state that the regulations may provide for different classes of visas and entry permits. Sections 11E and 11Q enable the Minister to consider, grant or refuse applications for visas or permits of a particular class. The regulations (R.41; R.42) state that subject to certain general restrictions, a person is entitled to be granted a visa or entry permit of a particular class if the person satisfies the prescribed criteria listed for that class of visa or permit. The classes of visas and entry permits (R.10; R.22) are those specified in Column 2 of Schedules 2 and 3. The prescribed criteria for each class are outlined in Column 3 of the Schedules. The Committee is disappointed that the classes of visas or entry permits are not exhaustively listed in those Schedules, nor are the extended eligibility and processing permits (R.127-131) listed in Schedule 3.

4.5 The Committee recommends that:

- **the classes of visas and entry permits be exhaustively listed in Schedules 2 and 3; and**

- **the extended eligibility and processing permits also be listed in Schedule 3.**

Visa Applications

4.6 Visa applications can be lodged inside (R.12) or outside (R.11) Australia. Visas provide authority to the holders, to undertake travel or return travel to Australia. In most cases

people arriving in Australia with valid visas will be given permission to enter but the visa is not a guarantee that an entry permit will be granted on arrival.

4.7 The Minister is only required to consider an application for a visa of a particular class provided it is in the approved form and any required fee is paid (S11E). Where the application is for an independent or concessional family visa and the applicant meets the pool entry mark but achieves less than the applicable priority mark, the application is put aside and reconsidered by the Minister. This procedure occurs no more than, three times (R.21). This is in accordance with announced policy, operating from 1 June 1989.

4.8 If the Minister is satisfied that the applicant meets the prescribed criteria for the particular class of visa, the Minister is required to give the applicant written notice of his intention to grant the visa (S11E). The notice requires the applicant to notify the Minister no later than 30 days after receipt of the notice if, since the date of application, there has been 'any material change' in his/her circumstances (R.14). A 'material change in circumstances' is not defined in the Act or in the regulations. Where no notification of change is received by the Minister the applicant is deemed to have notified the Minister that there is no material change (S11E(8)). Where the Minister is notified of a change, the Minister is obliged to reconsider the application, including, if necessary, by re-assessing the points score (S11E(4)).

4.9 If on the first occasion or upon this reconsideration of the application the Minister is satisfied that the person does the satisfy the relevant prescribed criteria or is not entitled under the regulations to a visa, the Minister shall refuse to grant the visa of the class concerned (S11E(6)). The Minister has no residual discretion to grant a visa which is outside or not in accordance with regulations.

4.10 The Committee notes that it is not unusual and indeed it is sensible practice for immigration departments to seek to impose upon arrivals an obligation of candour. Those applying for entry as dependent children should not be given entry as dependents if they marry and attain independence just prior to their entry. In the past and in future those entering by deception have been and will be caught by the illegal entry provisions. The formalised, 'positive candour' system set up by the 1989 Act and draft regulations extends and institutionalises the illegal entry model. This is consistent with the Government's intention.

Permit Applications on Entry

4.11 The Minister is not required to consider an entry permit application at all and shall not in any circumstances grant an entry permit unless the application is in accordance with the regulations and the applicant applies on and in accordance with the approved form and pays the required fee (S11Q). Those applying before entry to Australia must present valid visas with their applications (R.23).

4.12 Where it appears to the Minister that the person is entitled to be granted an entry permit of the class applied for, the Minister shall grant such permit (S11Q). The applicant must show that s/he satisfies the prescribed criteria for the particular class and, on entry, that the permit applied for is of a class equivalent to that of the visa held by the applicant.

4.13 The Minister must be satisfied that 'it would not be inconsistent with the interests of Australia to grant the entry permit' (R.42). The Committee notes this as new policy. It gives the Minister a broad, excluding discretion to be exercised on and after entry. The Committee raises no objection to this approach.

4.14 Where it appears to the Minister, under the regulations, that the applicant is not entitled to an entry permit of the particular class the Minister shall refuse to grant such permit (S11Q). Again, the Minister has no residual discretion to grant an entry permit which is not in accordance with or is outside the regulations. The discretion to exclude is available, the discretion to admit is not.

Conditions Attaching to Visas and Temporary Entry Permits

4.15 All visas and temporary entry permits can be granted subject to certain conditions. Migrant visas and entry permits are granted free of time limitations and there are very few conditions which could appropriately attach to a migrant visa. Examples include (R.17):

(i) that the holder of the visa is not to marry before entering Australia; and

(ii) that the holder of the visa is not to arrive in Australia or enter Australia before the arrival or entry of a person specified in the visa.

Conditions under the Regulations

4.16 Non-resident visas and temporary entry permits can only authorise the holder to remain in Australia for a stated, limited time. There are a range of conditions - specified at S11D(4), S11P(4) and R.16, 17, 28 and 29 - which can or must, (Schedule 5), attach to these visas or permits. The conditions which can be imposed on any class of visa are listed in regulation 17; those which can attach to temporary entry permits are given in regulation 29. Certain of these conditions are new - perhaps R.17(1)(c) and certainly R.17(1)(j) and (k) and reflect the Government's new policy. The Committee raises no objection to this approach.

Conditions applied under the Act

4.17 The other conditions which have attracted a good deal of attention are those included in the Act (S11D(4) (a); (b) and S11P(4) (a); (b)) namely:

(a) the condition that the entry visa or temporary entry permit will be taken not to be a valid temporary entry permit for the purposes of section 11ZD; and

(b) the condition that, in spite of anything else in the Act, the visa or temporary entry permit granted before entry to Australia will not entitle the holder to be granted another entry permit while she/he remains in Australia.

4.18 S11P(4)(a) is a mandatory condition for almost all temporary entry visas and permits, including the student visas and mean that holders will be restricted in attaining permanent resident status. S11P(4)(b) is to be a mandatory condition imposed upon all 'tourist special arrangement' visas and permits (Schedule 5) and will prevent holders from extending their stay in Australia. The significance and effect of these conditions is dealt with in paragraph ?, under the heading 'Extending Stay and Changing Status'.

4.19 However, the most significant policy change to visa and permit 'conditions' is the classification of certain specified conditions (R.16; R.28) as 'terminating conditions'. The significance of the distinction becomes apparent if or when the holder breaches a terminating or other condition. When the Minister determines that the holder has failed to comply with a terminating condition the visa or permit 'ceases to be in force'. The visa or permit ceases to be valid from the date when the Minister determines that there has been a breach (R.16(2)).

Where there has been a breach of a non-terminating condition, the breach is a ground for cancellation of the visa or permit (R.17(2)). Here the Minister decides that there has been a breach and goes on to decide whether the visa or permit ought to be cancelled.

4.20 The scheme is clearly designed to produce different consequences for the visa holder. It is possible that there will be different review rights in instances where the different decisions have been made, including a different review status for the decisions if there is to be Federal Court litigation.

Major Problems

4.21 The Committee considers that there are a number of problems associated with the general scheme. These are detailed below.

Possible vires challenge

4.22 The Act enables regulations to be made providing for the grant of visas or entry permits subject to conditions (S11D(1) and S11P(1)). The Committee considers that there may be sections of the regulations which are ultra vires the power granted under the Act. There is a general principle of administrative law that where legislation makes something lawful, delegated legislation which forbids it, is repugnant (ref). Depending on the operation and effect of the terminating conditions it might be argued that it is inconsistent with the Act to grant visas or permits subject to terminating conditions. They are not conditions qualifying entry or stay but compliance mechanisms.

4.23 The International Commission of Jurists in its submission made the further point that where delegated legislation departs from the positive provisions of the Act it is also ultra vires (p4). The Commission illustrated this by the following example:

'Arguably, the most prominent example of this occurs with regard to Section 11(ZD). This Section enumerates circumstances in which permanent entry permits may be granted to non-citizens after entry into Australia. Notwithstanding the provisions of Section 11(Q), it can be argued that the attempt by the regulations to limit by class of visa or entry permit the power of an applicant to be granted resident status runs counter to the intent of the various subsections of Section 11(ZD)(1). For example, Regulation 29(1)(i) could have this effect. Similarly, the provisions of Regulation 26(1)(b) having regard to the expectations of the Australian community, we have some doubt that the community would accept a situation where spouses, as a class, in certain situations, were denied the right at all to seek resident status in Australia. This would appear to be a consequence of Regulation 26(1)(b).'

'Material circumstance'

4.24 As stated in paragraph 3.8, 'material circumstance' is not defined. Theoretically it would be possible for the Department to adopt a broad definition encompassing any fact affecting a person's capacity to satisfy the prescribed criteria, including health and public interest criteria. It might even include facts affecting a family unit member's capacity to satisfy those criteria.

4.25 This would be the effect of the definition of 'material particular' which is given in the draft Procedures Advice Manual as:

'any particular which has the potential to influence the decision to grant entry, a visa or an entry permit.[1]

---

1. Procedures Advice Manual, Status of Illegal Entrant, Topic 1, 4.4.6.1

4.26 Such interpretations on the part of the Department and obligations approximate to a requirement of utmost good faith which is imposed upon arrivals, presumed in this scheme to know the immigration regulations.[2]

4.27 Those neglecting to disclose material changes in circumstances may nevertheless be given entry to Australia. Their failure to disclose may be deliberate or inadvertent, dishonest or innocent. In all cases they become illegal entrants on entry, liable to mandatory deportation and restricted from returning to Australia.

4.28 There are no review rights available to such people, even where the failure to disclose is innocent or inadvertent.

4.29 In those cases, the Committee recommends that:

- **there be a right of review, where the failure to disclose material changes in circumstances is clearly innocent or inadvertent.**

4.30 Other applicants who travel to Australia may disclose or confess their changed circumstances to the examining officer at the port of entry. The draft regulations are not explicit about the procedures to apply in such cases. The Committee can only presume that the Minister will exercise his absolute discretion to cancel the person's valid visa (S11G). The Committee is not sure whether the person has any right of review against such a

---

2. A similar scheme operating for a time in the United Kingdom was roundly criticised - for example this comment from Lord Scarman:
'The immigration officer does, or ought to, know the matters relating to the decision he has to make ... To allow officers to rely on an entrant honouring a duty of positive candour, by which is meant a duty to volunteer relevant information, would seem perhaps a disingenuous approach to the administration of (immigration) control: some might think it conducive to slack rather than to "sensitive" ... administration.'
(7.R. v Home Secretary, ex parte Khawaja, H.L. (1983) 2 WLR 321).

decision and it is possible, though the regulations are silent on this, that the person would be unable to apply for an entry permit and would be returned immediately to his/her port of departure.

Terminating Conditions - factual ambiguity

4.31 The 'terminating conditions' are drafted very broadly. This may produce litigation which is premised on arguments as to the facts of the case - for example (and there are many of them) in R.16:

(c) whether the holder is continuing in work of the specified kind;

(d) whether, depending on company structures, the holder has changed employers;

(g) whether the holder is working more than 20 hours per week - what if the person was required to work overtime for no additional remuneration or was helping out an employer in a crisis.

(h) whether this condition includes payment in kind;

(i) what is meant by changing the 'details' - does this mean some change is permitted?; and

(l) if the holder fails an examination in the course of study?

Breaches of conditions

4.32 As a corollary to this factual ambiguity there is inconsistency in the regulations about what constitutes a breach of the condition. Regulation 16(2)(b) states that the Minister

determines whether 'the holder has failed to comply with a terminating condition'. There is no suggestion there that minor breaches might be waived.

4.33 Regulations 120-125 which deal with the grant of temporary entry permits in Australia only ask that 'the applicant has complied substantially with any ('terminating' or other?) (visa/permit) conditions'. Examination of the draft Procedures Advice Manual on this topic only increases the confusion. In the manual, it is suggested that 'substantial compliance' could be shown where, for example, the person inadvertently overstayed his/her leave. Such a person is an illegal entrant - their inadvertence has rather more serious and disadvantageous consequences than a minor breach of a qualifying condition. A further review of the interrelation of the draft regulations and the procedures outlined in the new manual should be undertaken.

Natural Justice Implications

4.34 There are also difficulties with what might be termed the natural justice implications of the scheme. The holder is given notice of qualifying conditions when these conditions are set down in a visa or permit. The regulations permit conditions to be 'set out in a manner, or in accordance with a notation' approved by the Minister for the class of visas or permits. Where, as here, a breach of the condition has serious adverse consequences for the holder, the Committee expects that a rigorous notice requirement is imposed. This would have to be something more explicit than a notation in a passport - namely that the holder has written notice of the full terms of the condition, and notice of the consequences which result from a breach of the condition.

4.35 The Committee therefore recommends that:

- **visa holders have explicit written notice of the full terms of condition(s) relating to his/her visa and of the consequences which result from a breach of any condition(s).**

Selection and allocation of qualifying conditions

4.36 Another concern relates to the selection and allocation of qualifying conditions. The conditions listed in the Act and regulations can be applied to any visa or temporary entry permit. Schedule 5 specifies certain of these conditions as mandatory conditions which must be imposed on the visa or permit classes assigned in Column 2 of that Schedule. **There is nothing to say that these conditions can only be attached to the class of visas/permits assigned in Schedule 5.** It would be in accordance with the Act and regulations if an officer assigned any of the conditions to any class of visa or temporary entry permit.

4.37 Given that certain of the conditions represent a considerable limitation to the work life or practice of the holder and considerably limit rights (S11D(4); S11P(4)) to extend stay in Australia, the Committee's view is that these administrative powers need to be more clearly defined.

4.38 *The Committee also raises the question whether to review* rights, in case of the imposition of inappropriate or excessive conditions. It is in this context that the question is raised regarding infringements of the principle of the Senate Standing Committee on Regulations and Ordinances namely, that the delegated legislation does not unduly make the rights and liberties dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

Consequences

4.39 The scheme is clearly designed to meet the understandable and laudable concern with abuses of the temporary entry permit system, in particular, examples of abuse by overseas students who undertake full-time work here instead of attending to their studies. The Committee considers that the 'terminating condition' scheme is new but that it is consistent with the Government's announced policy.

4.40 Nevertheless, the Committee is concerned that the scheme may have some unintended, adverse consequences for genuine temporary residents. Further, the scheme could be misused by individual decision makers.

4.41 One possible example, is the case of a domestic worker who is employed by an overseas company executive, based temporarily in Australia. The worker is given a temporary resident permit subject to various conditions, including the terminating condition that she is not to remain in Australia after the permanent departure of her employer. After one year in Australia her employers return home for what was expected to be a brief visit. The worker remains in their Sydney home. The employer then telephones to say the he will not be returning, that she should pack the household items and return. The worker has formed attachments in Australia. She has a boyfriend. They decide to marry. The worker resigns her post, remains in Australia and applies, within the term of her temporary permit, for residence. The examining officer notes the breach of the terminating condition and, although s/he may regard it as a minor infraction, the officer believes that the marriage may not be genuine. In this case the officer could decide against the residence application and decide to circumvent the established review process by determining that the terminating condition has been breached. The worker then has no valid permit, cannot succeed on or may not have any review of the residence refusal decision and is now an illegal entrant liable to deportation and restricted from re-entering Australia.

4.42 Previously, the officer could refuse the residence permit citing his/her suspicions. The applicant could appeal the decision and the review authority would hear evidence about and decide on the bona fides of the marriage.

Possible errors

4.43 The Committee questions whether or not that there are errors in Item 4, Schedule 5. The condition 'holder not to change employer without permission of the secretary' is to be mandatorily imposed on the following permits: 29 medical practitioners, 31 public lecturers, 32 family relationship, 41 homosexual partners and 43 supported dependent. It does not appear to be a necessary or appropriate condition for all of the classes listed.

4.44 The Committee recommends that:

- the Government clarifies its policy on this matter and consequential corrections are immediately made to the regulations.

APPENDICES

APPENDIX A

RESOLUTION OF APPOINTMENT - JOINT SELECT COMMITTEE ON MIGRATION REGULATIONS

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Extract from the VOTES AND PROCEEDINGS

No. 127 ***dated*** Thursday, 1 June 1989

33 MESSAGE FROM THE SENATE—JOINT SELECT COMMITTEE ON MIGRATION REGULATIONS: The following message from the Senate was reported:

Message No. 387

Madam Speaker,

The Senate transmits to the House of Representatives the following resolution which was agreed to by the Senate this day:

(1) That a joint select committee, to be known as the Joint Select Committee on Migration Regulations, be appointed to inquire into and report upon the extent to which draft regulations and tabled regulations under the *Migration Act 1958*, which relate to decision criteria for the grant of visas and entry permits—

(a) reflect current and announced policies in relation to the grant of visas and entry permits as at 1 June 1989; and

(b) are likely to achieve the goals of the policies referred to in subparagraph (a).

(2) That the committee consist of 10 members, 3 Members of the House of Representatives to be nominated by the Government Whip or Whips, 3 Members of the House of Representatives to be nominated by the Opposition Whip or Whips, 2 Senators to be nominated by the Leader of the Government in the Senate, 1 Senator to be nominated by the Leader of the Opposition in the Senate and 1 Senator to be nominated by any minority group or groups or independent Senator or independent Senators.

(3) That every nomination of a member of the committee be forthwith notified in writing to the President of the Senate and the Speaker of the House of Representatives.

(4) That the committee elect a government member as its chairman.

(5) That the committee elect a non-government Senator or member of the House of Representatives to be the deputy-chairman who shall act as chairman of the committee at any time when the chairman is not present at a meeting of the committee, and at any time when the chairman and deputy-chairman are not present at a meeting of the committee the members present shall elect another member to act as chairman at that meeting.

(6) That, in the event of an equality of voting, the chairman, or the deputy-chairman when acting as chairman, have a casting vote.

(7) That 5 members of the committee constitute a quorum of the committee.

(8) That the committee have power in relation to its functions to send for persons, papers and records.

(9) That—

(a) in respect of proposed regulations received from the Minister before 31 October 1989 the committee shall furnish its observations to the Minister before 21 November 1989 and report to each House of Parliament within 5 sitting days of the tabling of those regulations; and

(b) in respect of proposed regulations received by the committee after 31 October 1989 the committee shall furnish its observations to the Minister within 56 days (unless the Minister declares the regulation urgent, in which case it shall be 28 days) and shall report to both Houses of Parliament within 5 sitting days of the tabling of those regulations.

(10) That the committee cease upon the dissolution or expiration of the House of Representatives.

(11) That the foregoing provisions of this resolution, so far as they are inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

The Senate requests the concurrence of the House of Representatives in this resolution.

KERRY SIBRAA
President

The Senate,
Canberra, 31 May 1989

Ordered—That the message be taken into consideration forthwith.

Mr Holding (Minister representing the Minister for Immigration, Local Government and Ethnic Affairs) moved—That this House concurs in the resolution transmitted in message No. 387 of the Senate relating to the appointment of a joint select committee on migration regulations.

Debate ensued.

Question—put and passed.

(A R BROWNING)
Clerk of the House

APPENDIX B

SENATE REGULATIONS AND ORDINANCES COMMITTEE

PRINCIPLES OF THE COMMITTEE

PRINCIPLES OF THE COMMITTEE

(Adopted 1921: Amended 1979[1])

The Committee scrutinises delegated legislation to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

---

1. Sixty-fourth Report, March 1979, Parliamentary Paper No 42/1979

APPENDIX C

LETTER OF 14 NOVEMBER 1989 FROM

SENATOR RAY

Minister for Immigration, Local Government and Ethnic Affairs

Senator the Hon. Robert Ray

Parliament House
Canberra ACT 2600
Telephone: (062) 777 860

14 NOV 1989

Dr Andrew Theophanous, MP
Chairman
Joint Select Committee on
Migration Regulations
Parliament House
CANBERRA ACT 2600

Dear Colleague

In response to the request of your Committee I write in relation to several matters of concern expressed by the Committee or some of its members.

I was asked to consider favourably an amendment to the Migration Legislation Amendment (Consequential Amendments) Bill 1989 so as to amend section 4 of the Migration Legislation Amendment Act 1989 so as to defer the commencement of that Act for several months.

The time fixed for the commencement of the Migration Legislation Amendment Act 1989 was short: six months after royal assent. That was the maximum period available having regard to the resolution of the Senate sponsored by Senator Macklin. The task of putting into place the administrative arrangements for the implementation of the Act was and is complex and arduous.

Within that short period, the novel mechanism of examination of proposed regulations by a Select Parliamentary Committee had to be accommodated, and in particular the processes of limited public consultation initiated by your Committee in full knowledge of the timetable.

Nonetheless, my Department had put a massive effort to get the job done.

The preparation of procedures, the instructions, the authorisations, the notices, booklets and staff training have been geared for a 19 December 1989 start. The regulations, with the co-operation of your Committee, should also be ready for that date.

The Immigration Review Tribunal has been set up with the Principal Member, Senior Members and some Members awaiting the applications that will come their way after 19 December 1989.

While a short delay in tight deadlines has superficial attractiveness, the cost of revising the start date at this very late stage is too great to countenance. Printing costs alone to be thrown away by such a revision would be above $120,000.

I am also concerned that the delay will prejudice by premature disclosure the implementation of some policy changes which I planned to coincide with the commencement date.

In any case, I do not see the commencement date as a crucial date to the refinement of the regulations. While Migration Regulations will have to be made by that date, I believe that those regulations will undergo necessary changes and refinement with administrative experience. The Government will not be slow to amend the regulations in response to the observations of the Committee, Parliamentarians, the IRT, the courts, Ethnic and other organisations and departmental experience.

The sooner the new system is tested in the crucible of administration, the sooner any faults and shortcomings will become apparent and will be corrected.

In the circumstances, I cannot accede to the deferral of the commencement date.

I turn now to the question of a general discretionary provision for compassionate cases which do not fit the criteria.

The proposed regulations do not put in place a rigid system in which there is virtually no discretion.

The proposed regulations have attempted to leave room, within a structured approach, for judgement and for discretion. At times, it was necessary to translate open-ended waivers with a system of exceptions. At others, it was necessary to spell out the criteria for waiver.

To that extent the proposed regulations, have faithfully translated the degree of discretion in current Migration policy. However, the requirement of administrative law that holders of a statutory discretionary power must consider whether they should apply the Migration policy in a particular case was not carried forward to the regulations. Indeed, the mischief that the Migration Legislation Amendment Act 1989 sought to remedy, was to ensure that the migration policies of the Government of the day, as provided in the regulations are binding as rules of law on all decision-makers (including those in merit and judicial review).

In translating migration policies in the regulations, it can be argued that the line in a specific class should be drawn here rather than there. I would consider carefully any observations of the Committee in that regard.

However, it is another matter to provide for a catch-all discretion provision. As Senator Alston said in the Senate in relation to a similar provision sought to be included in the Act, it is a classic invitation to hopeless cases to throw themselves on the mercy of the court and that this ultimate discretion would override everything else, and render the system a nonsense.

It is no help that the catch-all discretion provision seeks to refer to "compassionate circumstances". I must say I have hardly dealt with an immigration case that has not had in it an element of compassion. This is part of the difficulty.

Nor is it helpful for such a provision to rely on the personal judgement of the Minister. There are different views on the way Ministerial discretion had been exercised in the past. I do not make accusations. The system that the Amendment Act sought to reform was a system that was open to abuse in terms of political patronage and favouritism. More importantly, the access to the Minister was a critical issue. Those who tend to get access to a Minister are members of parliament and other prominent people around the country. Others are less favoured.

An overriding discretionary provision is an invitation to any applicant no matter how hopeless his or her case might be otherwise, to seek to have "compassionate circumstances" taken into account despite any necessity to make a firm decision. It brings the ordinary administrative processes into disrepute. Due process is replaced by the lobby of the powerful and the influential.

In any case, in the present administrative law climate, such an overriding discretion will ultimately reside in the courts rather than in the hands of a Minister. In other words, any catch-all discretionary provision in the regulations will be available to all and any person aggrieved will be able to seek the review of the decision in the courts, and the courts will rule on how and in what circumstances that discretion will be exercised by a Minister.

Even if it were possible, let alone desirable, to quarantine the processes and decisions of such ultimate Ministerial discretion from the reforms of administrative law in the last decade, I would object to such a course on grounds of equity and fairness. But putting the clock back to the 70's is not an easy task. It would require the exclusion of the jurisdiction of the Federal Court and the Ombudsman and the specific exclusion of provisions in the Administrative Decisions (Judicial Review) Act, Judiciary Act, Freedom of Information Act and any rules requiring the furnishing of reasons or indeed the making of decisions on applications for the exercise of the discretion.

The great reform introduced in the Amendment Act is to put in the open the rules of the game, and to apply those rules - without favour - to all.

My approach to "discretion" for the marginal cases has three elements:

(a) retain elements of judgement in the various individual criteria for decisions as appropriate

(b) the Minister's ultimate right to intervene after due process and review. I refer to the provision in s.64U of the Act.

(c) refinement of the regulations on a regular basis to provide for specified sets of compassionate circumstances as the administration of the Act unfolds.

I think that such an approach steers the correct course to pick up the marginal cases in an open, fair and equitable way without endangering the integrity of the day to day administration of the Act.

I was then asked to set down the variations between current policies and the policies behind the regulations.

I thought it convenient to set out those variations as an attachment to this letter and I request the Committee to treat the information in confidence until 19 December 1989.

I turn now to the question of the treatment of homosexual relations under the proposed regulations.

All applications for visas and entry permits lodged after 19 December must be decided upon the criteria laid down in the regulations. This means the "informal practice" for dealing with applications on grounds of homosexual relations cannot be continued.

The proposed regulations provide a class of visa/entry permit on the basis of homosexual relationship with an Australian citizen or permanent resident. The criteria and other provisions translate the existing "informal practice" into the general scheme.

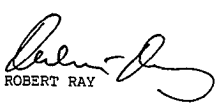
I understand that some members of the Committee take a strong objection to the inclusion of such provisions. Others favour a disguised approach, through a concept of "companionship" which is not a necessarily sexual relationship. I do not favour the latter, as it is an open ended concept which is difficult to focus. Its inclusion may endanger the integrity of the program.

If a majority of the Committee advises against the inclusion of a "homosexual partner" visa/entry permit in the scheme, I will accept that advice. The regulations will then omit the provisions relating to the class of visa/entry permit and the migration arrangements for homosexual partners.

In that case, the "informal practice" will cease in relation to any applications made after 18 December 1989. Thereafter, it would only be open in some circumstances to a Minister to deal favourably with an application based on homosexual partnership through the provision of section 64U of the Act.

I turn now to the legal difficulty that the drafting officer is facing in drafting the temporary "empty shells" of refugee/humanitarian classes of visas. Mr Gibbons is arranging for a high level conference with officers of the Attorney-General's Department later today to find a suitable legal solution to this problem.

Yours sincerely



ROBERT RAY

APPENDIX D

EXTRACT: BRITISH IMMIGRATION RULES

Children

50 If the requirements of paragraph (48) are satisfied, children under 18, provided that they are unmarried, are to be admitted for settlement:

(a) if both parents are settled in the UK; or
(b) if both parents are on the same occasion admitted for settlement; or
(c) if one parent is settled in the UK and the other is on the same occasion admitted for settlement; or
(d) if one parent is dead and the other parent is settled in the UK or is on the same occasion admitted for settlement; or
(e) if one parent is settled in the UK or is on the same occasion admitted for settlement and has had the sole responsibility for the child's upbringing; or
(f) if one parent or a relative other than a parent is settled or accepted for settlement in the UK and there are serious and compelling family or other considerations which make exclusion undesirable - for example, where the other parent is physically or mentally incapable of looking after the child - and suitable arrangements have been made for the child's care.

51 Children aged 18 or over must qualify for settlement in their own right unless there are the most exceptional compassionate circumstances. Special consideration may, however, be given to fully dependent and unmarried daughters over 18 and under 21 who formed part of the family unit overseas and have no other close relatives in their own country to turn to.

APPENDIX E

LETTER OF 23 NOVEMBER 1989
FROM SENATOR RAY TO MR RUDDOCK

Minister for Immigration,
Local Government and Ethnic
Affairs

Parliament House
Canberra ACT 2600
Telephone: (062) 777 860

Senator the Hon. Robert Ray

Mr Philip Ruddock
Member for Dundas
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock

Following our discussions on Tuesday 21 November 1989 I have given further thought as to the most appropriate method of enabling decisions to be fast tracked to the stage where a Minister could exercise powers currently contained in new section 64U of the Migration Act 1958.

I considered cutting out the first tier review stage, therefore putting such cases directly to the Immigration Review Tribunal. I felt however that the integrity of the Immigration Review Tribunal could be challenged in such cases in that it would be required to fast track cases, possibly against its wishes, which it felt may be overturned later anyway.

In the end the most practical solution is to amend the Migration Act 1958 to enable a Minister, where minded, to consider a case after the first tier internal review, but before the Immigration Review Tribunal considers the case. I am also proposing that once the Minister has exercised the power under the new provision, the applicant will not be able to lodge an application to proceed to review by the Tribunal.

I am proposing to introduce this amendment as another bill, rather than an amendment to the current Migration Legislation Amendment (Consequential Amendment) Bill for the reason that that bill is already in the Senate, and if amended there would have to be returned to the House of Representatives for reconsideration. Should the House not sit until the 20th or 21st of December, the Migration Legislation Amendment (Consequential Amendment) Bill will be of no effect as it is drafted in anticipation of commencement prior to the commencement of the Migration Legislation Amendment Act 1989, which commences on 19 December 1989.

Initial advice from the Office of Parliamentary Counsel is that the amendments are simple in nature as they substantially duplicate a current provision, i.e. section 64U.

I would be grateful for your early reaction to the proposal. Should you agree that the amendment is suitable I would propose to introduce the bill into the Senate as soon as possible with a view towards consideration by the House of Representatives when it returns to consider legislation returned from the Senate. If this cannot be achieved, I would propose it be considered by the House of Representatives early next year.

Yours sincerely

SGD ROBERT RAY

ROBERT RAY

SUBMISSIONS

1. International Commission of Jurists
2. Commonwealth and Defence Force Ombudsman
3. Law Institute of Victoria
4. Immigration Advice and Rights Centre (NSW)
   Public Interest Advocacy Centre
   Refugee Council of Australia Inc.
5. Amnesty International
6. Law Council of Australia
7. Victorian Ethnic Affairs Commission
8. Human Rights and Equal Opportunity Commission
9. Office of Youth, Sport, Recreation and Ethnic Affairs (N.T.)
10. National Federation of Blind Citizens of Australia Ltd.
11. South Australian Ethnic Affairs Commission
12. Supplementary Submission - Commonwealth Ombudsman
13. South Brisbane Community Legal Service Inc.
14. Supplementary Submission - Immigration Advice and Rights Centre (NSW)

INTERNATIONAL COMMISSION OF JURISTS
Australian Section
G.P.O. Box 173
Sydney 2001
Australia

6 November 1989

The Chairman
Joint Select Committee
on Migration Regulations
Parliament House
CANBERRA ACT 2600

Dear Sir

We refer to your kind invitation to comment on the Migration Regulations which are being considered by your Committee this week.

Regrettably, because of the time constraints imposed between the date we received the copy of the draft Regulations and the closing date provided for our submission, it is not possible for us to provide as detailed a submission as we would have liked, having regard to the importance of the regulations for the Australian community at large because of the complete overhaul that they encompass to the migration system.

Of course, detailed Regulations were anticipated, consequent upon the enactment of the Migration Legislation Amendment Act 1989. However, the full contents and implications of the Regulations can only be considered after they have been made available.

You would be aware that the International Commission of Jurists, Australian Section has as its mandate inter alia the monitoring of government action to ensure that proposed legislation and delegated legislative enactments are in accord with the Rule of Law (Declaration of Bangkok, Resolution from Committee III Clause 3.2, February, 1965).

The ICJ is also anxious to ensure that the extent, purpose and procedure appropriate to delegated legislation are observed. It is essential that it should be subject to ultimate review by a judicial body independent of the Executive and that acts of the Executive which directly and injuriously affect the person or property or rights of the individual should be subject to review by the Courts.

Submission No. 1
Date Received 10 NOV '89

1233b

These are Conclusions declared at the ICJ Delhi Conference of January, 1959.

It is noted that the terms of reference of the Senate Standing Committee for the scrutiny of Bills calls on the Committee to report in respect of clauses of Bills introduced into the Senate which:

"1. Trespass unduly on personal rights and liberties;

2. Make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

3. Make such powers, liberties and/or obligations unduly dependent upon non-reviewable decisions;

4. Inappropriately delegate legislative power or insufficiently subject the exercise of legislative power to parliamentary scrutiny."

Without canvassing at length the current Committee's role, it is hoped that you will have regard to these terms of reference in your consideration of the current regulations.

The other major guiding principle which Committee members must bear in mind when considering the regulations is that contained in the Senate resolution establishing the Committee, namely at paragraph 1(a) to determine whether the regulations "reflect current and announced policies in relation to the grant of visas and entry permits as at 1 June, 1989 " and (b) "...are likely to achieve the goals of the policies referred to in subparagraph (a)."

We understand that other submissions may deal in detail with the question of areas in which the regulations in fact depart from current and announced policies. Comments will be made later in this submission in respect of some of the draft regulations where we feel a breach arises. We do not canvass this aspect of the Regulations in full detail.

The ICJ Australian Section protests in the strongest terms at the haste with which the Regulations are now being considered. This comment is not intended to cast any adverse reflection on the workings of the Committee. As will be apparent to Committee members, the Regulations go far beyond merely recapitulating existing policy.

They also raise issues which were not canvassed or discussed in the CAAIP Consultation. We are concerned that Regulations which will have a fundamental impact on the workings of the migration system and consequently Australians should not be hurriedly rushed through the

parliamentary process. It is noted that errors appeared in the Migration Legislation Amendment Act before the enactment of which there was at least a modicum of community consultation. These errors had to be the subject of amendment in the Migration Legislation Amendment (Consequential Amendments) Act. It is to be anticipated that further amendments will be required, even assuming that the latest legislation is passed in the Parliament.

We fear that similar problems will arise with the Regulations which could largely have been overcome had there been a proper period of time allowed for public debate and comment. After all, the Department has had almost five months to work on the Regulations since the passing of the Act in June and, in any event, presumably many of the Regulations were framed prior to the enactment of the legislation.

We are also concerned that the Regulations which have been submitted are not all the Regulations which will have to be adopted if the legislation is to have meaningful effect. In particular, we regret the omission of the regulations dealing with the workings of the Immigration Review Tribunal and the regulations explaining the operation of Sections 17(A) and 18 of the Act dealing with deportation.

We understand the reasons for the complexity of the regulations having regard to the provisions of the Act. Nevertheless, it is to be regretted that there appears in the regulations an inadequate system of cross-referencing notwithstanding the schedules, and many regulations have a cross-referencing impact which is not directly apparent unless the regulations are read in full. For example and most notably, for consideration of the impact of the Regulations in relation to Section 11(A) of the Act, one must consider inter alia Regulations 26 and 42(3).

The complexity of the regulations will have, we assume, the undesired result that persons caught up in the immigration system will be forced to seek assistance of agents and/or lawyers firstly to have the system explained and secondly, to assist them in the preparation of applications and appeals. Whilst we assume the Department will have available for the public explanatory memoranda, it is unlikely that these memoranda will be sufficiently detailed and in plain language (with we hope translations in community languages) such that the "average person" will feel confident enough to act on his own behalf. The Minister's guiding philosophy was to achieve "justice and fairness in the system" and to obtain a non-adversarial appellate system.

We feel this aim may well be thwarted by the complexity of the Regulations and the assumed consequential involvement of agents.

Another concern arising from the above comments is the ability of the administration to handle all the requirements imposed on it under the Regulations. Indeed, vast new tracts of administrative supervision are imposed by, for example, Regulations 16(2) 17(3) 28(3) and 33(3), having regard to the obligatory provisions of these Regulations. The public must be assured that persons will be advised in a meaningful manner of their rights and obligations under the law and Regulations, the correct manner of compliance with the Regulations and the dire consequences to persons who fail to do so. The Department will also have to ensure that decisions are taken promptly and that applicants are not kept waiting for undue periods which is a feature of the current system. Appropriate mechanisms for monitoring the decision-making standards of departmental staff will have to be created. All of the foregoing will presumably involve a substantial increase in the size of the Department with consequential fiscal costs.

Before making comments on particular Regulations, the following more general observations are made.

1. Ultra Vires

It seems to us that many of the Regulations in fact may well be ultra vires the power granted under the Act. It is a general principle of administrative law that where legislation makes something lawful, delegated legislation which forbids it, is repugnant. Also, where delegated legislation departs from the positive provisions of the Act it is ultra vires. See Morton v Union Steamship Co of N.Z. (1951) 83 C.L.R., 402 and Powell v May (1946) K.B. 330. Arguably, the most prominent example of this occurs with regard to Section 11(ZD). This Section enumerates circumstances in which permanent entry permits may be granted to non-citizens after entry into Australia. Notwithstanding the provisions of Section 11(Q), it can be argued that the attempt by the regulations to limit by class of visa or entry permit the power of an applicant to be granted resident status runs counter to the intent of the various subsections of Section 11(ZD)(1). For example, Regulation 29(1)(i) could have this effect. Similarly, the provisions of Regulation 26(1)(b) having regard to the expectations of the Australian community, we have some doubt that the community would accept a situation where spouses, as a class, in certain situations, were denied the right at all to seek resident status in Australia. This would appear to be a consequence of Regulation 26(1)(b).

2. Discretions

The Minister has indicated his intention is to remove discretions from the existing system to create a certainty to the regulations.

However, as drafted, the Regulations maintain unexplained Ministerial (departmental?) discretions in many important areas. For example, Regulation 4(a)(3), Regulation 4(b), Regulation 16(2)(b), Regulation 28(2)(c), Regulation 42(2)(c), Regulation 112(b), Regulation 113(2), Regulation 114(2), Regulations 116 and 117, Regulation 140(1), Regulation 141(b), Regulation 143. The Regulations do not set out how these discretions are to be exercised and we are unclear as to which of the decisions based on these discretions will be appellable and in what circumstances. It is our basic contention that where a discretion is exercised by a departmental officer, that discretion should either be appellable to the Minister or, alternatively, to the Tribunal. It is unacceptable administration that departmental officers will have the right to make final decisions which are not the subject of ultimate review.

3. Transitional Provisions

Neither the Act nor the Regulations appear to make provision for transitional procedures. We accordingly query the status of current holders of visas and entry permits which are not defined by class as per the Regulations, after the new Act and Regulations come into force with the concomitant scheduled criteria and conditions. Similarly, the rights of present illegal persons after the commencement of the Act remains unclear. Will they be "caught" by the provisions of Regulation 26? We assume that this will be the case. Thirdly, no consideration appears to have been given to the manner of consideration of applications currently before the Department for visas and entry permits. And further, notwithstanding the provisions of Section 115, will for example those with pending change of status applications on Refugee grounds, be precluded (especially if given a Regulation 118 or 119 class of visa) from applying on genuine marriage or other humanitarian grounds if the Refugee Application is rejected. If so, this limitation may also be ultra vires.

4. Status of Illegals and Mandatory Deportation

The combined operations of Sections 17A and 18 is unclear. As unamended the ICJ,AS is of the view that a Deportation Order must be signed under Section 17A when the period of grace has expired. This not only has the

possible effect of creating substantial hardship but could cause Australia to offend against its international obligations when dealing with Refugee applications. The operation of this Section must be explained before the Act is proclaimed. Because the Section is mandatory if a Deportation Order is not signed in a particular case it could always be open for a third party to seek a Mandamus Order from the Federal Court against that person by seeking an order that the the Minister comply with the law. Of course, an illegal criminal convicted in Australia to a prison sentence would also presumably approach the Minister to avail himself of the opportunity of an early release by the Section and the Minister would be obliged to act. Once signed a Deportation Order must be put into act without further delay. Further, if a Deportation Order is signed then the Minister has no power to grant an entry permit whilst the person is in Australia. This in itself would make the provisions of Regulation 26 irrelevant.

We now turn to the Regulations and make specific comments on particular clauses.

Regulation 2(1) - "Dependent Child"

No differentiation appears between a dependent child in the custody of applicants or of other persons. This is of particular relevance for subclause (c).

"Humanitarian Visa"

It is noted that the class of defined visas is closed. The draftsman should refer to other situations as may be prescribed.

"Public Interest Criteria"

Clause (b) is absolute and this could create particular hardship in individual cases. The Minister should be empowered to waive the debt. This Regulation also seems to carry over the current policy in relation to sponsorships that the sponsor must be resident for two years. A similar clause appears, for example, in Regulation 137(a). Provision should be made for sponsorships in appropriate situations of hardship or where the spouse of an Australian resident who has lived in Australia as a resident for more than two years.

Also, all the criteria are negative; are there no positive public interest factors which could assist an Applicant?

"Sponsor"

The regulations do not clarify that an infant child can, through his or her guardian, act as a sponsor of a parent. This should be inserted for clarity. It will become especially important if and when Australia ratifies the Convention on the Rights of Children which is presently before the United Nations General Assembly.

Regulation 4

The absolute nature of the drafting of this regulation and especially those convicted of criminal offences, could cause hardship. The wording would also imply a deeming provision which may have ramifications, especially for Section 11A cases. Further, because of the absolute nature of the clause, there is no consideration for the offences for which a person has been convicted. Thus, for example, persons convicted and imprisoned for a period over one year for a political crime in an unsavory or repressive dictatorship might be inadvertently affected by this regulation. The interrelationship of this Regulation, and Regulation 143 and the definition of "public interest criteria" is unclear and may well be contradictory. Why express the clause in the absolute, if a discretion is intended.

Regulation 7(1)

The "and" in the subclauses could lead to a misinterpretation that the requirements are cumulative, rather than alternatives.

Regulation 13(2) and Regulation 25(2)

Both refer to Items X to Y and A to B in Schedule 2. These do not exist.

Regulations 16(2) and 28(3)

Both import the requirement for compliance with a "terminating condition". This is a new feature of the migration system and the ramifications should be carefully considered.

Firstly, the Regulations impose by inference an onerous obligation on visa and entry permit holders to maintain contact with the Department which, as noted above, will increase substantially the administrative burden of departmental officers. It is essential that the obligations on the Department thereby imposed will be properly and promptly administered.

Also, the consequences of a failure to comply with, inter alia, the obligation to leave Australia, which will render

the visa and entry permit cancelled and the applicant an illegal without consequential change of status rights, must be fully considered.

The ICJ,AS believes having regard to the dire consequences flowing to an illegal under the new system, either an appeal mechanism or a system whereby a visa/entry permit holder can exonerate himself should be inserted. Similar observations apply in respect of Regulations 17 and 29.

We also note the draftsman could possibly rearrange the ordering of the subclauses of Regulations 17 and 29 to achieve consistency with Schedule 2.

We trust the Committee will be concerned to ensure that appropriate mechanisms are in place to prevent future Ministers capriciously using the visa/entry permit issued to an applicant to thereby preclude that person from applying for change of status in Australia. Whilst this may sound bizarre, Australian immigration history is replete with such examples, vide the now disgraced language test.

Regulation 26

Reference has already been made to our concerns that this clause may be ultra vires. We also note that this is a completely new Regulation which does note reflect current policy or announced policy. The draconian nature of this regulation should be diminished. Committee members would all be aware of particular situations of hardship. An example of extreme hardship which is known to the ICJ,AS concerns the case of a child who was smuggled into Australia shortly after birth and who has lived with an Australian family all her life without that family having gone through the legal formalities of adoption or the obtaining of custody orders from the Court and immigration regularisation. Under the current law, that child could seek regularisation of her status in Australia. This would be precluded under Regulation 26 if the child had been in Australia for more than six months. The child knows no other life or other family than her Australian family and yet would, presumably, be denied residence in Australia.

We also query the need for this Regulation given the existence of the Section 17A power.

Regulation 35

The requirements for notice are totally inadequate. Experience has taught us that departmental officers frequently either inadvertently or maliciously forward correspondence to the wrong address. For example, if it is sufficient for notice to be given to the residential address provided by the applicant in the application, an officer may

well do this even though the Department has been advised subsequent to the lodgement of the application that the applicant has changed residential address. This situation occurs all too frequently in practice. A person may well become illegal as a result of departmental error and unless the regulations contain further clarification, an affected person will have no redress. The Regulation at least should refer to the "last known" address.

Regulation 36 - Restrictions on Re-entry

The absolute nature of (b) is not acceptable. This effectively means all criminally deported persons will never be able to return to Australia.

The distinction between priority visas, entry permits and others is to be applauded. However, a philosophical objection remains to denial of entry by this regulatory procedure. Denial of entry effectively amounts to a quasi gaol sentence to affected persons and, in particular, family members lawfully in Australia. Rather, this power should be vested in the judiciary. Unlike the current policy which retains an overriding discretion, the regulation removes this discretion and removes rights of appeal. Subregulation 3 should also incorporate the homosexual partner visa or entry permit category.

Regulation 38(1)

The reference to section 11(ZD) of the Act should refer to 11(ZD)(3).

Subregulation (3) is unfair, especially in situations where countries where persons "disappear" and death is presumed but is not certain. It is suggested that "unknown" children be further defined by reference to a period of time, for example, twelve months.

Regulation 40

A further subcategory should be added referring to homosexual relationships. The ICJ,AS also finds strange the reference to notices published in the Gazette. This device is adopted in other Regulations and it is felt that it is both unwieldy and also pays no account for local conditions which may impact adversely on an applicant but not the community at large. This comment is made notwithstanding subclauses (g) and (h).

Part 3

We do not comment on the additional and prescribed criteria in relation to visas and entry permits in general. We assume that the Committee will carefully consider each to

ensure it is an accurate reflection of current or announced policy. However, we do note that Regulation 55 by *specifying "the applicant meets the requirements specified* from time to time by the Minister" may well be ultra vires and could be used by an unsympathetic minister in an unfair manner. The drafting of this regulation runs counter to the whole philosophy of the Act and regulations. It may also be an illegal subdelegation - Hawkes Bay Raw Milk Producer's Coop v N.Z. Milk Board (1961) NZLR 218.

Also, Regulation 89(b) is uncertain and could be applied in a discriminatory manner against persons from particular countries. It could also lead to the refoulement of a Refugee.

Regulation 120(a)

No clarification is given as to "substantial compliance". Presumably, reference should be made to the terminating conditions. The reference to the health criteria is strange. Does this mean that all visitors who seek to extend their stay will have to undergo medical assessment? Surely, this could not be the intention. Also, how can the Health criteria be required for class 48 tourist visas, as is the requirement. This could lead to a discriminatory application of the requirement to different countries. Presumably also, there will be further clarification as to the definition of "compelling personal reasons" in subclause (e). Similar comments are made in respect of Regulations 121, 122 and 125.

Regulation 155

Notwithstanding Regulation 144 (wrongly styled 114) it is felt that the Regulation is too broadly drawn and in a nonspecific manner. Further, in the course of the possible retrospective operation of the Regulation, the impact on Section 11A persons should be considered to avoid litigation.

Schedule 1

We are mystified by the power under which schedule 1 is drafted. The designated regulations clearly are not appropriate.

We trust that the comments made in this submission will be of value for the Committee in its deliberations. We have, of course, attempted to be constructive in our comments and avoid unnecessary repetition. References to positive features of the regulations which do not require further comment, have not been made.

Should you seek clarification in respect of the matters raised in this submission, would you please contact us.

THE HON. JOHN DOWD, M.P.
Chairman, Council
ICJ, Australian Section

DAVID BITEL
Secretary-General
ICJ, Australian Section

Submission No. 2
Date Received 6/11/89

COMMONWEALTH & DEFENCE FORCE
OMBUDSMAN

Prudential Building cnr London Circuit & University Avenue Canberra City
G.P.O Box 442 Canberra A.C.T 2601
Telephone (062) 760111
Facsimile (062) 497829

RECEIVED
14 NOV 1989
House of Representatives Committee Office

6 November 1989

Ms Robina Mills
Secretary
Joint Select Committee
on Migration Regulations
Parliament House
CANBERRA ACT 2600

Dear Ms Mills

I would like to thank the Committee for the opportunity to comment on the draft Migration Regulations. In the short *period that the draft regulations have been available to* my Office it has not been possible for a full and detailed submission to be prepared. However, there are some matters on which I would like to comment.

General

The Department seems to be attempting to enshrine in regulation many of its current policies. The manner in which this has been done has been to frame detailed regulations which remove discretions previously available. The criteria applicants must satisfy for the grant of the various visas and entry permits are all laid down. However, there is a distinct lack of alleviating discretions to allow for the grant of visas and entry permits in cases where all the criteria may not have been satisfied but, in all the circumstances of the case, it seems that the visa or entry permit should nonetheless be granted.

Rather than including alleviating discretions in the draft regulations, the Department has, in most of the regulations, included a criterion requiring a subjective judgement of the decision-maker which gives the Department the option not to grant a visa even when all the factual criteria have been satisfied.

For example, draft Regulation 120 sets down the criteria for the grant of a temporary entry permit to the holder of visitor visa or entry permit. In addition to factual criteria to be satisfied (such as substantial compliance with conditions for current visa, the nonexistence of a condition on current visa that an entry permit not be granted after entering Australia, satisfaction of public interest criteria etc.) there is also a criterion which

../..

states that the Minister must be satisfied that the applicant intends to comply with any conditions subject to which the entry permit is granted. In this circumstance, it is not clear what evidence would be needed for a decision-maker to refuse an entry permit on the grounds that the applicant had not satisfied him that he would comply with the conditions of the entry permit.

Therefore an applicant may satisfy all the objective criteria for a particular visa or entry permit but still miss out because the decision on the subjective criterion has gone against him. I realise that it is intended that the new system of internal review and the right of appeal to the Immigration Review Tribunal should ensure consistency among decision-makers. However, notwithstanding this, I have raised this point as I believe that the best efforts should be made to ensure the primary decision-maker has sufficient guidance available to him to make a fair and reasonable decision.

Delegation

I note that section 66DA (1) of the Migration Act provides that the Minister may, by writing signed by him, delegate to a person any of his powers under this Act. I also note that, by and large, the draft regulations are framed in such a way that the Minister is named as the person to be satisfied of a particular point or who is to form an opinion on a point. Many of the issues that the Minister must be satisfied on or form an opinion regarding are crucial to an applicant's chances of success and require subjective judgements. Given this, if the Minister is intending to delegate these powers, it seems to me that it would be desirable that the regulations provide for the issue of Ministerial guidelines for delegates regarding the kinds of factors which are to be taken into account in reaching a decision. I also believe that if it is intended that the Minister will delegate his powers under the regulations that a provision should be included in the regulations specifying that this is permissible.

Internal Review

In draft Regulation 2, internal review is defined as "review by a review officer of a decision of the Minister as referred to in section 61 of the Act." Section 61(1)(a) of the Act, under the heading of "Internal review of certain decisions", states "The regulations may provide for decisions of the Minister to be reviewed." In the case of decisions made by the Minister's delegate the wording of the draft regulation and the section of the Principal Act may seem appropriate. However, surely if the Minister himself makes a decision under the Act it is not intended that an internal review officer (an officer of his Department) will review his decision?

../..

Good Character Requirement

Draft Regulation 4 sets out conditions under which an applicant is taken not to be of good character. Notwithstanding that draft Regulation 143 sets out the circumstances under which the Minister may waive the good character requirement, some of the conditions set out in draft Regulation 4 are of concern. Draft Regulation 4(a)(ii)(C) deems a person not to be of good character if they have at some time been charged with a crime and either found guilty of having committed the crime while of unsound mind or acquitted on the ground that the crime was committed while the person was of unsound mind. In the absence of any indication as to how the Minister's delegates are likely to exercise the power to waive the good character requirement, it seems unduly prejudicial to include this ground in draft Regulation 4. Any person who remained mentally ill at the time of application would fail the health requirement. It is not clear why any other person who came under draft Regulation 4(a)(ii)(C) should automatically be taken to be not of good character.

Draft Regulation 4(a)(iii) provides that a person is taken not to be of good character if the applicant has, in the reasonable belief of the Minister, been involved in activities indicating an habitual contempt, or disregard for the law. It is not clear what this subparagraph means nor what would constitute sufficient evidence for the Minister (or his delegate) to form a "reasonable belief" that an applicant has been involved in such activities. The broad manner in which this subparagraph is currently worded would seem to give the Minister an unreasonably wide power to exclude a person from Australia. Unlike the other subparagraphs in this draft regulation, which at least require that a person have been convicted or charged, this provision includes no such requirement.

I note that at the end of 4(a)(iii) there appears, after a semicolon the word "and". This does not seem appropriate as there appears to be no further part to paragraph 4(a) or subparagraph 4(a)(iii). The next provision appearing is paragraph 4 (b). This paragraph also concerns me as it includes the same broad concept of "indicating in the reasonable belief of the Minister, an habitual contempt, or disregard, for the law." In this paragraph, however, at least the applicant has had to be convicted of an offence. Nonetheless the wording of the paragraph does not give any clear indication as to what sorts of offences would be considered to warrant the Minister forming a reasonable belief that the applicant had an habitual contempt or disregard for the law.

Last remaining relative

Draft Regulation 9 deals with the definition of "last remaining relative" for the purpose of concessional entry. Subregulation (1) of the draft regulation deals with

../ .

persons who have no relatives resident outside Australia. Subregulation (2) deals with persons who have up to three relatives outside Australia but who have no relatives in the country where they reside. Paragraph (b) of subregulation (2) requires that the person (and spouse if applicable) have had no contact with any relatives outside Australia during the period of 5 years preceding the day of the relevant application under the Act. "Contact" under this paragraph is not defined. Therefore it seems that mere correspondence with relatives living outside the country an applicant lives in (but not living in Australia) may constitute sufficient "contact" to preclude a person being granted concessional entry as a "last remaining relative". In this circumstance, I believe draft Regulation 9(2)(b) would have an unduly harsh effect on an applicant.

Prohibition against grant of entry permit

It is not clear whether draft regulation 26(1)(b) dealing with the prohibition on the grant of an entry permit to some illegal entrants should read as it now does "not being a person who became an illegal entrant because of subsection 6(2) of the Act..." or should indeed read "being a person who became an illegal entrant because of subsection 6(2) of the Act...".

Restrictions on re-entry

Draft Regulation 36 seems to have been developed to enshrine in regulation the Department's current policy of banning from re-entering Australia, either permanently or for varying periods of time, persons who have breached the Migration Act while in Australia. Current departmental policy is that persons who have overstayed their visas, but left Australia voluntarily, are banned from re-entry for three years and persons who have been deported are banned for five years.

My Office has received a number of complaints from the spouses of persons subject to such bans. The spouses are all Australian citizens or residents who wish to sponsor their husbands or wives so that the couples may live together in Australia. The department's current policy allows for the ban on re-entry to be waived if an officer so decides, after taking into account the objectives of Australia's migrant entry policy and the merits of the individual application including factors such as the genuineness of the marriage, other strong compassionate or humanitarian circumstances and the gravity of the offence in Australia or any other evidence of bad character.

Where there is no strong evidence to indicate that a marriage is not genuine and where the person who has been banned has not been found guilty of any more serious offence than breaching the conditions of his or her visa, I have been inclined to believe that separation from one's

spouse for three or five years is unreasonable. Spouses have complained to me after the department has refused to waive the ban in their wife's or husband's case. However, I have, thus far, had little success in convincing the department to utilize the waiver discretion more generously. It is not only the person banned from re-entering Australia who is affected but also the Australian citizen or resident to whom they are married.

I note that in moving to enshrine this policy in the regulations the department has given some consideration to the difficulties restrictions on re-entry can cause when the people so affected have married Australians. However, I note that while halving the restriction periods for persons, such as the spouses of Australian citizens or residents, the department has removed any discretion to allow such person's into Australia prior to serving out the ban as laid down in the draft regulation. Thus, notwithstanding the existence of a genuine marriage, and in the absence of any evidence of wrongdoing by their spouses other than breaching the conditions of their visas, spouses of persons subject to restrictions under this regulation, unless they leave Australia to join their spouse, will be forcibly separated from their spouses for periods from six to thirty months.

Grant of temporary entry permit to holder of visitor visa or entry permit

Draft Regulation 120 lays down the criteria under which the holder of a visitor visa or entry permit (other than a working holiday entry permit) can be granted a temporary entry permit while in Australia. Paragraph (d) of the draft Regulation requires that the Minister be satisfied that the applicant intends to comply with any conditions subject to which the entry permit is granted. It seems to me that the judgement required of the Minister or his delegate by this paragraph is a very subjective one and that if the paragraph is to remain in the regulations it is most desirable that guidelines be provided to the decision-makers if a fair result is to be achieved.

I note that paragraph (d) of draft Regulation 121 is identical to paragraph (d) of Regulations 120, 122, 125 and paragraph (c) of draft Regulation 123. These draft regulations deal with the grant of temporary entry permits to the holders of working holiday entry permits, student visas or entry permits and lawful temporary residents. Of course, my concerns regarding these regulations are the same as outlined above.

Processing entry permits

Draft subregulation 131(d) requires that the Minister be satisfied that it would be unreasonable to require the applicant to leave Australia before an application for a further entry permit or a permanent entry permit has been

determined. Once again a most subjective judgement is required of the decision-maker with no indication as to what will be *considered unreasonable*.

Waiver of health criteria

It is laudable that in draft Regulation 144 some provision has been made for the waiver of the health criteria in respect of applicants for some classes of visas and entry permits. However, I note that the dependants of persons who have applied under the Independent and Concessional categories are not covered by this provision. Where, as draft Regulation 144 puts it (in respect of some visa classes), "undue harm is unlikely to result to the Australian community if the visa or entry permit was granted" it seems unreasonable that there is no facility to waive the health criteria, especially where the failure to meet the criteria is not extreme or does not presage high cost to the Australian community.

The points system and current experience

Each paragraph of draft Regulation 146 specifies a qualification for employment which correlates with a point allocation set down in Schedule 4. Paragraphs (a), (b), (d) and (f) all require that an applicant have worked in their usual occupation for not less than 3 years immediately before the date of the application (unless some other period, has been specified by Central Trades Committee or National Office Of Skills Recognition). Paragraphs (c) and (e) are confusing in that they both state the applicant must have worked in their occupation either, if there is a period of employment specified by CTC or NOOSR for the purposes of the provision - at least *for a shorter period immediately before the day of the* application, or, if no such period is specified, for a period of not less than 3 years immediately before the day of the application. It may be that the word "shorter" in paragraphs 146(c)(ii)(A) and 146(e)(ii)(A) was intended to be the word "that". This would make more sense and would cover those situations in which the CTC or NOOSR requirement for experience may be less that 3 years.

Under the current points system the maximum points available for employment qualifications are 75. However, without 3 years experience or the period specified by CTC or NOOSR immediately before the date of the application the maximum points available are 30. Apart from the unreasonable effect such a stipulation is likely to have on any applicant with a break in employment, the emphasis on current experience would seem to actively discriminate against women applicants who have taken time out of the workforce to have children. A woman might have 10 years solid experience in her occupation. However, if she had taken time out in the previous 3 years for bearing or caring for children she will be unable to score more than 30 points. In a family where the wife is the more highly

../..

qualified partner this could well be sole reason for the family's failure of the points test and so the *refusal of* its application to migrate.

In previous informal discussions with the Department we had been assured that the "new" points test , which is the one covered by the draft regulations, unlike earlier points tests, would be flexible enough to prevent people being substantially disadvantaged by breaks in their employment. From my reading of draft Regulation 146 the Department has quite clearly failed to achieve the promised flexibility on this point.

Yours sincerely

D C Pearce
Commonwealth Ombudsman

6 November 1989

Administrative Law Section

A Section of the Law Institute of Victoria

Law Institute of Victoria, 470 Bourke Street, Melbourne 3000, Victoria. A.D.E. DX350. Telephone: (03) 607 9311 Facsimile: (03) 602 5270
All correspondence: G.P.O. Box 263C, Melbourne 3001

Your ref: Telephone enquiries: When replying please quote:

Submission No. 3
Date Received 6 NOV 89

Ms R Mills
Secretary
Joint Select Committee on
Migration Regulations
Parliament House
CANBERRA ACT 2600

By Facsimile Transmission (062) 772067

Dear Ms Mills,

I refer to your letter of 1 November, 1989, and the enclosure.

The extraordinarily short notice given by the Joint Select Committee for comment upon the draft Regulations has made it impossible for the Migration Committee to meet to prepare a considered response. Accordingly, the Committee has delegated the task of comment to meet your deadlines to the Chairman of the Migration Committee and Ms Mary Crock, a member of the Committee and a former chairperson. I am personally most disappointed at this apparent disregard for considered expert comment upon such significant Regulations.

The Migration Legislation Amendment Act 1989 and the consequential amending bills presently before Parliament, clearly only set the parameters of the powers as to migration of the Commonwealth of Australia. The execution of the Act depends entirely upon the detail contained in the draft Regulations. Up until now the Department of Immigration Local Government and Ethnic Affairs has carried out its functions pursuant to the Migration Act by observance of ministerial policy.

The draft Regulations clearly fail to reduce current policy into a statutory form. It was stated that the draft Regulations would not create new policy. However, all discretion has been removed by the draft Regulations so that if the individual facts of a case do not fit neatly into the narrow parameters set by the draft Regulations then the case will fail despite its merits. Whilst this may suit bureaucratic "ease of decision making", the consequence will be a system that is without logic let alone compassion. Given the very hasty manner in which consultation has been sought, I urge you to defer rushing such important Regulations through the committee process.

The enclosed memorandum highlights the more glaring omissions and errors contained in the draft Regulations. The opinions expressed in the Memorandum are those of its authors alone given that the short time frame allowed by the Committee does not permit the matter to be considered by the Migration Committee or by the Law Institute Executive in the usual way. A more considered response will follow in due course.

Yours faithfully,

Paul D.B. Baker,
Chairman
Migration Committee
Law Institute of Victoria

Erskine Rodan
Chairman
Administrative Law Section
Law Institute of Victoria

405.931005

MEMORANDUM ON PROPOSED CHANGES TO DRAFT REGULATIONS

DEFINITIONS

p.7 "Public interest criteria" - sub-paragraph (e) applies settlement test to all but holders of "spouse" visa - all close family should be exempted.

p.16 "Remaining relative" - excludes from the exceptions, relatives living in applicant's usual country of residence. This is unfair given overall purpose of position to reunite family - Onus is clearly on applicant to show lack of contact with remaining family members, wherever they might be.

p.18 Applications for Visas
reg 11(2) Discriminates against black South Africans
(3) Why do Turks get special treatment.

p.26 Conditions that can be placed on Visas
reg 17(1)&(k) restricting change of status on any but refugee (A) and (B) grounds - this is too tight - exceptions must be made for other special compassionate/humanitarian situations.

p.32 Prohibition against grant of entry permit
- sub regulation (1) should also apply to special humanitarian cases referred to at page 127 (reg 130)

- there should be an obligation on officers to notify detainees of their rights under reg 26(1)

p.37 Restriction on grant of permanent entry

reg 29(1)(i) & (j) too restrictive (see comments re reg 17(i)(j) & (k)

p.40 reg 34(a) Statutory visitors - should be able to remain refugees, or if suffer from genuine change of circumstances (i.e. reg 130) could contravene ref: convention (article 33)

p.41 Restrictions on re-entry reg 36(1)(b)
Blanket and permanent exclusion of 8.12 deportees is <u>too</u> lavish as many would have <u>all</u> their family here. There <u>must</u> be a discretion to resident. This is <u>not</u> current policy.

p.45 reg 38(3) balance of family test - children whose whereabouts are unknown should be discounted. This is not policy.

reg 39 prescribed non-citizen - assisted student - how does this work <u>re</u> reg 129?

p.46 reg 40 prescribed change in circumstances should include general provision to cover other change in circumstance lead up to cover personal hardship.

reg 40(e) & (f) - shouldn't have to rely on Minister to gazette disturbances - this process may be too slow and too prone to political decisions at the expense of humanitarian considerations (look at the US experience - on "upheaval" in El Salvador not the same as an "upheaval" in Nicaragua).

Should be another catch all to cover other cases where person suffers detriment or misfortune.

p.49 reg 42 prescribed criteria for entry permits
sub reg (31) certificates - regard should be had to the circumstances of other people reflected by deportation of applicant. Again there should be a catch all provision to cover any other relevant considerations.

p.52 Adoption Visa
reg 46 (a)(b) overseas residence not "contrived to circumvent requirement for entry to Australia for adoption".
This is new and unnecessarily harsh.

p 59 & 66 reg 53-4 Former Australian Citizen permanent residence - this in fact, save for requirement of sponsorship and assurance of support for people who don't meet the public interest criteria.

p.66 p.81-2 reg 72 Family Relationship Visa

- very restrictive - can't come out to learn english, must stay with relative.

p.92 Expatriate Visa

- the spouse of a person working near Australia for a Company based in or dependant on Australia. How is "respectability" of the international company to be determined?

p.96 - 99 Different types of tourist visa and visitor (other) visas is this all necessary?

reg 94 "Australian Requirement Visa"
How will this work in circumstances other than prospective marriage? For business purposes?

p.99-101 Why the need for different classes of return visa?

p. 102 Division 3. Why the sunset clause at reg 100?

p.104 Division 4 - special cases

p.102 Transit visa reg 111
now have to meet public interest and health criteria for the transit visa! It will involve a lot of administration and could be a source of considerable injustice i.e. do we refuse to transit a sick patient on route to somewhere else? Compare skills transfer policy.

reg 111 Border Visa

- only available to permanent residents.

This is ridiculous - what about the people we currently let in who have the wrong visa or no visa through an administrative mix up?

p.108 Emergency T.E.P. & P.E.P. - this is good.

p.113 Extensions to further T.E.P.'s for people in Australia.

Visitors (general)

reg 120 - can get extension on stated grounds

- can apply for employer nomination or retirement E.P.
- can become a student on stated grounds and approval of Minister for Employment!

reg 121 Working Holiday Maker

- can extend on stated grounds.
- can apply on employment nomination grounds.
- can become student on stated grounds and - "show" exceptional reasons "for grant of permit".

reg 122 Students

- can extend with permission of Minister of Education or NIDAB
- can become visitors
- employment nomination in special cases (this is more liberal than the present policy.)

reg 100 Trainee (non formal) English Language

- can extend
- can become visitor
- can become student

p.94 reg 102 Prerequisite Entry Permit

* For illegals

must be an applicant for change of status under S.112D

who does not hold a T.R.P. valid for the purposes of S.112D

Can apply for a prerequisite entry permit if :

A. Current T.E.P. is not operative because of an administrative error or

B. The Minister is satisfied that it would be unreasonable to not so grant.

p.108 Border entry permit

Again only available to permanent residents.

p.111-3 reg 116 - Refugee A (restricted)

- Has refugee status but no T.E.P. and permanent residency is appropriate.

reg 117 - Refugee B (restricted)

Has refugee status but where "permanent residence is not appropriate".

reg 118 - Refugee C (restricted)

Has T.E.P. and has claim of substance to be granted refugee status

reg 119 - Refugee D (restricted)

Does not have T.E.P. but has claim of substance for refugee status.

What is the significance of different categories? Why are they needed?

p.113 Grant of T.E.P.'s to persons in Australia.

reg 120 Visitor (excluding working holiday-maker or domestic)

- can get T.E.P. if original visa an entry permit not restricted re: change of status while in Australia.

reg 121 Working holiday makers

can get T.E.P. if original visa etc not restricted etc and special skills

reg 122 Students

123 "

p.122 reg 125 - T.E.P. to lawful temporary resident

- Visitor
- Temporary resident
- Student

p.124 reg 126 - Family Unit Entry Permit

to join family member who are extending stay

T.E.P. is prerequisite to permanent entry permit

reg 127 - Extended Eligibility (special cases)

- Open to T.E.P. holders but not visitors or illegals.

- since arrival has married.
- has been homosexual partner for 30 months of an Australian.

Homosexual entry permit

(excludes visitors and illegals) - no time requirement

- What is difference between 127 and 128?

re 129 - Extended eligibility (family and economic)

- no requirement of legal story for dependant children, where parent dies, aged parents (after arrival) or person who becomes preferential family member after arrival because of health back home etc

- holders of T.E.P. can get T.E.P. on economic grounds

p.127 reg 130 Extended eligibility (other) entry permit.

T.E.P. for people suffering from national disaster - attempts to categorise compassionate and humanitarium cases grossly inadequate. There must be a catch-all provision to prevent gross injustice - If not, there should be at least an amnesty before proclamation.

Division 6

Change of status to permanent resident (S.1120).

p.132 reg 138 Refugee (after entry) entry permit

- resettlement is in best interest of the applicant.

Immigration Advice and Rights Centre (NSW)
Public Interest Advocacy Centre
Refugee Council of Australia, Inc.

Submission No. 4
Date Received 7/Nov 89

Dr Andrew Theophanous
Chairman
Joint Select Committee on Migration Regulations
Parliament House
CANBERRA NSW 2600

7 November 1989

Dear Dr Theophanous,

Attached please find the combined response of the above-named organisations to the draft Regulations being considered by your Committee. We appreciate the opportunity to have some input to the Committee's deliberations before it finalises its views and presents them to the Minister.

We trust you will also appreciate, however, that our comments are unfortunately limited by the unrealistic timetable set for this important project. Two and a half working days (during which the rest of our service delivery must continue) is hardly sufficient time to present fully considered comments on such complex Regulations.

In keeping with your Committee's Terms of Reference, we have confined ourselves primarily to identifying instances where the proposed Regulations depart from current and announced policies of the Department as at 1 June 1989, or where they may be ultra vires the powers granted under the Act.

We have also addressed our minds to the second part of your brief, i.e. the extent to which the draft Regulations are likely to achieve the *goals* of these policies. It is with regard to this latter consideration that we believe our practical experience is invaluable; for we have first-hand knowledge of the adverse consequences that can unintentionally flow from poorly-designed policies or from inadequate resources to implement policies.

We would ask that our attached comments be read in the context of several general concerns we have regarding these draft Regulations.

(1) Unnecessary Complexity

One of the underlying motivations behind this total overhaul of the Migration Act has been the desire to create a more "user-friendly" package of legislation. An important part of the Government's aim is to ensure that people who are subject to immigration law, or who administer that law, know their entitlements and responsibilities in order to facilitate a two-way compliance.

It is therefore most regrettable that the proposed schema is excessively complicated in its structure, and that this problem is exacerbated by a deficient system of cross-referencing.

Despite our considerable knowledge of migration law and policy, we had great difficulty in "tracking" the import of different sections of the Act and Regulations on a class of visa-holders or applicants. We therefore have grave doubts that the "ordinary person" will be able to unravel the schema to such an extent that they will be able to competently act on their own behalf.

(2) Need for competent and free Advisory Services

It is with this in mind that we call on the Committee to make a strong plea to the Minister to fund competent, community-based, non-profit advice and assistance services for applicants.

While the Minister has indicated his willingness to consider such an initiative, his view is that the Government should wait 12 months before making a decision. With respect, we submit that such a "wait and see" approach is undesirable and will be counter-productive to enhancing fairness in the system.

It is already manifestly clear that people require assistance in their dealings with the Department and that the new schema will, if anything, increase this need. Those who are well-off and well-connected will continue to buy this assistance from competent lawyers and agents, notwithstanding the new provisions of the appeals system which will prevent these professionals from representing their clients in person at hearings. The poor or badly-connected will continue to provide fertile feeding grounds for incompetent and unscrupulous agents. The only way to break through this inequity impasse is to provide a range of government-funded services, which are independent but also accountable for the quality of their work.

(3) Serious Omissions in the Draft Regulations

Another goal of this new package is to enhance consistency in decision-making by codifying or providing guidelines for the exercise of discretion. It is therefore both worrying and surprising to see glaring gaps in the draft Regulations in important areas such as deportation, assurances of support, and the operation of the Immigration Appeals Tribunal.

We submit that the Committee must have access to these proposed Regulations if it is to be able to carry-out its Terms of Reference.

In conclusion, we emphasise that our attached comments are preliminary and incomplete due to the absurdly tight timetable. We can only hope that the Committee does not allow itself to be likewise constrained in fulfilling its important task. If this requires delaying the implementation of the new package, we urge the Committee to convince the Government to do so.

Yours sincerely,

George Masri
(on behalf of the Immigration Advice and Rights Centre)

Ken Rivett

Ken Rivett
(on behalf of the Refugee Council of Australia)

Betty Hounslow
(on behalf of the Public Interest Advocacy Centre)

MIGRATION REGULATION:

PART 1 PRELIMINARY

REG 2(1) INTERPRETATION

"aged dependent relative" - This definition differs from existing policy, which is found in paragraph 8.10 of the Migrant Entry Handbook, in a number of ways:

- The definition in the Migration Regulations reads "has been dependent" whereas the existing policy in paragraph 8.10.1 reads ... "wholly or largely dependent". The regulation definition seems to be a stricter test and should be adjusted to reflect current policy

- The definition in the migration regulations requires that the relative be dependent for "not less than 3 years". Whilst this is normally the case under existing policy, it is not always so. Discretion exists to consider cases where there has been a lesser period of dependency. Paragraph 8.10.2 of the Migrant Entry Handbook states "... situations involving a lesser period may be considered where compassionate circumstances exist."

- The definition in the regulation requires the relative to be old enough to be granted an age pension under the Social Security Act i.e. 60 years and over for a woman and 65 years and over for a man. This is current policy according to both the Migrant Entry Handbook at paragraphs 3.27.2 and 3.27.10 and , Integrated Departmental Instructions Manual, Grant of Residence Status, Vol 1, No 5 Aged Parents of Australian citizens or holders of permanent entry

However, the Grant of Residence Status Manual Section 5, paragraph 3.1- 3.1.3 allows for a partner under the 'aged parent' category to become a resident if he or she is "marginally below (normally within five years) the minimum age. At paragraph 3.1.2 those more than marginally below the minimum age may be considered Therefore in order to be consistent and fair the regulation definition should allow for at least those marginally below the minimum age to be considered as aged

Further, there should be discretion to allow those below retirement age to be considered as aged dependent relatives where special circumstances exist.

• Changes to the definition of relative in the Regulations (see below) have also changed the policy relating to aged dependent relatives. For example, under current policy it is possible to sponsor a great aunt or uncle who fits the criteria as an aged dependent relative. This is no longer possible. This definition and/or the definition of 'relative' should be changed to reflect current policy.

"**close relative**" - The definition in the Migration Regulations differs from existing policy in that it does not include half-brother and sisters. As paragraph 3.27.9 of the Migrant Entry Handbook states "relative" includes relationships by blood (including half-brothers or sisters, i.e. persons having one parent biologically in common). A similar definition is found in the IDEM, GORS Vol 2, No 2 Family Unit and Dependency section. The regulation definition should therefore specifically include half-brothers and half-sisters in order to reflect existing policy.

"**custody**" - The definition in the regulation seems to be a new definition not to be found in the Migrant Entry Handbook or the IDEM GORS.

"**dependent**" - The definition in the regulation differs slightly from the definition of "dependant" in the Migrant Entry Handbook para 4.7 Instead of the dependent being wholly or substantially dependent, as the Migration Regulations states, the Migrant Entry Handbook states that the person be entirely or mostly reliant upon another person.

"**dependent child**" - The definition of dependent child in the Migration Regulations differs slightly from that found int Migrant Entry Handbook para 4.7.2 - 4.7.7 and the Grant of Resident Status, Integrated Departmental Instructions Manual Family Unit and Dependency 4.2 - 4.8. The regulation definition omits the following, which is to be found in both the Migrant Entry Handbook and IDEM GORS

> An unmarried child over 18 years and under 21 years living in the family home is considered prima facie dependent and part of the family unit A claim that the child is NOT dependent should be tested

Although strictly speaking this part of the definition may fall within the regulation definition under the paragraph (b), it seems that it is now likely to be more difficult for a child who is over 18,

but still living at home, to prove dependency. Therefore it seems there has been a shift in the direction of policy in this area.

Further, the requirement under (b) (ii) of the regulation definition refering to "wholly or substantially under the custody", seems to be another shift from existing policy. Both the Migrant Entry Handbook at 4.7.4 and the IDEM GORS Vol 2, No 2 "Family Unit and Dependency" at parargraph 4.4, envisage situations where the child who is living away from home, for example to pursue studies, may be dependent notwithstanding the lack of daily care and control of that child. The existing policy at paragraph 4.7.5 of Migrant Entry Handbook for example states that the cultural attitudes could also be significant in assessing claims of dependency for those over 21 years. No such provision seems to be allowed for in the regulation definition. It would be difficult in many cases to prove that the parent has "control" of a child over 21 years although having regard to cultural, financial and other factors the child may still be dependent. There is no need to retain part (b) (ii) of the regulation definition.

"**orphan**" - The definition of orphan in the regulation differs from existing policy which is found in paragraph 8.8.1 of the Migrant Entry Handbook The existing policy at paragraph 8 8.1 provides for migration of orphaned unmarried children when they cannot satisfactorily be cared for in the home country and it is in their best interests to enter permanently into the care of relatives in Australia. The regulation definition seems harsher. It does not take into account situations where entering into the care of Australian relatives may be in the best interests of the child, even if an individual or institution elsewhere is capable of taking care of the child and willing to do so. Further, the regulation definition refers only to an individual or institution capable and willing to take care of a child It no longer specifies that such care should be satisfactory . The definition should be changed to reflect current policy.

"**orphan relative**" - The term usually resident which qualifies the Australian citizenship requirement seems to be a totally new provision The existing policy as set out in paragraph 17.3.1 of the Migrant Entry Handbook requires the sponsor to be either an Australian citizen or an Australian resident lawfully and permanently resident in Australia (i.e. permanent resident).

Changes to the definition of 'relative' in the regulations (see below) have also changed the policy relating to aged dependent relatives. For example, under current policy it is possible to sponsor a second cousin or great neice or nephew who fits the criteria as for an orphan relative. *This is no longer possible. This definition and/or* the definition of 'relative' should be changed to reflect current policy.

"public interest criteria" - The "public interest criteria" when examined as a whole is effectively a new requirement. Under existing policy "public interest criteria" falls into two broad groups; firstly, those which relate to all applicants, namely health and character, and secondly, those which relate to specific types of applicants, such as guidelines to determine the weight to be given to previous breaches of Australian immigration law and guidelines relating to labour market considerations. See paragraph 3.13 - 3.15 of Grant of Resident Status, Integrated Departmental Instructions Manual: Vol 1, No 1, General Processing Procedures. Clearly the regulation definition of public interest is substantially different from such existing public interest policy.

More specifically, there are further concerns with various provisions of this definition.

•Debts to the Commonwealth. *Sections 21A and 21B of the* Migration Legislation Amendment Act 1989 and paragraph 3.26 of the Migrant Entry Handbook refer to debts to the Commonwealth as relating only to debts for deportation or detention. Paragraph (b) of the public interest criteria speaks of outstanding debts to the Commonwealth, without specifying the kinds of debts involved. This could be interpreted to include debts in relation to social security, health or taxation. If so it is clearly an expansion of existing or announced policy. The regulation definition should be more precise when referring to debts to the Commonwealth , so that it is clear they are limited to costs of detention and deportation.

• Repayment of debts. A further change in policy under this provision is the proviso that the Minister be satisfied that appropriate arrangements have been made for payment of outstanding debts. This proviso seems to have replaced existing policy, as stated under paragraph 3.26 of the Migrant Entry Handbook, that the debt can be waived where it is recoverable (pursuant to section 70c of the Audit Act 1901) or where urgent or

compassionate circumstances exist. Such discretion should remain under this provision.

•Under paragraph (c) of the regulation definition terms such as "involved" "activities disruptive to", "violence threatening harm" and "Australian community" may be interpreted so widely so as to exclude many potential migrants. Especially vulnerable are refugee and humanitarian applicants. Such a provision is likely to cause much inconsistency and uncertainty in decision-making and as such likely to create much litigation. Apart from the problems and danger in interpreting such terms paragraph (c) does not reflect existing policy and should therefore be removed.

•In order to be consistent with existing policy paragraph (e) should include provision whereby children under 16 are excluded from such settlement assessment. Children in this case should include children for adaption and orphaned unmarried children. See chapter 7 of Migrant Entry Handbook.

•Apart from this, paragraph (e) differs from existing policy on settlement assessment as it introduces terms such as "undue personal difficulty" and "without imposing undue difficulties or costs on the Australian community". Such terms were not used in the Migrant Entry Handbook section which deals with settlement assessment (i.e. paragraph 14.4). Further, such terms are fairly broad and run the risk of being interpreted too broadly and or inconsistently thus potentially leading to inconsistency in decision-making and much litigation.

"relative" - This definition is more restrictive than the existing definition of relative which is to be found at paragraph 3.27.9 of the Migrant Entry Handbook. According to this definition relatives are those related

- by blood (including half brothers or sisters, i.e. persons having one parent biologically in common)
- by legal adoption, provided the adoption took place before the adoptee reached 18 years of age by marriage, i.e. in-law, only while the marriage giving rise to the relationship is in existence and the partners are living together (a blood link with one partner).
- by marriage with no blood link, (i.e. step-relationships resulting from re-marriage but only where the persons

concerned are clearly integral members of the one family unit or (for the purposes of sponsorship) have been so in the past for a substantial period.

By changing this definition, the policy relating to aged dependent relatives, orphaned unmarried relatives and special needs relatives is changed

The definition of "relative" under the regulations should be widened to include the above circumstances.

"special need relative" - . As noted above, changes to the definition of "relative" in the migration regulations limits the type of relative who may be sponsored as a "special needs relative" in ways which current policy does not. Under current policy, it is possible to sponsor relatives such as second cousins or great nieces or nephews. Under the regulation definition, this is no longer possible. This definition and/or the definition of "relative" should be changed

"sponsor" - The definition of "sponsor" in the regulation is slightly different to existing policy The regulation definition makes no provision for under 18 year olds to sponsor Paragraph 17.3.1 of the Migrant Entry Handbook effecively allows for under 18 years old to sponsor in limited circumstances It states In the rare instance where a minor child .. seeks to sponsor the admission of parents (or , in the case of an orphan under guardianship of the Minister ... another close family member capable of assuming guardianship) and the reunion in the home country is not practical, a sponsorship from a responsible adult resident or voluntary agency lodged on the child s behalf may be considered " This safeguard of allowing children under 18 years of age to sponsor in relatives in certain circumstances (albeit through sponsorship from a responsible adult resident or voluntary agency) should be set out in the regulation definition.

Reg 3 & Reg 38.1 "balance of family test" - Under current policy there is discretion to waive this test where "grave injustice or exceptional hardship to the applicant would occur if the test was applied. (paragraph 8.6.7 of the Migrant Entry Handbook). These Regulations should be changed so this discretion is retained.

Reg 4.Good Character - The definition of good character seems to be broad and incorporates provisions which are not found in existing or announced policy.

- At 4(a) (ii) of the regulation definition there has been a departure from existing law and policy and found at section 16(1) (c) of the Migrant Act 1958 and paragraph 6 5.2 of the Migrant Entry Handbook. Both the policy and law refer to a person who "has been convicted" or "has been charged". The inclusion of the phrase at some time" before "been convicted" or "been charged" clearly changes existing law and policy by making it too broad. The regulation definition may cover those persons who have had convictions quashed or who have been pardoned. Surely people in such situations would not be treated the same as those who have been convicted or charged of a crime. A further charge in policy and law created by the inclusion of the phrase "at some time " is that penal certificates may be sought for a period beyond 10 years as presently exists

- A person may be found not to be of good character, according to 4(b) of the regulations, if he or she has "at some time been convicted of an offence ... in circumstances indicating, in the reasonable belief of the Minister, an habitual contempt, or existing law or policy." Such a provision causes a number of problems Firstly it is difficult to see how being convicted of an offence could indicate habitual contempt or disregard for the law Surely it would require being convicted of a number of offences Secondly the test for indicating habitual contempt or disregard for the law (i.e in the reasonable belief of the Minister) is clearly inadequate. It is far too uncertain and broad with the potential of inconsistency in decision-making and unfairness.

- The good character provision should also include provision similar to existing policy found at paragraph 6 5 6 of the Migrant Entry Handbook so that the following considerations are taken into account:

  - the nature of the offence
  - how old the applicant was when the offence was committed.
  - the applicant s record since
  - how many offences were committed.

Reg 13. In sub-regulation 13(2) items x and y and items A and B in schedule 2 do not exist

Reg. 18. Mandatory conditions for grant of visa. See comments in relation to schedule 5.

Reg 22 Classes of entry permit. In sub reg 25(2) reference is made to items x to y and to items A to B in Schedule 3. These items do not exist

Reg 25. Grant of entry permit. In sub reg 25(2) reference is made to items x to y and to items A to B in Schedules 3. These items do not exist.

Reg 26 (1) This regulation introduces provisions which do not reflect existing or announced law or policy. It is much more restrictive.

It appears to mean that no illegal entrant (except those with refugee status) can be granted an entry permit if they are arrested an fail to lodge an application within 2 days or they have been an illegal migrant for for than six months. As a consequence, no illegal entrant will be able to apply for permanent residence after they have been in Australia for six months

There also seems to be an anomaly between sub-regulation (1) (a) and sub-regulation 1(b). Are these provisions to be interpreted to mean that someone who has been in illegally in Australia for more than six months will still have two days grace in which to lodge an application if they are arrested? If so, why should a person who has been apprehended be in a more advantageous position to a person who, because of genuine changes of circumstances and would have otherwise been entitled to residency status is unable to make an application for residency because they have been illegally in Australia for more than 6 months.

Whilst sub regulation 26(1) may water down some of the draconian mandatory deportation provisions of the Amendment Act, there should be further safeguards for those who have a genuine case for change of status Such a safeguard may be a requirement to inform all illegal entrants arrested of such a right to make an application for an entry permit and to allow them reasonable access to advice and assistance.

The prohibition against grant of an entry permit as set out in sub section 26(1)(b) is particularly harsh and radically departs from existing law, policy and practice. The present situation is that where an illegal entrant satisfies one or more of the legal preconditions, his/her application will then be considered on its merits no matter how long they have been illegally in Australia If their case has merit, they are then issued a temporary entry permit, so they can meet this legal pre-condition for change of status

Grant of Residence Status Integrated Departmental Instructions Manual, Vol 1, Number 1 (General Processing Procedures) 3.11, which states:

If, in the case of the sub sections 6A(1)(c)(d) and (e), the applicant meets the category criteria, but does not hold a valid TEP, then the decision maker has a broad discretion under the Migration Act (S7)2, whether or not to grant a TEP and thus to enable the applicant to satisfy S6A(1). Thus failure to hold a TEP does not in itself mean that an applicant will automatically fail to satisfy S6A(1). In reaching this decision, the decision maker is bound only to take into account the broad public interest criteria. In the case of S6A(1)(d) the decision maker has a similar discretion to authorise work.

The document entitled "Applications for the Grant of Resident Status from persons who are illegally in Australia and who are married to or in a de-facto relationship with an Australian citizen or resident" - which was issued by the Resident Status Section, DILGEA, Sydney, April 1988, also specifies circumstance in which illegal migrants may be granted permanent residence no matter how long they have been illegal.

Further, the Full Federal Court decision in Tang v The Minister for Immigration and Ethnic Affairs (17th October 11985), which dictates existing policy and law, found inter alia that:

- Inflexible insistence that an applicant satisfied the pre-condition of section 6A (1) (b) of the Migration Act must leave Australia and make an application to re-enter Australia from overseas is inconsistent with the intent and operation of sections 6 and 6A of the Migration Act

- Applicants who satisfy the pre-condition in section 6A (1) (b) of the Migration Act are entitled to have their applications considered on the merits.

Clearly the 6 month limitation which is introduced in the regulation is an attempt to depart for the spirit of such a decision This is so notwithstanding that the legal one pre-condition for all change of status provisions under the Amendment Act will be that the applicant be a holder of a valid temporary entry permit. Clearly existing policy allows for an applicant who would otherwise come within the scope of the change of status provisions, but for the fact that he or she does not hold a valid temporary entry permit to apply for a temporary entry permit concurrently with an application for resident status

Sub-regulation (2) should also at the very least apply to apply to special humanitarian cases under regulation 130.

If this Regulation is introduced it will mean great hardship to some people, including citizens and permanent residents of Australia. For

If, in the case of the sub sections 6A(1)(c)(d) and (e), the applicant meets the category criteria, but does not hold a valid TEP, then the decision maker has a broad discretion under the Migration Act (S7)2, whether or not to grant a TEP and thus to enable the applicant to satisfy S6A(1). Thus failure to hold a TEP does not in itself mean that an applicant will automatically fail to satisfy S6A(1). In reaching this decision, the decision maker is bound only to take into account the broad public interest criteria. In the case of S6A(1)(d) the decision maker has a similar discretion to authorise work.

The document entitled "Applications for the Grant of Resident Status from persons who are illegally in Australia and who are married to or in a de-facto relationship with an Australian citizen or resident" - which was issued by the Resident Status Section, DILGEA, Sydney, April 1988, also specifies circumstance in which illegal migrants may be granted permanent residence no matter how long they have been illegal.

Further, the Full Federal Court decision in Tang v The Minister for Immigration and Ethnic Affairs (17th October 11985), which dictates existing policy and law, found inter alia that:

- Inflexible insistence that an applicant satisfied the pre-condition of section 6A (1)(b) of the Migration Act must leave Australia and make an application to re-enter Australia from overseas is *inconsistent with the intent and operation of sections 6 and 6A of the* Migration Act.

- Applicants who satisfy the pre-condition in section 6A (1)(b) of the Migration Act are entitled to have their applications considered on the merits.

Clearly the 6 month limitation which is introduced in the regulation is an attempt to depart for the spirit of such a decision. This is so notwithstanding that the legal one pre-condition for all change of status provisions under the Amendment Act will be that the applicant be a holder of a valid temporary entry permit. Clearly existing policy allows for an applicant who would otherwise come within the scope of the change of status provisions, but for the fact that he or she does not hold a valid temporary entry permit to apply for a temporary entry permit concurrently with an application for resident status.

Sub-regulation (2) should also at the very least apply to applications for special humanitarian cases under regulation 130.

If this Regulation is introduced it will mean great hardship to some people, including citizens and permanent residents of Australia. For

example, people married or in genuine de facto relationships with Australian citizens or residents may be separated for considerable periods of time. These couples may have children who are Australian citizens, who would be also be separated from one of their parents for considerable periods of time. If these individuals are denied the opportunity to lodge permanent residence application, both they and their Australian partner and any children of the relationship would suffer emotional hardship. Another example of people likely to suffer unreasonable consequences is individuals who come to Australia with their parents as young children and grow up in Australia. These individuals become absorbed into Australian society and may have great problems adjusting to living in their parents country of origin. Further, they became illegal immigrants through no fault of their own. It would be extremely harsh to deny these people an opportunity to lodge an application for permanent residence.

Further, although this regulation specifically excludes people who already have refugee status,

- part (a) of this Regulation states that no entry permit may be granted if an applicant arrested under S38 or 39 applied for a permit over two days after their arrest, unless the the individual has refugee status. The individual could presumably apply for refugee status at any stage while under arrest.

- part (b). The exact meaning of this provision is unclear. If it means that entry permits may be granted to an illegal entrant if they fit 11A(1) or (2) of the Regulations -(ie they can have provided misleading information to obtain a visa or entry permit - we applaude its inclusion as this will benefit applicants who gave false information or used false travel documents because of their fear of human rights abuses. However, if its inclusion disadvantages these people for example ii. because of deeming provisions their illegal status is applied retropectively, we believe it should not be included as it would not reflect current policy and would disadvantage some individuals with strong humanitarian cases. It should be noted that the UNHCR Handbook on Proceduares and Criteria for Determining Refugee Status states (paragraph 196) "In most cases a person fleeing from persecution will have arrived with the barest possessions and very frequently even without personal documents.

If the first interpretation of 6A(2)(b) is correct, it follows that a person who did not give misleading information to obtain a visa or entry permit and, did not apply for an entry permit within 6 months of becoming illegal, can no longer be granted a temporary permit or permanent entry permit, (unless they are granted refugee status).

example, people married or in genuine de facto relationships with Australian citizens or residents may be separated for considerable periods of time. These couples may have children who are Australian citizens, who would be also be separated from one of their parents for considerable periods of time. If these individuals are denied the opportunity to lodge permanent residence application, both they and their Australian partner and any children of the relationship would suffer emotional hardship. Another example of people likely to suffer unreasonable consequences is individuals who come to Australia with their parents as young children and grow up in Australia. These individuals become absorbed into Australian society and may have great problems adjusting to living in their parents country of origin. Further, they became illegal immigrants through no fault of their own. It would be extremely harsh to deny these people an opportunity to lodge an application for permanent residence

Further, although this regulation specifically excludes people who already have refugee status,

• part (a) of this Regulation states that no entry permit may be granted if an applicant arrested under 236 or 39 applied for a permit over two days after their arrest, unless the the individual has refugee status. The individual could presumably apply for refugee status at any stage while under arrest.

• part (b). The exact meaning of this provision is unclear. If it means that entry permits may be granted to an illegal entrant if they fit 11A(1) or 72 of the Regulations -(ie they can have provided misleading information to obtain a visa or entry permit) we applaude its inclusion as this will benefit applicants who gave false information or used false travel documents because of their fear of human rights abuses. However, it its unclear in other circumstances these people for example it, because of deeming provisions their illegal status is applied retropectively, we believe it should not be included as it would not reflect current policy and would disadvantage some individuals with strong humanitarian cases. It should be noted that the UNHCR Handbook on Proceduares and Criteria for Determining Refugee Status states (paragraph 196) "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents

If the first interpretation of 1a 12 (b) is correct, it follows that a person who did not give misleading information to obtain a visa or entry permit and, did not apply for an entry permit within 6 months of becoming illegal, can no longer be granted a temporary permit or permanent entry permit, (unless they are granted refugee status).

This is of concern. Currently, many people who apply for refugee status are not granted temporary entry permits, if already illegal, or extensions to existing temporary entry permits if not. In other words, these people are technically illegal entrants. If their applications for refugee status are rejected and they did not obtain their visa or entry permit through the use of misleading information, they CANNOT be granted permanent residence, even if they have strong humanitarian cases, because the processing of refugee cases often takes overs 6 months.

Reg 30 Mandatory conditions for grant of entry permits

See comments in relation to schedule 5.

Reg 34 Conditions in conneciton with grant of temporary entry permit - statutory visitor

Sub regulation (a) is far too restrictive and departs from existing policy At the very least refugees, or those who have strong compassionate or humanitarian grounds should be able to seek residency. Often changes in circumstances after arrival in Australia may make returning to country of origin or last residence dangerous.

Reg 35 Notice of decision on application for visa or entry permit

The provisions relating to notice of a decision are totally inadequate Safeguard to waive these notice requirements in special circumstances should at least be included in the regulations.

Reg 36 Restrictions on Re-entry

The provisions relating to re-entry are not consistent with existing policy as expressed by paragraph 3.2.5 to 3.2.6 of the Migration Entry Handbook. Of particular concern is the ommission of the discretionary power to waive restrictions on re-entry. In relation to students paragraph 3.2.5 of the Migrant Entry Handbook allows for waiver where

- "the objectives of Australia's overseas student policies will not be undermined or
- there are compassionate or other factors inherent in the individual case which merits its approval"

In relation toother cases the merits of individual cases are considered having regard to factors such as:

. a genuine relationship with an Australian resident or citizen (e.g. spouse)

. evidence of dependency on an Australian resident or citizen (e.g. aged relative).

Impact on a relative resident in Australia if entry is denied (e.g. special need relative)

significant economic benefit to Australia resulting from approval (e.g substantial business migrant).

other strong compassionate or humanitarian circumstances.

Gravity of offence in Australia or other evidence of bad character " (Paragraph 3.2.6 of Migrant Entry Handbook)

It is important that such discretionary provisions are reflected in the regulations. Total waiver may be appropriate in some cases.

Another area of concern and radical change in policy involves the total restriction on re-entry for those deported in relation to the commission of a crime or on security grounds (see sub-regulation 36 (1) (b)). At the very least there should be discretion to waive such restrictions in cases where strong compassionate grounds exist

Reg 53. Former citizen visa The regulation in relation to former citizens is slightly different from existing policy as expressed by paragraph 11.3.9 of the Migrant Entry Handbook. In order to reflect policy the regulation under 53(c) should include a third alternative provision whereby the applicants circumstances have changed since acquiring the other citizenship to the extent that their ties with the other country . Further sub-section (e) should be amended so that only applicants whose economic viability is in doubt should seek sponsorship or assurance of support. To extend it to those who do not satisfy the public interest criteria is to change existing policy. See paragraph 11.3.9 of the Migrant Entry Handbook

Reg 56. Former resident visa: Regulation 56(e) differs from existing policy in that the regulation extends the test an applicant has to satisfy (ie that sponsorship and or assurance of support is not needed) from economic viability under policy to public interest. Clearly such a public interest test is much wider than the economic viability test under paragraph 11.3.9 of the Migrant Entry Handbook.

Reg 57. Retirement visa: Regulation 57(b) which relates "where the applicant intends to settle in Australia" differs from existing policy as expressed by Policy Control Instruction No. PC 1547. The existing policy relates to applications for "temporary residence as an extended stay retiree". Clearly the regulation requirement of "intends to settle" is contrary to "extended stay" and therefore should be omitted.

Reg 64. Working holiday visa: Regulation 64 is slightly more restrictive than existing policy as it omits the possibility of applicants from countries other than United Kingdom, Canada, Ireland, Japan and the Netherlands from applying for working holiday visas. Paragraph 12.1 of the Temporary Entry Handbook, Part 1, Visitors and Temporary Residents allows for applicants "from other countries whose entry would be of considerable mutual advantage and who are applying in their countries of citizenship may also be considered. A similar provision should also be included in the regulation in order to reflect existing policy

Reg 130. Extended Eligibility (Other) Entry Permit. This provides temporary protection on very similar grounds to strong humanitarian. Temporary protection of this kind is possible under current policy, although no written policy specifying precisely how and when temporary protection is to be extended exists. We are concerned that repeated EEO/EPs for a particular group will create hardship. The Regulations should guantee that if protection is required for very extended periods of time for example in excess of a year, permanent protection should be given. We are also concerned that this provision stipulates that a 'significant change' has occurred since the applicants arrival

Reg 136. child (after entry) entry permit: There seems to be a slight change in policy by the inclusion of sub-regulation 136(c). Existing policy does not require the Minister to be satisfied that rights and interests of any person who has custody or guardianship of the child, or access to the child, would not be prejudiced if the entry permit was granted. The Grant of Resident Status: Integrated Departmental Instructions Manual. Children of Australian Citizens or holders of a permanent entry permit at paragraph 4.1 states that no inquiry into custody need be made where the child's applications is supported by both natural or adoptive parents unless there is evidence that another person or authority has custody. At paragraph 4.2 policy states that if the child's application is supported by only one parent a check should be made to ascertain that the supporting parent has legal custody. However the further requirement of the Minister being satisfied that the rights and interests of any person who has custody or guardianship would not be prejudiced. At paragraph 4.5 policy states it is not appropriate for the Department to become involved in custody disputes nor for officers to undertake the assessment of complex custody problems. The sub-

regulation (c) requirement seems to be contrary to such existing policy. Further the regulation should include provision similar to existing policy as expressed at paragraph 4.4 of the Instructions Manual where it is stated that the custody check may be waived in the following cases

- the overseas parent cannot be located.
- the child has been estranged from the overseas parent for a substantial period of time.
- there is no evidence to suggest that the overseas parent has, or may be seeking custody.
- granting resident status is in the childs best interests.

Reg 138 Refugee (after entry) entry permit

The additional criteria as set out under sub-regulation 138(b) are not to be found under existing policy. Existing policy as set out in the Integrated Departmental Instructions Manual: Grant of Resident Status, Refugee status, states that apart from satisfying legal conditions and policy guidelines of the present section 6A (1) (c) of the Migration Act 1958 the applicant will have to satisfy the health and character requirements before residency status is granted (see paragraph 2.1.2). The policy guidelines relating to the Migration Act condition is that the decision-maker will be guided by the recommendation of the Determination of Refugee Status Committee as well as the Australian Government policy guidelines in relation to the determination of refugee status which take into account the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*. Correctly under existing policy there is no further requirement that resettlement in Australia be in the best interests of the applicant and such resettlement would not be contrary to the interests of Australia. The additional criteria as set out in Regulation 138(b) is attempting to introduce new stricter requirements for refugee resident status applicants. Such a provision is likely to lead to inconsistent decision-making and unfairness in many cases. Terms such as "best interest of the applicant" and "not contrary to the interest of Australia" are far too broad and subjective.

Reg 140 Compassionate Grounds entry permit

The additional criteria in relation to grant of resident status on compassionate grounds as set out in regulation is much more restrictive than existing policy.

The present policy in str ng compassionate circumstances as set out in the Integrated Departmental Instructions Manual, Grant of Resident Status, Vol. 1 No. 6, Strong Compassionate Grounds at paragraph 2.4 sets out two broad groups of individuals which can be distinguished.

The first group relates to those whose claim is based "principally on the advantage to an Australian citizen or resident if they were to remain in Australia and the claim that their departure would significantly disadvantage an Australian resident".

The second group relates to those whose claim is based on "compassionate factors in their personal circumstances and that it would be unreasonable from a compassionate viewpoint to require them to leave".

The requirement set out in sub-regulation 140(1)(c) that the applicant be nominated by an Australian citizen or resident whose mode of life would be seriously affected if the entry permit were not granted will exclude the second broad group above as well as some former Australian citizens and residents from being considered on the compassionate change of status grounds.

This presents a radical change in immigration law and policy and is particularly harsh on those whose circumstances have changed since arriving in Australia and who have strong compassionate reasons to remain in Australia.

Further problems occur when sub-regulation 140 (1) (c) is considered in connection with compassionate grounds such as an aged dependant relative, an orphan relative a remaining relative former citizen, former resident or family reunion (New Zealand citizen). The applicant relying on such grounds may have difficulty proving that an Australian citizen or resident nominee's "mode of life would be seriously affected if the entry permit was not granted". This is too harsh a requirement and is a clear departure from existing policy. It is likely that in many cases such a provision would be unworkable as it presents an anomaly with sub-regulation 140(2).

The grounds refered to as being strong compassionate grounds under sub-regulation 140 (2) are far too restrictive and do not reflect existing policy and law on the definition of strong compassionate reasons. Most, if not all individuals included in the second broad group above would be excluded. Under existing law and policy the compassionate grounds are not exhaustive and each case is considered on its merits after having regard to all the circumstances of the individual's case. (see also paragraph 3.3 of the Integrated Departmental Instructions Manual, Grant of Resident Status Vol. 1, No. 6 Strong compassionate grounds). It is important that the wider and existing definition of compassionate grounds is maintained in the regulations. The Minister's discretion should not be limited to the exhaustive list under sub-regulation.

Reg 141, Humanitarian grounds entry permit

The additional criteria in relation to humanitarian grounds is substantially more restrictive than existing policy in a number of areas.

Firstly, sub-regulation 141 (b) (ii), (iii) and (iv) introduces additional criteria which are presently not relevant in determining whether a person has humanitarian grounds. Nowhere under existing policy is the applicant required to prove that it is in their best interest to take up permanent residence in Australia, that it would not be contrary to the interests of Australia to allow them to take up Australian residence or that there is no other country which would offer them long term protection.

Under existing policy guidelines (see paragraph 2.3 of the Integrated Departmental Instructions Manual Grant of Residence Status, Vol.1, No. 10 Strong Humanitarian Grounds) humanitarian applicants are required to "demonstrate ... or have a sound basis for expecting substantial violations of their human rights in their country of origin or country of last permanent residence". Such a definition of strong humanitarian should be included in the regulation.

Further, under existing policy guidelines (at paragraph 2.3.2) the applicant is required to demonstrate the following:

- "it would be significantly unfair or unjust to expect the applicant to return to their country of origin or last residence because severe hardship would result;

- residence elsewhere would be inappropriate;

- the circumstances on which the claim relies should be of indefinite duration or, if no longer current, have so severely affected the applicant

as to render effective rehabilitation in the country of previous residence unlikely;

- the claims being advanced are based on the applicant experiencing greater adversity than that experienced by the general population of the applicant's country of residence."

Clearly such policy has not been correctly translated into the regulations. The requirement of "in the best interests of the applicant to take up permanent residence in Australia" is a more restrictive and vague test than the existing policy requirement that it would be significantly unfair or unjust to expect the applicant to return to their country of origin or last residence because severe hardships would result. The onus should not be on the applicant to prove that it is in their best interests to take up residence in Australia (as opposed to residence elsewhere). The test should be that it would be unjust or unfair to return to their country of origin or last residence because severe hardship would result. Further the onus should not be on the applicant to demonstrate that there is no other country which would offer long term protection. The applicant should have to demonstrate that residence elsewhere would be inappropriate. As mentioned above in relation to the refugee provisions terms such as "best interest of the applicant" and "not contrary to the interest of Australia" are far too broad and subjective, thus leading to greater potential for inconsistent decision-making and unfairness to genuine applicants.

The definition of "strong humanitarian grounds" under sub-regulation 141 (2) is again inconsistent with existing policy and is far too narrow. The definition should not be exhaustive but should cover the range of situations in which an applicant may have experienced or has a sound basis for expecting violations of human rights in the country of origin or last residence.

Existing policy at paragraph 2.3.2 of the Intergrated Departmental Instructions Manual, Grant of Resident Status Vol. 1 No. 10, Strong Humanitarian grounds states that "humanitarian claims may relate to incidents or circumstances which occurred prior to or after arrival in Australia." The requirement under sub-regulation 141 (2) (b) that there be "the occurrence of significant changes" is a clear departure from such policy and is a much more restrictive requirement. An example is where repression of a group has been constant for several years (ie there has been no 'significant change' for the group) but there are increasingly serious dangers of human rights violation to an individual member of the group who thus flees to Australia. It appears doubtful that this individuals situation will fit the new definition of "strong humanitarian grounds".

A further restriction under the regulation definition is the requirement of being a member of a group or body. The danger is that the term "member" could be interpreted strictly. More importantly, it ignores applicants who, although they may not be a member of a particular group or body which is suffering repression or significant restricitons, may on an individual basis may on return to their homeland may face discrimination.

Paragraph 2.3.9 of the existing policy instrucitons allows for situations where people have made strong political, social, moral or economic criticisms of the present socio-economic system in their country of nationality or habitual residence to gain residency on humanitarian grounds. This is so notwithstanding that the applicant may not be a member of a particular group or body which is suffering repression or significant restricitons

A maior change in the new definition is the absence of the requirement to be "singled out." This would make eligible a person who had no special unique reason to believe they would be singled out for repression, although the group to which they belong may be facing an increase in repression. The only constraint on this is the Minister's discretion that it would not be in the applicant's best interests to take up permanent residence

Reg 143 Waiver of good character requirement

The provisions relating to waiver of good character requirements do not correctly reflect exisiting policy as stated at chapter 6 of the Migrant Entry Handbook. An important omission in the regulations of an existing power to waive character requirement is the policy under paragraph 6.5.3. of the Migrant Entry Handbook which allows for waiver where "strong compassionate or other grounds justify" or where "circumstances are sufficiently grave". It is important that such existing discretionary power is retained in the regulations

Reg 144 Waiver of health criteria

The provisions relating to waiver of health criteria seems to be narrower than existing policy as it limits waiver only to certain types of health conditions

Reg 146 Qualification - suitability for employment

146(a) This differs from existing policy in two areas. Firstly in relation to sub-regulation 146 (a) (ii) present policy does not require both registration and licensing for many occupations. Secondly present policy

does not state that the applicant must have worked in teh occupation for 3 years or more, immediately before the date of the application as is required under sub-regulation 146 (a) (iii).

Reg 147 Qualification - relationship

subreg 147 (b) This differs from existing policy as it does not include half-brothers or half-sisters.

subreg 147 (c) and 147 (2) (b) The requirement under these two provisions represents a harsher rule than existing polict. Under existing policy relating to step-relatives there is no 3 year period requirement.

SCHEDULE 1

CRITERIA AND REPRESENTATIVE SYMBOLS

6(b) Custody or guardianship - see comments on regulation 136

9. Health Standard

There seem to be a number of slight differences in the health standards criteria when compared with existing policy as expressed at paragraph 2.5.4 of the Health Standards for Permanent or Long-Term Entry or stay purposes (Health Manual). Firstly at paragraph (a) of the regulation criteria "tuberculosis or any other communicable disease" is referred to whereas at point 1 of paragraph 2.5.4 of the Health Manual reference is made to "transmissable disease". Secondly paragraph (b) of the regulation criteria differs from existing from existing policy in that point 3 of paragraph 2.5.4 of the Health Manual refer to "any other contagious or infectious disease" whereas reference is only made to "any other disease" in the regulation. Thirdly the wording under (c) (i) of the regulation criteria is much wider than existing policy. Points 5, 6 and 9 of paragraph 2.5.4 of the Health Manual refers to care or treatment in "institutions", "special schools" or "hospital". Fourthly, paragraph (c) (ii) is much wider than exisiting policy set out under point 7 of paragraph 2.5.4 of the Health Manual. The Health Manual refers to requiring "treatment by life saving drugs which are in short supply" where the regulation criteria refer to "requiring care or treatment ... involving the use of community resources in short supply". Fifthly, paragraph (c) (iv) of the regulation health criteria is much wider than existing policy which is stated at point 7 of paragraph 2.5.4 of the Health Manual. Existing policy

limits the criteria to people who "require treatment by life saving drugs which .. would represent very considerable expense in public funds".

Note: That the criteria relating to (5) public interest, (7) balance of family test and (16) good character and readmission have already been discussed above in the interpretation sections.

SCHEDULE 2

CLASSES OF VISAS, PRESCRIBED CRITERIA AND CODE NUMBERS

PART 1 - CLASSES OF VISAS NOT SUBJECT TO SPECIAL PROVISION (SUB REGULATION 41(4) APPLICABLE)

2. **Child** As noted earlier in the interpretation section dealing with "public interest" the child should also be exempt from the settlement factor under paragraph (e) of that definition According to existing policy children are exempt from settlement assessment.

3. **adoption**. As noted earlier in the interpretation relating to "public interest", the adopted child should also be exempt from the settlement factor under paragraph (e) of that definition According to existing policy adopted children are exempt from settlement assessment.

5 **preferential family** The group of relatives set out as falling under the preferential family class differs from existing policy as it has omitted the fiance, spouse, child, adopted child or parent of Australian citizen or resident (see paragraph 6.1.1 of Migrant Entry Handbook)

7 **labour agreement** "Under existing policy criteria Symbol H' and N apply to labour agreement category

13. **former citizen** See comments regarding regulation 53 above

14 **former resident** See comments regarding regulation 54 above.

15. **refugee** The prescribed criteria of (A) which related to the quota and (F) which relates to balance of Family test should not apply to [illegible] applying for migration to Australia as refugees have in the past been subject to a flexible quota The prescribed criteria of (A) which related to the quota and (F) which relates to balance of family test should not apply to refugees. Those applying for migration to Australia as refugees have in the past been subject to a flexible quot however those applying for refugee status whilst in Australia and those refugees applying for permanent residency whilst in Australia have not previously

been limited to a set quota Therefore if the refugee class includes change of status and in-country applications then prescribed criteria (A) should not apply. Further the balance of family test does not, under existing policy apply to refugees and should therefore be omitted.

17. **retirement**: See comments regarding regulation 57 above.

24. **working holiday**: See comments regarding regulation 64 above. Further, under existing policy (see Annex 16 of chapter 14 of the Temporary Entry Handbook Part 1) working holiday makers are excluded from having to satisfy the health and character requirements Therefore prescribed criteria (H) and (D) should be omitted from the regulations.

27. **entertainment**: The inclusion of prescribed criteria (D) relating to public interest and (H) relating to health demonstrated a change of policy See Annex 16 of chapter 14 of the Temporary Entry Handbook, Part 1 where the health and character requirements are not applicable to entertainers. Therefore prescribed criteria (D) and (H) should be omitted.

31. **public lecturer** The inclusion of prescribed criteria (D) relating to public interest and (H) relating to health demonstrate a change of policy. See Annex 16 of chapter 14 of the Temporary Entry Handbook, Part 1 where the health and character requirements are not applicable to public lecturers Therefore prescribed criteria (D) and (H) should be omitted

45. **prospective marriage** The prescribed criteria of (prospective spouse) relating to sponsorship requirement does not correctly reflect existing policy Under paragraph 8.4.3 of the Migrant Entry Handbook states that in "the case of a 16 or 17 year old female in Australia, sponsorship of the male fiance by her parent or guardian is required". As if sponsorship under the regulations is limited to those 18 years or older then either the definiton of "sponsorship" should be amended or the prescribed criterion relating to sponsorship of a prospective spouse should include prospective spouse's parent or guardian (if the prospective spouse is 16 or 17 years of age).

55. **Return visa, Class A**. The regulation prescribed criteria of (D) relating to public interest criteria and (O) relating to good character and readmission do not comply with existing requirements The Resident Return Handbook does not require permanent residents to further satisfy public interest, settlement or good character requirements

56. **Return visa, class B** - The regulation prescribed criteria of (D) relating to public interest criteria and (O) relating to good character and readmission do not comply with existing requirements. The Resident

Return Handbook does not require permanent residents to further satisfy public interest, settlement or good character requirements.

57. **Return visa, class C** - The regulation prescribed criteria of (D) relating to public interest criteria and (O) relating to good character and readmission do not comply with existing requirements. The Resident Return Handbook does not require permanent residents to further satisfy public interest, settlement or good character requirements.

58. **Return visa, class D** -The regulation prescribed criteria of (D) relating to public interest criteria and (O) relating to good character and readmission do not comply with existing requirements. The Resident Return Handbook does not require permanent residents to further satisfy public interest, settlement or good character requirements.

59. **Return visa, class E** - The regulation prescribed criteria of (D) relating to public interest criteria and (O) relating to good character and readmission do not comply with existing requirements. The Resident Return Handbook does not require permanent residents to further satisfy public interest, settlement or good character requirements.

SCHEDULE 3

CLASSES OF ENTRY PERMITS AND CODE NUMBERS

PART 2 - CLASSES OF ENTRY PERMITS TO WHICH ADDITION PRESCRIBED CRITERIA APPLY

3 **Child (after entry)** see comments on regulation 136 relating to child (after entry) entry permit

5 **refugee (after entry)** see comments on regulation 138 relating to refugee (after entry) entry permit

7 **Compassionate grounds** - see comments on regulation 140 relating to compassionate grounds entry permit

8 **Humanitarian grounds** - see comments on regulation 141 relating to humanitarian grounds entry permit.

SCHEDULE 4

PRESCRIBED QUALIFICATIONS AND PRESCRIBED NUMBER OF POINTS

1. see comments in relation to sub-regulation 146 (a).

15. The prescribed qualification relating to the ability to speak and write English under the regulation is harsher than existing policy as expressed under paragraph 14.3.9 of the Migrant Entry Handbook. The existing policy is as follows

. ability to speak English with little or no hesitation with few errors in most work and social situations.

. ability to complete all forms used in daily life and write more complicated reports and letters in most work and social situations.

Clearly speaking English "in any situation" is potentially a harder test than speaking "in most work and social situations than in any situation Writing English "in any context" is also potentially a harder test than completing "all forms used in daily life" and writing "in most work and social situations". The regulation requirement could fall into the danger of being a quasi-dictation test.

20. see comments in relation to sub-regulation 147 (b).

21. see comments in relation to sub-regulation 147(c) and 147 (2) (b)

SCHEDULE 5

MANDATORY CONDITIONS FOR GRANT OF VISAS AND ENTRY PERMITS.

9 It is confusing why a mandatory condition that the holder of a visa or entry permit relating to (41) a homosexual partner or (42) a supported dependant should not change employer without permission of Secretary It does not presently apply as policy

12. It is contrary to existing law and policy as well as to fairness not to allow refugees to apply for other change of status grounds were relevant. Surely a refugee applicant, who may have to wait up to a few years before his or her case finally determined should be able to apply for change of status on another ground if one example circumstances have changed and strong compassionate grounds exist

13. See comments relating to Item 12 above

ADDITIONAL COMMENTS AFFECTING REFUGEES

Visitor and Tourist visa criteria

The regulation requirement that tourist and visitor visas are subject to public interest and health checks is likely to adversely affect certain genuine refugees who seek a visitor visa in order to flee persecution.

This could prevent individuals fleeing persecution from applying for visas from within their own country, with their own or false passports, because of the attention this will draw from their own government, which may be seeking them.

The public interest criteria and health checks may only serve to filter out genuine refugees, not abusers of the system.

Refoulement

It is good to see that some attention is given to the special circumstances of refugees and asylum-seekers, but there are still some loop-holes which could lead to refoulement:

a) The "late change" in the Migration Legislation Amendment (Consequential Amendments) Bill to s17A is not necessarily sufficient. It is hoped that an application for refugee status can be considered after expiry of the period of grace - however this section is expressed ambiguously. Attention is drawn to Article 31 "Refugees unlawfully in the country of refuge" in the 1951 UN Convention on Refugees.

b) Visa/entry permit class 49 is of great concern. It appears to be the only one to which s11P(4) (b) applies. That section is a blanket prohibition on issue of any type of further entry permit and neither the Act nor the Regs. exempt refugees. A person entering Australia with a class 49 could therefore be barred from getting refugee status and would have to be deported under 17A. Attention is drawn to Article 33 "Prohibition of expulsion or return (refoulement)" in the 1951 UN Convention on the Status of Refugees.

amnesty international australia

Ste 6, Level 3, 134 Broadway, NSW 2007
Private Bag 23, Broadway, NSW 2007
Tel (02) 211 3566 Fax (02) 211 3608 Tlx AA123206

Ms Robina Mills,
Secretary,
Joint Select Committee on Migration Regulations
Parliament House,
Canberra 2600.

7th November, 1989.

Dear Ms Mills,

Please find following our submissions on the draft regulations under the Migration Act 1958.

If you have any inquiries relating to our submission please do not hesitate to contact me.

Yours sincerely,

Harris van Beek
National Director

Submission No. 5
Date Received 7 NOV 89

DRAFT REGULATIONS TO THE MIGRATION ACT 1958 AND THE CONCERNS OF AMNESTY INTERNATIONAL AUSTRALIA

AMNESTY INTERNATIONAL'S MANDATE

1. Amnesty International opposes the removal of persons from one country to another where they can reasonably expect to become prisoners of conscience, face torture, extra-judicial execution or the death penalty.

2. Given this mandate, Amnesty International Australia's (AIA) concerns with Australia's immigration legislation and policy are limited to the extent that they ensure that the actions of the Australian Government do not result in anyone becoming a prisoner of conscience, or being subjected to torture, extra-judicial execution or the death penalty.

3. Throughout this submission, "asylum" is used to embrace both refugee status as determined by the UN Convention Relating to the Status of Refugees (the Convention), and the less rigorous procedures for the grant of permanent entry on strong humanitarian grounds (section 11ZD(1)(g) Migration Act, 1958 (the Act))

AIA'S CONCERNS

4. Broadly, AIA is concerned that the Act, and its Regulations - which largely address issues of immigration control - should have the necessary flexibility to safeguard the rights of asylum-seekers.

5. AIA maintains that any person eligible to apply for refugee status should also be entitled to apply for a permanent entry permit on strong humanitarian grounds. This provision is generally recognized as a "safety net" to catch asylum-seekers who fall through the anachronistic Convention definition of a refugee, yet still have compelling humanitarian reasons for not wanting to return to a country.

6. AIA notes that under section 11ZD(1)(g) of the Act the possession of a valid temporary entry permit remains a pre-requisite to an application for a permanent entry permit on humanitarian grounds. AIA's concerns with the draft regulations are limited to the issuing of temporary entry permits, and how they will affect an asylum-seeker's access to Australia's protection on "strong humanitarian grounds".

ILLEGAL ENTRANTS

8. AIA considers an asylum-seeker's "illegal" immigration status to be irrelevant when deciding whether that person can reasonably expect to become a prisoner of conscience, or face torture, extra-judicial execution or the death penalty on return to a country.

9. AIA believes that Australian immigration law and policy should not distinguish between "legal" and "illegal" applicants for asylum.

10. We note that under the Act, there are several predictable ways in which an asylum-seeker may become an illegal entrant:
    a) by *inter alia, using false documents, making false* statements, or "evading" an officer (section 11A Act);
    b) by inter alia, having been convicted of a crime and and sentenced to death, to imprisonment for life, or to imprisonment for a period of at least one year (section 11A Act);
    c) by the expiry of their entry permit (section 6(3) Act);
    d) *by having their entry permit cancelled at the absolute* discretion of the Minister (section 11R Act)
    e) by the operation of the the "capping" provision of section 11W Act whereby the Minister may stop dealing with applications for entry permits until further notice.

11. We note that under regulation 26 (prohibition against grant *of entry permit) asylum-seekers who have become illegal* entrants will be prevented from gaining an entry permit
    a) where their application is lodged more than 2 working days after being arrested under section 38 or section 39 of the Act; or
    b) specifically excluding persons mentioned at (a) and (b) of paragraph 10, where an application is lodged *more than 6 months after becoming an illegal entrant.*

12. We note that this prohibition may operate to exclude an asylum-seeker's access to Australia's protection under section 11ZD(1)(g) of the Act (permanent entry on strong humanitarian grounds). An application for refugee status will not be prevented, but the "safety net" will be removed.

13. We note that not all asylum-seekers who are illegal entrants will be disadvantaged by operation of regulation 26. It will depend on the circumstances by which the asylum-seeker acquired his or her "illegal" status. Those who became an illegal entrant because of subsection 6(2) of the Act (which inter alia includes those referred to at (a) and (b) *of paragraph 10) are specifically excluded.*

14. In addition to our point at paragraph 8, AIA believes that *an asylum-seeker's access to section 11ZD(1)(g) should not* hinge on how that person came to be classified as an "illegal entrant".

15. Therefore, noting the humanitarian flexibility of regulation 26 with respect to persons who have been granted refugee status, AIA recommends that similar flexibility should be demonstrated with respect to asylum-seekers who wish to make an application under section 11ZD(1)(g) of the Act. The regulation should not be used to effectively deny an asylum-seeker the "safety net" he or she would enjoy but for being classified as an illegal entrant.

HUMANITARIAN ENTRY PERMITS

16. An asylum-seeker who wishes to apply for a permanent entry permit on humanitarian grounds (section 11ZD(1)(g) of the Act), where they are not the holder of the pre-requisite valid temporary entry permit, will presumably have to apply first for an entry permit on humanitarian grounds.

17. Regulation 42(4) (prescribed criteria - classes of entry permits) establishes what will be taken into account in any application for an entry permit on humanitarian grounds:
    a) Regulation 141: (presumably schedule 3, part 2, item 8, column 3 (a) should read regulation 141 and not 140) and
    b) - public interest criteria
       - the applicant's family
       - health criteria

    Regulation 141 and the public interest criteria attract most concern, and are dealt with below;

18. Regulation 141(1): (n.b. paragraph (1) not numbered) AIA notes that paragraph (1)(b) inserts new conditions not reflected in current policy. It is AIA's opinion that they impose unnecessarily strict requirements, with enormous Ministerial discretion, that may be used to negative the humanitarian basis to the application. If strong humanitarian grounds do exist, then AIA believes this should be paramount. For example, an asylum-seeker who could reasonably expect to become a prisoner of conscience could be denied a humanitarian entry permit simply because the Minister decided that it was not in her best interests to remain in Australia (paragraph (1)(b)(ii)). This is patronizing in the extreme. What the Minister decides is in the "interests of Australia" may also prevent an asylum-seeker from gaining an entry permit (paragraph (1)(b)(iii)). The discretion is enormous. Further, the

Minister must be satisfied that there is no other country which would offer the applicant long term protection (paragraph (1)(b)(iv)). This last provision reflects a hostile attitude towards asylum-seekers, and is particularly onerous on the asylum-seeker. AIA believes it is not in the best interests of Australia to shift our humanitarian responsibilities in this way.

19. Regulation 141 (2): The meaning given to "strong humanitarian grounds" is new and does not reflect current policy. AIA believes it is too narrow.
    - It refers to "significant changes" in the country concerned. Obviously, a person may seek Australia's protection because of changes to their individual circumstances, without there being any "significant changes" in the relevant country.
    - Further, there does not necessarily have to be any change for an individual to have humanitarian reasons for seeking Australia's protection. Where a civil war has been raging for 10 years, there is no "change" as such.
    - The asylum-seeker must be a member of a group or body which is suddenly facing repression or significant restrictions. AIA is aware that "membership" has been defined extremely narrowly in the past to exclude persons who are associated or affiliated with a group or body. "Member" should be unambiguously stated to give its broader meaning.

20. Public Interest Criteria: (regulation 2 (interpretation)) Firstly, it will require an asylum-seeker to be of "good character". This in turn is defined by regulation 4. It excludes persons assessed to be a risk to Australian national security (paragraph (a)(i)) persons who have been convicted of crimes and imprisoned for various periods (paragraph (a)(ii)(A) and (B), persons found by a court to be of unsound mind and found guilty or acquitted (paragraph (a)(ii)(C), persons who the Minister believes by their activities have shown an habitual contempt or disregard for the law (paragraph (a)(iii) or persons who have been convicted of an offence that the Minister believes indicates an habitual contempt or disregard for the law (paragraph (b)).

    AIA notes that by operation of regulation 143 the requirement of "good character" may be waived. (n.b. in regulation 143 (a)(i) and (ii) it is not clear what subparagraph 5(a)(i), (ii) and (iii) refer to). It allows the Minister to disregard any period of imprisonment where he or she is satisfied that it was imposed in reality for a "political offence" (paragraph (c)(ii). AIA is concerned; that many prisoners of conscience, whose imprisonment should not count against them, were not imprisoned because of "political offences". c.f. those imprisoned because of their religious beliefs.

Further, AIA recommends that where a conviction against an asylum-seeker for "an offence indicating, in the reasonable belief of the Minister, an habitual contempt or disregard for the law" (regulation 4(b)) denies him or her the required "good character", the Minister should be required to take into account the fairness of the law and the fairness of the trial. Amnesty International has extensive documentation on countries whose laws and trial procedures are unfair in the extreme.

AIA is also concerned that an asylum-seeker's activities "indicating an habitual contempt or disregard for the law" (regulation 4(a)(iii)) and thus grounds to deny him or her the required "good character", may be the very activities which constitute the asylum-seeker's humanitarian reasons for seeking Australia's protection. e.g. writing articles in contravention of a country's anti-subversion laws.

AIA believes that the waiver of good character requirement (regulation 143) should be broadened to encompass our concerns. Where a person can reasonably expect to become a prisoner of conscience or face torture, extra-judicial execution or the death penalty, their lack of "good character" should not be used to deny them Australia's protection.

21. Public Interest Criteria: other requirements: Broadly speaking, AIA believes that where an asylum seeker can reasonably expect to become a prisoner of conscience, or face torture, extra-judicial execution or the death penalty, then the public interest criteria as listed should not be used to deny them Australia's protection.

    In particular, the requirement that the asylum-seeker be "likely to become established in Australia without undue personal difficulty and without imposing undue difficulties or costs on the Australian community" (paragraph (e)) reflects a hostile attitude to asylum-seekers, and a lack of humanitarian concern that is not in Australia's best interests.

RESTRICTIONS ON APPLICATIONS FOR ENTRY PERMITS

22. Sections 11S and 11T of the Act impose restrictions on applications for entry permits whilst a person remains in Australia. These restrictions do not apply where changes prescribed in regulation 40 have occurred.

23. The prescribed changes of interest to AIA are (e) substantial political upheaval and (g) significant changes involving repression etc.

24. Our criticism of these presecribed changes are the same as those given in paragraph 19 above in relation to regulation 141. Further, it is of concern that a "political upheaval" must be specified as such by the Minister by notice published in the Gazette. The discretion is enormous!

ADDITIONAL NOTES:

25. In the ridiculously short time available it has not been possible to consider the regulations in detail. The above reflect AIA's concerns with the most obvious aspects of the regulations that we find objectionable. It is not an exhaustive treatment of our concerns.

LAW COUNCIL OF AUSTRALIA
THE NATIONAL COUNCIL OF LAWYERS

VBM:IK:FPLS:2110(4310)

VIA FACSIMILE

7 November 1989

Ms Robina Mills
Secretary
Joint Select Committee on
Migration Regulations
Parliament House
CANBERRA ACT 2600

Dear Ms Mills

Thank you for your letter of 6 October 1989 which was received at this office on 1 November 1989.

The proposed Migration Regulations have been considered by the Law Council of Australia. The regulations are concerned with the circumstances in which visa and entry permits should be granted, and associated matters. The Law Council of Australia considers that these matters are matters of policy upon which it is not appropriate that it should put submissions to Government.

However, it is noted that Part III of the Migration Amendment Act 1989 provides for the review of decisions made under the Migration Act 1958 but does so in terms that the decisions which can be reviewed, and the way in which the review is to take place, are largely to be provided for in regulations. The Migration Regulations under present consideration contain no provisions relating to review, and, *therefore, contain no provisions conferring any right of* review relating to the matters dealt with in the regulations. It is the opinion of the Law Council that detailed provisions relating to the granting of visas and entry permits should not be made unless and until the regulations relating to the review of the relevant decisions are also promulgated.

IAN POTTER HOUSE CNR EDINBURGH AVENUE AND MARCUS CLARKE STREET ACTON ACT 2601 GPO BOX 1989 CANBERRA ACT 2601 TELEPHONE (062) 47 3788
TELEX AA62690 DX 5719 CANBERRA TELEFAX (062) 47 3626

The only submission, therefore, which the Law Council of Australia wishes to make with respect to the proposed Migration Regulations is that they do not contain any provisions relating to the review of the decisions which will be made under the regulations; nor, for that matter, for the review of any decisions made under other provisions of the Migration Act.

The Law Council asks that the promulgation of the regulations be delayed until the review regulations are also prepared, made available for comment, and promulgated.

Yours sincerely

Peter Levy
Secretary-General

Victorian Ethnic Affairs Commission
232 Victoria Parade, East Melbourne, Victoria 3002.
Telephone: (03) 412 6700

Submission No. 7
Date Received

Your Ref:

In Reply Quote Ref: AF:mh

8 November, 1989

Ms. R. Hills,
Secretary,
Joint Select Committee on
Migration Regulations,
Parliament House
CANBERRA A.C.T. 2600

Dear Ms. Mills,

I refer to your letter of 1 November 1989 regarding draft regulations under the Migration Act 1958.

Please find enclosed my comments which I hope will be of assistance to the Joint Select Committee.

Yours sincerely,

GEORGE PAPADOPOULOS
Chairman

Comments on Draft Regulations

The following comments are offered on the draft regulations under the Migration Act 1958 which relate to decision criteria for the grant of visas and entry permits.

Before making some specific comments on the draft regulations, it may be appropriate to raise some general points:

(i) The opportunity to comment on the draft regulations is most welcome and the process is strongly supported.

(ii) The time limit for comment on the regulations was far too short. Accordingly, lack of time prevented serious consideration of what is a highly detailed document.

(iii) It is recommended that in future there be an opportunity for public discussion of the draft regulations.

(iv) It is recommended that at some time in the future the regulations be provided in plain English.

(v) It is expected that there will be a further opportunity for comment on the draft regulations related to the Immigration Review Tribunal.

(vi) As an overall comment, it would appear that the regulations in codifying current policy have been much more restrictive. Areas of discretion which currently are part of of decision making now appear to be missing. Two obvious examples are the definition of "aged dependent relative", where the normal requirements have become the sole test and the definition of humanitarian in which the most common

examples form the fixed definition. If this tendency is allowed to remain it would have the unintended effect of changing policy.

Definitions

The following comments are made on the definitions:

"Aged dependent relative" (p2) (d) should read "who is dependent on that person". That is any reference to a period of dependency should be deleted and so bring the regulation into line with current policy which merely refers to the normal situation of demonstrating dependency.

Under the definition of sponsorship it would appear that sponsors are required to provide financial support for an indefinite period. This would appear to be contrary to current policy.

Under the interpretation of good character an applicant may be taken not to be of good character if they have habitually "disregarded the law". This could include the flouting of the laws of *oppressive regimes. Presumably this is not intended.*

Regulations

The following comments are offered on the regulations:

Regulation 16 (8)(n) (p25) allows for a terminating condition that "the holder is not to marry before entering Australia". It is recommended that this condition be dropped.

Reg.19(2) It is questioned whether there is a need for such a widesweeping restriction on a Minister to grant an entry permit.

Regulation 36 is welcome in part particularly 36(1)(d) which details the re-entry rights of persons detected illegally in Australia and 36(4) in waiving any time periods, if the person is granted refugee status. However it is pointed out that the *regulations do not grant the Minister the power to allow for the* immediate re-entry of people in special circumstances. Although current policy allows discretion in special cases, it is clear that the regulation does not. The example of illegal immigrant children who inadvertently become illegal is an obvious case.

Reg 38 It is believed that the balance of family test is now intended to read simply "...is not fewer than the *number resident* in any one overseas country".

Regulation 40 details the "Prescribed Change of circumstances" referred to in paragraphs 11S (1)(a) and 11T (2)(a) of the Act. Although these provisions may afford some discretion and flexibility with illegal entrants in very important areas it is unreasonably strict, with gazettal as a mandatory 'condition precedent' to any beneficial offering. This criticism is related to Regulation 40(e) which is considered to be very inflexible such that if there is no gazettal, then no benefit prevails, irrespective of the merits of individual cases. Accordingly, a provision allowing for discretion in individual non gazetted situations should be included.

This is to be contrasted with Regulation 40 (g) which requires no gazettal, but significant 'changes'. It is therefore suggested that the reference to 'changes' be replaced with 'events' so as to cater for ongoing unsatisfactory upheavals.

It is further noted that reg. 40(h), however, offers a wider benefit in its simple requirement that the applicant has been granted refugee status without the need for gazettal, or a significant "change" qualification. Although preferable, the problem with this is that providing refugee applications continue *to take the current 2-3 years to process, there will be a lengthy* time span between application for change of status and recognition of refugee status, without any interim status afforded applicants.

Regulation 55 specifies additional criteria in relation to the granting of a refugee visa. The applicant must meet the requirements "specified from time to time by the Minister, in relation to a refugee programme administered by the Dept...." The phrase "specified from time to time" in effect gives the Minister ultimate flexibility with respect to reliance upon policy and possibly maintains the status quo, merely putting into writing the current practice. Accordingly, provided the Minister's actions comply with pre existing administrative law requirements, this may not really change the current position. Codification, therefore, may provide no greater certainty for applicants.

The major concern however lies in the arbitrary and uncertain nature of the terminology. Although it may enable a flexible approach to individual cases, which is not constrained by the requirement of gazettal, the uncertain component relates to what satisfies "specified". Does this mean it must be written, circulated as a ministerial minute, or some other form of inter departmental communication, before it can be considered "specified"? If this is not adequately 'specified', does that defeat the applicants otherwise bona fide claim?

It is noted that Regulation 57 does not allow for situations in which a retiree may enter Australia if they have dependents. It is questioned whether this is intended. Indeed, the restriction would appear to be unnecessary.

It is suggested that Regulation 64 should not specify individual countries but rather should include a general clause referring to countries with which Australia has a signed agreement.

Attention is drawn to Regulation 68(a)(i)(B) referring to individuals representing Taiwan. In the light of Melbourne's bid for the 1996 Olympic Games it is assumed that this regulation would not create a diplomatic difficulty.

Regulation 92 is regarded as too prescriptive and in any case does not appear to reflect current policy. These restrictions should be omitted.

It is questioned as to why Regulation 95 does not include an applicant who holds a refugee or humanitarian based Visa.

It is questioned why there is a necessity to have a sunset clause (Regulation 100) for regulations in Division 3.

Concern is raised about regulations 116, 117, 118 and 119. These regulations relate to a Refugee, A, B, C, D (restricted) Visa, or entry permit, respectively. Although the clarification of different status of refugees is welcomed and it is appreciated that the different visas are based on the merits of the applications, some major concerns should be noted. In particular visa category "A", Reg. 116 (d)'s requirement that "permanent settlement in Australia is the appropriate course for the applicant", could be regarded as an attempt by Australia to ship out any "problems" to other countries. (see also 141(b)(iv).

Uncertainty is also created by the requirement in reg. 116(e) (incorrectly noted as (d)) that settlement of the applicant in Australia would not be contrary to the "interests of Australia". The question again is what does this mean - character and or health consideration? Is it meant to fall within the "public interest" criteria in the definition section? Is it tied to regulation 4's criteria as to what constitutes good character?

With regard to Regulation 130 it is noted that among other things applicants (who are affected by natural disaster) must satisfy "public interest criteria. It may be asked at this point, when, what and how are public interest criteria applicable.

With regard to Regulation 138 where resettlement must be in the best interest of the applicant and not contrary to the interests of Australia, it must again be asked what these terms mean.

It is noted that with Regulation 140 entry on compassionate grounds is tied to nomination by an Australian citizen or permanent resident in that their mode of life would be seriously effected if the entry permit was not granted. Yet it is restrictive in that it is tied to a "relative" as specified. Is that within the policy objectives for persons seeking a "compassionate" view of their position. What about orphans with no relatives? What about the other policy grounds, that is what has happened to the compassinate elements in current policy.

With regard to Regulation 141 it would appear that all humanitarian grounds appear reasonable except for 141 (b) (iv). This criticism is similar to that made with respect to regulation 116. It is recommended that this clause be deleted.

A more important consideration relates to the very restrictive definition of a "humanitarian ground", which is detailed in Regulation 141(2). It is noted that 141(2)(b) refere to 'significant changes'. However, this fails to recognise the frequent and very grave consequences to applicants subjected to ongoing political oppression but which may not really be viewed as a "change". Accordingly, this strict requirement would most probably deny any humanitarian grounds to people from country's such as Somalia, Ethiopia, Iran, Sierra Leone or South Africa for example, who after finally managing to escape, cannot prove that the country "changed" very recently.

A possible solution would either be to include in (a) the political or social factors noted in (b), and substitute the word "events" for "changes" in (b). Additionally it may be preferrable to enable the gazettal of policy considerations in relation to particular countries (eg as with Lebanon), or a catch-all phrase which catered for a real "humanitarian" approach to individual circumstances.

Some concern is raised in regard to Division (7) - waiver of good character and Health Requirements' - Regulations 143(b) and 144(3). The use of the term "undue harm", referred to in these regulations is regarded as unsatisfactory. It is uncertain and nebulous, and creates nightmares for persons engaging in statutory interpretation. If consistency and certainty are to be achieved, then criteria as to what constitutes "undue harm", or the preferable term 'public interest' should be included, or referred to.

Attention is drawn to Schedule 1, item 9 where reference is made in subsections (a) (b) and (c) to the Commonwealth Medical Officer. It is suggested that such references are unnecessary.

COMMONWEALTH OF AUSTRALIA
DEPARTMENT OF IMMIGRATION, LOCAL GOVERNMENT
AND ETHNIC AFFAIRS

OFFICE OF THE SECRETARY
CANBERRA, A.C.T.

With Compliments

The Department's second Corporate Plan is attached.

The second plan has been developed after the Government's consideration in December 1988 of the Report of the Committee to Advise on Australia's Immigration Policies, headed by Dr Stephen Fitzgerald.

The result has been a fundamental change to the Migration Act and its administration, including among other things the establishment of a Bureau of Immigration Research and an Immigration Review Tribunal.

The new plan seeks to give the Parliament, members of the public and staff a clear indication of the strategies which the Department intends to pursue to achieve specific outcomes against seven key goals which are set out in the plan. The plan is also complemented by local work plans prepared by each major work area.

Of particular interest is a report on the portfolio's achievements in meeting the goals set out in the first plan.

Should you have any queries regarding anything covered in this Plan, Information Officers at the nearest local office of the Department will be able to assist you.

Regards

Ron Brown

RON BROWN

Human Rights Australia

Human Rights Commissioner

Submission No. 8
Date Received 8 NOV '89

Our ref: BC/js 89.541

8 November, 1989

Robina Mills
Secretary
Joint Select Committee on
Migration Regulations
Parliament House
CANBERRA ACT 2600

Dear Ms Mills

I refer to your letter of 1 November concerning the draft regulations under the Migration Act 1958.

In the extremely short time available to us it has not been possible to provide other than the most cursory comments on the proposed regulations.

In view of your own very tight deadlines, therefore, I attach some preliminary comments which I hope you will find useful.

If you wish to discuss these in more detail please contact the Acting Secretary Mr Bill Chapman on (02) 229 7605.

Yours sincerely

Patricia Mahony

for Brian Burdekin
Federal Human Rights Commissioner

Human Rights and Equal Opportunity Commission Level 24 American Express Building 388 George Street Sydney NSW 2000 GPO Box 5218 Sydney NSW 2001
Telephone: 229 7600 Facsimile: 229 7611 Telex: AA 178000 DX 869 Sydney

COMMENTS RE MIGRATION REGULATIONS

Page 7

Under the Interpretation provisions (#1), certain aspects of the definition of 'public interest criteria' need to be clarified.

For example, the use of words such as 'disruptive' and 'undue' suggest there is some objective standard or meaning that an assessing officer might apply. There is no clause prescribing that these words be interpreted in a certain way eg such words are to be interpreted according to their everyday meaning and usage. Perhaps such a clause (sub-reg) should be inserted.

Page 13

The Interpretation provisions (#4 re: good character) cause some concern, particularly 4(a)(ii) A & B & C.

These 3 provisions re a person's attaining a bad character as a result of having been found guilty of committing some sort of criminal offence are far too broad and fail to contemplate the convenient use to which a Nation State might apply\define the word 'crime'. The substance of the offence might very well be political, and not at all criminal, subversive or dangerous in the eyes of another Nation State.

If the regulation were applied as it currently reads, the practice by a person of their fundamental human rights may be misrepresented as criminal activity, consider for example a person's rights under the International Covenant on Civil and Political Right (ICCPR) such as the rights to:

- hold opinions without interference (ICCPR Article 19)
- freedom of expression (ICCPR Article 19)
- freedom of thought, conscience and religion (ICCPR Article 18)
- freedom of association (ICCPR Article 22)
- freedom of assembly (ICCPR Article 21)
- liberty of movement (ICCPR Article 12)

The application of these criteria affect many other provisions in the regulations (eg. Regs 111(e), 122(c), 124(c), 128(c) and 130(b). Although the impact of this definition is reduced a little by way of Regulations 143 (see under Page 135 below) the provision clearly needs further attention.

Page 19

Interpretation re Applications for visa outside Australia
Re provision 11(3), query the lawfulness of singling out specific conditions to pertain to people with certain nationalities eg. Turkish and Vietnamese (and Lebanese, see Regulation 107).

The provision relating to Vietnamese persons causes particular concern. Firstly, it operates to deny the fundamental right of persons to the liberty of movement and secondly allows for the government of the Republic of Vietnam to determine who shall have such a right and who shall not.

Query whether 11(2) (e)(i) is really necessary?

Page 29

Re the reconsideration of an application that is put aside. Regulation 21(2) states that reconsideration involves the comparing (by the Minister) of the applicant's score with the specified pass mark and that no reassessment of the score need be made. Surely this renders the term 'reconsideration' a mispresentation. Any real reconsideration must involve an examination of the substance of the matter ie a rescore not the mere checking (twice indeed) of the relationship between the two figures. If this is what the provision means at no stage would a numerical mistake be picked up, let alone a misjudgment of substance.

Page 32

Regulation 26 re prohibition against grant of entry permit.

Shouldn't 26(2) include 'a person who has applied for refugee status'?

Page 61

Re Refugee Visa.

The concern with this provision relates to the potentiality it provides for the introduction in the future of arbitrary or even unlawful requirements being made of persons seeking such visas.

Page 102

Query the purpose of Division 3 re additional criteria. It is not clear what the purpose and effect of Regulations 102, 103, 104, 105, 106 are meant to be.

Page 111 re

Re Refugee A (restricted) visa or entry permit.

Query S.116(c), does it mean a person granted refugee status by the United Nations High Commissioner for Refugees, or by the Australian Government?

Ditto re s.117(b), 118(c) and (d), 119(a).

Page 129

A similar query as that re provisions on page 102 ff can be made re Regulation 134.

Page 135

Regulation 143 re the waiver of the good character requirement affords the applicant some, albeit inadequate, protection from the misapplication of the law at the hands of certain Nation States (as referred to supra). Suggest this protection needs tightening up, and that Regulations 4 and 143 be expressly cross-referenced (for the attention of DILGEA's assessment officers).

Page 152

Regulation 152(2) anticipates remarkable efficiency on the part of Australia Post; 3 working days from date of posting is considered too brief a period, perhaps 7 days would be more realistic.

OFFICE OF YOUTH, SPORT, RECREATION AND ETHNIC AFFAIRS

ETHNIC AFFAIRS DIVISION
First Floor Harry Chan Arcade
[illegible] Street Darwin
GPO Box 1222 DARWIN NT 0801
Telephone: (089) 897332
Facsimile: (089) 896836

13 November 1989

Submission No. 9
Date Received 14 NOV 89

Ms R Mills
Joint Select Committee on
Migration Regulations
Parliament House
CANBERRA ACT 2600

Dear Ms Mills

Thank you for giving the Northern Territory Ethnic Affairs the opportunity to comment on the draft regulations under the Migration Act 1958 which relates to the decision criteria for the grant of visas and entry permits.

I am unable to confirm as to whether the whole draft regulations accurately reflect and translate the current and announced policies in relation to the grant of visas and entry permits as at 1 June 1989.

Occasionally, Ethnic Affairs receives copies of ministerial statements and news releases from the Minister for Immigration, Local Government and Ethnic Affairs on immigration procedures in the areas mentioned earlier. However, these ministerial statements are not presented in detail.

I attempted to obtain a co-ordinated policy document from the Regional Office, Department of Immigration, Local Government and Ethnic Affairs, but was advised that they do not have one.

Due to the limited time frame provided to us, further investigation of this issue can not be executed.

However, I would like to offer the following comments:

1. On the basis of the News Releases received from the Minister for Immigration, Local Government and Ethnic Affairs in the areas of concern, it would appear that the draft regulations are likely to achieve the goals of the current and announced policies relating to the grant of visas and permits.

2. The draft regulations on Part 3 - Prescribed Criteria for Classes of Visas and Entry Permits, Division 2 - Regulations 47, 48, 49 and 50 seems to reflect the current announced policies in these areas. I wish to add though that the policies relating to the Business Migration Program (BMP) capital transfer requirements should be improved e.g. lowering the capital transfer requirements of Business Migrants in the 41-57 years of age bracket.

3. I would like to query the inclusion of the word "sexual" in the definition of Homosexual Partner, Part 1 of interpretation (2). I understand that the policy statement did not specify the word "sexual" relationship in this category. I believe this relationship is implied in the policy. I therefore suggest that the word "sexual" be omitted.

4. In regulation 128 - Extended Eligibility (Homosexual) entry permit section (c) - AIDS screening should be clearly stipulated. I believe that the recently announced polices on AIDS by the Commonwealth Government include AIDS screening of migrants. I recommend that AIDS screening be included in this regulation.

5. I suggest that in Part 1 (2) - the word Secretary which is mentioned all over the draft regulations should be defined and included in the section 'Interpretation'.

6. The draft regulations make special provisions for homosexuals in several clauses. The question arises as to why special consideration is given to the group above and beyond considerations affecting other minority groups, e.g. disabled people. One of the major aims of the Immigration Policy is to quickly populate Australia. However, there is no doubt that homosexuals can not contribute to long term population growth. Therefore no positive discrimination should exist.

7. The sentences used in the draft regulations are long and too detailed. I suggest the concepts be separated.

While I understand that the time frame has been imposed on the Committee by its resolution of appointment, I would like to express my disappointment in not having a reasonable time frame to prepare the Northern Territory Ethnic Affairs response on this important issue.

I would be grateful if you could keep me informed on the outcome of the inquiry.

Yours sincerely

Jenny Medwell
Director
Ethnic Affairs Division

Submission No. 10
Date Received 13/11/89

National Federation of Blind Citizens of Australia Ltd.

THE VISUALLY HANDICAPPED PEOPLE OF AUSTRALIA

RECEIVED
13 NOV 1989
House of Representatives Committee Office

Reg. Office:
45 Waverley Road,
East Malvern, Vic. 3145
Phone: (03) 572 1044

Dr Andrew Theophanus,
Chairman,
Joint Select Committee on Migration Regulations,
Parliament House,
CANBERRA. A.C.T. 2600

13 November 1989

Dear Dr Theophanus,

The National Federation of Blind Citizens of Australia, among many other organisations representing people with disabilities, is concerned about the discrimination that is currently inherent in the application of the Immigration Act against disabled people.

The Federation would like to ensure that people with disabilities who apply for a visa or entry permit to Australia are not discriminated against and are treated equally with people who are not disabled. An application by a person with a disability for a visa or entry permit should be decided on its merits and the criteria should be applied in the same way as they would be to an applicant who is not disabled.

The Regulations provide for a variety of classes of visa and entry permits. These include: humanitarian and refugee visas, public interest criteria visas, refugee permits, temporary residence entry permits and temporary residence visa and visitors visas. These Regulations are, we believe, to be used by Officers administering the Migration Act in conjunction with other 'guidelines'.

On behalf of the Federation, I ask the Committee to look specifically at the application of the Regulations and other guidelines to people with disabilities.

I attach herewith a copy of resolutions recently passed by the Federation.

May I finally add, that while there is no evidence to suggest that the Government's immigration policy intends to discriminate against people with disabilities, the practical application of the Immigration Act has without doubt been discriminatory and this conflict between intention and application should be redressed by this Committee.

Yours sincerely,

Deborah Hamilton
NATIONAL ADVISOR

Equality in Migration

That the National Federation of Blind Citizens of Australia condemns the discrimination encountered by blind and vision impaired people and their families who wish to migrate to Australia. This discrimination takes the forms of rigid interpretation of medical criteria for migration and stringent application of maintenance guarantee requirements. The Federation reminds the Australian Government that this discrimination may contravene international standards and obligations, particularly those under relevant United Nations Declarations relating to the prevention of discrimination and the upholding of the rights of people with disabilities. This Federation calls upon the Government to revise its immigration policy and administrative procedures to eliminate discrimination on the ground of disability against persons seeking to migrate to Australia.

Discriminatory Imposition of Visa Requirements

Given the recent discrimination encountered by Ms Mary Schnackenberg (an Executive member of our sister organisation, the New Zealand Association for the Blind and Partially Blind), when she visited Australia on blindness services related business, the National Federation of Blind Citizens of Australia condemns the practice of the Australian Government in imposing on a blind person wishing to enter this country, the requirement that he or she obtain an entry visa in circumstances where a sighted person would not require a visa. The Federation points out that this practice is discriminatory and may contravene international standards and obligations with respect to the prevention of discrimination against people with disabilities and the upholding of the rights of people with disabilities. Accordingly, the Federation calls on the Government of Australia to cease this discriminatory practice and permit blind people to enter the country on an equal basis with, and subject to, the same requirements as are imposed on sighted people.

SOUTH AUSTRALIAN
ETHNIC AFFAIRS COMMISSION

24 Flinders Street,
Adelaide,
South Australia 5000
Tel (08) 224 0577
Fax (08) 224 0448

SAEAC 97/89
AG:MW

8 November 1989

Ms Robina Mills
Secretary
Joint Select Committee on Migration Regulations
Parliament House
Canberra, ACT, 2600

Dear Ms Mills

Thank you for providing me with copy of the draft regulations under the Migration Act 1958 which relate to decision criteria for grant of visas and entry permits.

In the short time allocated I did not have the resources to conduct a thorough analysis of the documents to be completely satisfied that the regulations comply with the publicly announced policy of the Commonwealth Government.

Whilst I realise comment on the policy itself is outside the scope of the Joint Select Committee, I would like to bring to the attention of the Committee certain aspects of the policy reflected in the Regulations which are raising concerns among ethnic communities. These are:

- the balance of family criterion, particularly in relation to parents of persons who have migrated under the Refugee or Special Humanitarian Programs and whose families are still in their countries of origin or in third countries. These persons often view their families as being in crisis conditions similar to those that caused their own flight and eventual refugee status.

- Concerns among established communities (such as Southern Europeans) about the very small number of persons migrating from their countries of origin under present policy - and the consequent failure of their communities to rejuvenate (both in age and cultural terms) through continued migration.

I also understand that the new policy and regulations in relation to change of status will only apply to persons with a legal entry visa, and not to persons who are illegal entrants or immigrants, including overstayers. I understand the justification for these policy changes, but I believe that voluntary departure or deportation in many of these cases may cause public outcry or futile representations to both Commonwealth and State Members of Parliament.

I stress that these are community concerns and that the South Australian Government in its submission and response to the report of the Committee to Advise on Australia's Immigration Policies endorsed in principle the main thrust of the Commonwealth's immigration policy and the need for the legislative and administrative reforms reflected by the proposed regulations.

Yours Sincerely

M.Z. Schulz
CHAIRMAN
SA MULTICULTURAL AND ETHNIC AFFAIRS COMMISSION

COMMONWEALTH & DEFENCE FORCE
OMBUDSMAN

Prudential Building, cnr London Circuit & University Avenue, Canberra City
G.P.O. Box 442, Canberra, A.C.T. 2601
Telephone: (062) 780111
Facsimile: (062) 497629

15 November 1989

Ms Robina Mills
Secretary
Joint Select Committee
on Migration Regulations
Parliament House
CANBERRA ACT 2600

Dear Ms Mills

Thank you for providing the opportunity for me to make further comments to the Committee on the draft Migration Regulations. I have had a further look through the Regulations and attach comments additional to those contained in my letter to you of 6 November.

Yours sincerely

D C Pearce
Commonwealth Ombudsman

COMMENTS ON DRAFT MIGRATION REGULATIONS

Regulation 36(1)(a)(iv)

This sub-paragraph refers to a visa not being granted unless the Minister is satisfied that it would not be detrimental to Australia's policies in respect of overseas students. A person seeking to challenge a decision of the Minister would be faced with the problem of ascertaining what the policies in respect of overseas students might be. What are such policies and where are they ~~are they~~ stated?

Regulation 36(1)(b)

The effect of this paragraph is that a person who has been deported from Australia for the commission of a crime or on security grounds is never entitled to a visa. I question whether it is appropriate to include such a definitive prohibition without the possibility of a discretion to allow the grant of a visa. The passage of time may mean that a criminal deportee can show reform or good conduct over many decades such that the grant of, for example, a tourist visa, would no longer constitute a risk to Australia. As far as security grounds are concerned, my worry here would be that changes in international relations can result in persons who were once regarded as security risks becoming acceptable. The changes currently occurring in Eastern Europe may exemplify this situation. In this context I draw attention to regulation 42(3) which provides a discretion to the Minister where an entry permit would not otherwise be able to be granted.

Regulation 36(2)

I note that there is no sub-regulation 36(2) in the Regulations as printed.

Regulation 40(f)

There is no conjunction "and" or "or" after sub-paragraph (i) of this paragraph. It is therefore unclear whether the factors set out in the two sub-paragraphs are alternatives or have both to be satisfied.

Regulation 55

This regulation depends for its operation upon the refugee program administered by the Department. Would it not be appropriate that this program at least be tabled in the Parliament so that it is able to be commented upon by members of Parliament and is available to persons affected by the Regulations.

../..

Regulation 67(c)(v) and Regulation 69(b)

These two regulations require the approval of an outside body before a visa may be granted. As things presently stand, it would not be possible to challenge a refusal of a visa on the basis that one of these bodies, even perversely, declined to give approval. I question whether entry into Australia should be dependent upon a decision by a third party rather than the Minister or his delegate. If these regulations were cast in the form of the Minister declining entry after consultation with the bodies mentioned, responsibility would seem to be vested in the appropriate officer and could make the decision reviewable.

Regulation 74(c)(ii)(B) and Regulation 86(b)(ii)

Both these regulations refer to the production by a sponsoring person or body of an undertaking not to seek to recover any expenditure by the sponsor in relation to the applicant's travel to or from Australia. Presumably this refers to not recovering from the applicant or perhaps from the Commonwealth. It would seem to be inappropriate to bind the sponsor not to seek recovery from another source, for example, the diplomat's government in the first instance and the head office of the religious organisation in the second. The inclusion of the words "from the applicant or the Commonwealth" after the word "recover" in both cases may be appropriate.

Regulation 88(b) and Regulation 89(c)

In both these paragraphs there is reference to "an other (sic) visitor visa". Is this a reference to the visa referred in regulation 92? If so, it should be referred to as a "visitor (other) visa". If it is not a reference to regulation 92, to what is it a reference?

Regulation 124(c) and Regulation 125(e)(iii)(C)

Both these regulations refer to a visa being granted respectively, on the recommendation, or with the agreement, of a Minister other than the Minister for Immigration. Such a provision seems to preclude review of an adverse decision by that other Minister.

../..

SOUTH BRISBANE COMMUNITY LEGAL SERVICE INC.
SERVIZIO DI CONSULENZA LEGALE
KOINOTIKH NOMIKH YΠHPEΣIA
TOPLUM HUKUK HİZMETİ
SERVICIO COMUNITARIO DE ASISTENCIA LEGAL
PHỤC VỤ CỘNG ĐỒNG VỀ LUẬT PHÁP
الخدمات القانونية للمجتمع

1st Floor, 97 Vulture St.,
West End 4101,
AUSTRALIA.
Telephone 846 3189
P.O. Box 143, West End 4101.

November 15, 1989

Dr Andrew Theophanous
Chairman
Joint Select Committee on Migration
Regulations
Parliament House
CANBERRA ACT 2600
(FAX NO: 062 - 77 2067)

Dear Dr Theophanous

The South Brisbane Community Legal Service is a free legal advice and casework service specializing in immigration matters. As such we have considerable expertise in the area of migration law and have been anxious to make some response to the draft migration regulations being considered by your committee.

Unfortunately, due to limited time and the recent departure of one of our staff members, we have been unable to prepare fully such response.

However, we have had the opportunity of reading the submission from the Immigration Advice and Rights Centre (NSW), Public Interest Advocacy Centre and Refugee Council of Australia, Inc dated the 7th November 1989. We advise that we fully support their comments in their submission and also the general comments concerning the complexity of the legislation, the need for sufficient competent and free advisory services and the serious omissions in the draft regulations.

We trust the committee will seriously consider the submission forwarded and take appropriate action in this extremely important area of migration law. Finally, it is indeed unfortunate and in fact quite unacceptable that such an extremely short period of time has been given to comment on these draft regulations.

Yours faithfully

for ROBERT LACHOWICZ
Solicitor

Submission No. 13
Date Received 15 NOV 89

Submission No. 14
Date Received 15 NOV 89

15 November 1989

Dr Andrew Theophanous
Chairman
Joint Select Committee on Migration Regulations
Parliament House
CANBERRA ACT 2600

Dear Dr Theophanous,

Re: Migration Regulations

Attached please find further submissions on behalf of the Immigration Advice and Rights Centre (NSW) and Public Interest Advocacy Centre (unfortunately Refugee Council of Australia have been unable to consider this submission in time). These submissions are in addition to those already received by the Committee dated 7 November, 1989.

We hope that these further comments will be given careful consideration by the Committee and are of use in formulating the views which will be put to the Minister.

We thank you for the opportunity to make further submissions on the draft regulations though we reiterate our previously expressed view that given the universal significance of the final product, the proclamation of the Act should be delayed.

Yours sincerely

George Masri
(on behalf of Immigration Advice & Rights Centre Inc (NSW) and Public Interest Advocacy Centre)

Regulations 16 and 28. Effect and operation of visas and entry permits

Regulations 16 and 28 which incorporate "terminating conditions" will have grave implications on those who make minor breaches of a condition in their visa or entry permit. The effect could be the cancellation of a visa or permit, with no right of review. These terminating conditions, which are set out in sub-regulation 16 (8) and sub-regulation 28 (3), are not to be found in existing policy or law.

Under the regulations a person who breaches a terminating condition will (it seems) be unable to apply for an entry permit (whether a temporary, extended or permanent entry permit) whilst he or she remains in Australia. This is so notwithstanding that the criteria for a further temporary entry permit or permanent residency may be satisfied.

It would also seem that such a person will not be able to rely on sub-regulation 120 (a) that he or she has "complied substantially with any conditions subject to which the visa or entry permit was granted" in order to be granted an entry permit. The conditions refered to in sub-regulation 120 (a) do not relate to terminating conditions but to conditions refered to in regulations 17 and 29. This is contrary to existing policy and law where greater weight is given to whether a person satisfies the criteria for granting an entry permit than the technicalities of holding a valid visa. See for example The Grant of Resident Status, Integrated Departmental Instruction Manual, Volume 1, No. 1, General Processing Procedures, Part Two where policy allows for the grant of resident status to those who do not hold a valid temporary entry permit but who satisfy the policy guidelines for the eligible categories under section 6 A (1) of the Migration Act.

As a decision to terminate the entry permit is not reviewable (see section 64 B (1) (a) of the Migration Legislation Amendment Act), a person who has had his or her entry permit terminated would be unable to seek review on the decision not to grant a further temporary or permanent entry permit.

The new regulation scheme of terminating conditions is too inflexible and harsh. It does not have regard to the genuine changing circumstances of the applicant. This situation is likely to force people to remain in Australia illegally even though they may be in genuine relationships with Australian citizens or residents or they may have strong humanitarian or compassionate grounds to remain here. Clearly it is preferable (for the individual as well as for Australia's immigration program) to have such a person regularise his or her status than to remain illegally in Australia.

Regulation 26. Prohibition against grant of entry permit

Regulation 26 which relates to the grant of entry permits for illegal entrants is as previously stated far too restrictive and contrary to existing policy. The following statement by the Minister supports our previous comments that the more restrictive interpretation of the regulation 26 provisions is contrary to the announced policy. In response to Senator Jean Jenkins' claim that illegal entrants whose 28 day period of grace expired would be unable to change their status under the Migration Legislation Amendment Act, the Minister said:

> "Once a person is apprehended he may immediately apply for change of status. It is not true to say that he has no other choice. At the stage of being apprehended, he may apply.....I reiterate that a person may apply immediately upon apprehension. Whilst that decision is not reviewable, that course of action still remains open to the person who has been apprehended."
>
> Hansards Senate, Tuesday, 30 May, 1989 at page 3037.

Clearly, the six month restriction under the regulation departs from the Minister's assurances in Parliament about an illegal entrant's right to apply for change of status.

Regulation 36. Restrictions on entry - readmission

Regulation 36 which relates to prohibitions on re-entry is as previously stated too restrictive. Further to our comments that the total prohibition from re-entry under sub-regulation 36(1)(b) is contrary to existing policy, we are concerned that the wording is too broad. The distinction between "*commission* of a crime" and "*conviction* of a crime" must at the very least be maintained because of the permanent restrictions on re-entry. Section 12 of the Migration Act which deals with criminal deportation relates to "convicted in Australia of an offence.....for which the person was sentenced to death or to imprisonment for life or for a period not less than one year."

The wording of sub-regulation 36(1)(b) could be interpreted widely to include, for example, those who left voluntarily or were deported as a result of committing an offence under the Migration Act. Such offences include those relating to entering or remaining as an illegal (see s27 of the Migration Act), contravening conditions restricting performance of work (see s 31B of the Migration Act), failure to leave Australia within the time specified by the Minister or authorised officer (see s31A of the Migration Act) or producing false or forged documents (see s 31 of the Migration Act).

At the very least, regulation 36(1)(b) should only relate to deportations made pursuant to section 12 of the Migration Act when reference is made to deportation relating to a crime. The situation proposed in the regulations is far too inflexible for a restriction which has severe consequences. It ignores factors such as ties with Australia, the nature of the crime and the risk of recidivism.

We reiterate our comments made in the previous submission that at the very least there should be discretion to waive such restrictions in cases where strong compassionate grounds exist. To have a situation where there is no discretion to waive the prohibition period departs from existing policy.

Regulations 116 - 119, Refugee (restricted) visas or entry premits

The concept of the various extended refugee (restricted) visas or entry permits are not to be found in existing law or policy. The inclusion of such distinctions will cause great confusion and uncertainty. There seems to be no need to have such distinctions. It is also of concern that refugees may be denied access to residency or review rights under this regulation scheme.

We have previously expressed our dissatisfaction that decisions on refugee status are not reviewable. However, given the Ministers's insistence on his unfettered right to make these decisions we are not pursuing these concerns However, the Regulations make it clear that the Minister will be making two decisions on each refugee application - firstly, whether refugee status should be granted; and secondly, whether a Type A refugee visa or a type B visa should be given. Type A confers the right for the refugee to apply for permanent residency, whereas Type B withholds this right. We submit this second decision should be reviewable in a closed hearing.

Regulations 127 - 130, Extended eligibility entry permits - General comments

The concept of extended eligibility entry permits in the regulations is not found in existing policy or law. Its introduction is likely to lead to much confusion and require vastly increased adminstrative and staffing resources It is particularly onerous on the applicant and it is envisaged that many with genuine grounds for an entry permit will be excluded because they did not satify the formalities under the regulations. The scheme is, in fact, a cleverly - devised technical means of subverting not only existing policy, but of destroying the apparent intention of the main and amending legislation. We are sure that when Parliament approved

section 11D of the Amendment Act, it could not have foreseen that te power to improve restrictions on visas and permits would be welded so harshly and widely.

Regulation 127, Extended eligibility (special circumstances) entry permit

Under sub-regulation 127 (a) illegals and persons who hold a visitor visa or entry permit are excluded from being granted an entry permit under sub-regulation 127 (b) (i). When considered with schedule 5 it effectively prohibits visitors and illegals from applying for change of status on genuine married,de facto or homosexual relationship grounds. This is a radical departure from existing law and policy. See for example Grant of Resident Status, Integrated Departmental Instruction Manual, Volume 1, No. 3, Spouses of Australian citizens or holders of a permanent entry permit. The restriction is particularly harsh and ignores the genuineness of the relationship and the possibility of changed circumstances. It completely contravenes the rights of the Australian resident or citizen not to be separated from the partner of their choice.

Regulation 130, Extended eligibility (other) entry permit

Sub-regulation 130(1)(a)(i)(c) introduces a new requirement that "a major natural disaster, a significant political, social or religious change" must be "specified by the Minister as such a disaster or change by notice published in the Gazette " before an extended eligibility (other) entry permit can be granted. This is far too restrictive and is clearly contrary to existing policy where there is no such requirement to gazette. It is not clear whether the particular disaster or change must remain Gazetted at the time a person makes such an application.

This new rule would totally bind individual immigration decisions on humanitarian grounds to Australia's general foreign and bilateral relations policies. Currently, there is room for such general considerations to inform immigration decisions, without limiting the ability to respond to worthy individual cases which may not fit the general framework. This ability, which should be retained, will be completely eliminated by the "gazetting" requirement.

Regulation 144, Waiver of health criteria

As mentioned previously the provisions relating to the waiver of health criteria do not reflect existing policy. To elaborate, the existing policy can be found in Chapter 5 of the old Migrant Entry Handbook (note that the existing Chapter 5 - Health Requirements states "See separate instructions". According to the Freedom of Information Unit of the

department this means that the Health Requirements chapter of the previous Migrant Entry Handbook is existing policy).

Clearly under existing policy there are much wider provisions for waiver of the health criteria than will exist under the regulations. Firstly, under existing policy there is no limitation placed on the class of entry permits in which the waiver of health criteria applies. Sub-regulation 144(1) departs from this policy by specifying that the waiver provisions only apply to certain visa and entry permit classes. Secondly, under existing policy there is no limitation placed on the type of health condition subject to the waiver provisions. Sub-regulation 144(2) departs from this policy by specifying that it applies only in very limited situations and where the person does not have communicable diseases.

The existing policy considerations relating to health waiver are set out below.

As paragraph 5.13.1 of the Migrant Entry Handbook states:

> "While failure to meet the health requirements generally results in refusal of the application there may be special circumstances, especially compassionate ones, which justify consideration being given to waiving the usual standards."

At paragraph 5.13 2 it states:

> 'Whether or not such circumstances exist depend on assessment of individual cases. However, in view of the family reunion objective (which leads to a range of other selection concessions) all applications in Category 1 and in the sponsored sub-categories of Category 3 (ie preferentia' and extended family reunion categories) are to be reconsidered where health standards are not met."

It is important to note that while all family reunion applicants have their cases reconsidered when health standards are not met, it does not exclude reconsideration of other category applicants.

Paragraph 5.13.3 which sets out the factors to be taken into account in reconsidering cases, states:

> "Once a case has been assessed as justifying reconsideration, a judgement is to be made after weighing up the following factors
>
> * the extent of social welfare, medical, hospital or other institutional or day care currently required in the home country and likely future requirements

> * the availability of these services in the intended area of settlement in Australia
>
> * the potential lifetime charge to Australian public funds
>
> * the willingness and ability of a sponsor to provide any support and care required over and above that expected by the normal sponsorship
>
> * the applicant's and family's current and expected current and expected ability to cope with the particular health problem or disability
>
> * the short and long term educational and occupational prospects for the applicant in Australia
>
> * the degree of relationship with family already in Australia and the balance of family disposition
>
> * any outstanding qualities possessed by the applicant and the family which would provide significant contribution to some sphere of Australian life
>
> * other compassionate or humanitarian aspects of the individual case.

It is therefore submitted that the health waiver provisions in the regulations do not reflect existing policy and introduce new and harsher requirements.

Further sub-regulation 144(2)(d), which is also a new requirement, is worded too broadly. The danger is that "prejudice the access to health care" may be interpreted too broadly so as to exclude many from the waiver provisions.

Schedule 5, Mandatory conditions for grant of visas and entry permits

Further to our earlier submissions in relation to Schedule 5, we are particularly concerned about the implications of the mandatory conditions imposed on the majority of temporary entry visas and entry permits (see items 1 and 2). Under item 1 of the Schedule most temporary entry visas and permits (including tourists, visitors (other), immediately family visitor, students and working holiday makers) will be subject to mandatory conditions that will prima facie prohibit change of status to permanent residency unless the person applies for, and has

been granted, refugee status. This is a clear and most radical departure from existing law and policy.

Under existing law and policy only "prescribed non-citizens" (ie students, diplomatic or consular representatives and dependants) are prohibited from changing their status to permanent residents on employment grounds pursuant to the present section 6A (1) of the Migration Act. Those prescribed non-citizens, as well as others who enter on a temporary basis, are however allowed to apply for change of status on any other ground.

The Grant of Resident Status, Integrated Departmental Instruction Manual, Volume 1, No. 1, General Processing Procedures, Part Two even allows for the grant of resident status to those who do not hold a valid temporary entry permit but who satisfy the policy guidelines for the eligible categories under section 6 A (1) of the Migration Act.

Section 11ZD of the Migration Legislation Amendment Act appears to reflect the existing section 6A (1) of the Migration Act. However, when read in conjunction with Schedule 5 and Regulations 127 and130, it becomes clear that this appearance is deceptive. The new scheme not only tightens the eligibility for the general "compassionate" grounds; but also for change of status on family grounds. The end result will be that only people who enter Australia as temporary residents with work permits (and not even all of these) will be eligibile to access these change of status provisions.

This whole scheme is totally new and will have the effect of excluding many people who have a clear " in - principle" entitlement from ever being granted permanent residency whilst in Australia. As well as breaching the rights of Australian citizens, it will undoubtedly have the effect of forcing those with genuine cases to become illegal. The scheme is a clear departure from the spirit of the existing policy whereby greater weight is given to whether a person satisfies the criteria of the change of status provision than to satisfying the technical requirement of holding a valid temporary entry permit.

Schedule 5 item 2 sets out that certain tourists are excluded for gaining any further entry permits while in Australia (whether a further temporary entry permit, an extended eligibility entry permit or a permanent entry permit). Not only is this a total change form existing policy, it is also particularly harsh and inflexible as it ignores the possibility of changes in the applicant's circumstances.

APPENDIX G

LETTER OF 22 NOVEMBER 1989
FROM DEPARTMENT OF IMMIGRATION,
LOCAL GOVERNMENT AND ETHNIC AFFAIRS

Department of Immigration, Local Government and Ethnic Affairs
Benjamin Offices
Chan St Belconnen, A.C.T. 2617

Ms Robina Mills
Secretary
Joint Select Committee
on Migration Regulations
Parliament House
CANBERRA ACT 2600

Dear Ms Mills

I was asked by the Committee, at its meeting on 20 November to supplement the responses and comments listed in the attachment to my letter to you of that date.

Page 2 - the situation of children who are part of the family by reason of custom or other circumstances:

It is proposed to accommodate that issue not in the definition of the word "adopted" at page 1, but in the definition of "dependent child" at page 4. That latter term will be redrafted as to have two alternate meanings. The first is the definition that appears now at page 4. The second alternative meaning will read, along the lines of, "person who has not turned 18 (other than a person who is married or engaged to be married or a de facto spouse) and is wholly or substantially in the custody of a person in loco parentis.

Page 2 - "aged dependent relative":

It is proposed to replace the words "for not less than 3 years" with the words "for a reasonable period".

Page 2 - "assisted student":

The definition is being re-written to mean:

(a) a private student; and
(b) a student under AIDAB scholarship.

P.O. Box 25, Belconnen, A.C.T. 2616 Telephone (062) 64 1111 Telex 62037

Page 5 - "formal course":

The definition will be extended to cover study at a primary school.

Page 6 - "orphan":

In addition to the changes indicated in the attachment to my letter of 20 November, we are taking up with the drafting officer the concern expressed in relation to the situation that arises where the authorities of a foreign country assume care and control of orphans. We expect to find a formula that would overcome that situation.

Page 6 - "orphan relative":

The reference to "usually resident in Australia" will be re-drafted to apply to Australian permanent residents and not to citizens.

Page 7 - "public interest criteria"

Para (c) will be amended to place that judgement in the hands of the Minister personally. The provision will read, along the lines: "(c) is not subject to a certificate by the Minister personally that the Minister thinks he or she is likely to be involved in activities .... etc."

Page 8 - "relative":

The definition will be rewritten to the following effect:

- for purposes other than for refugee/humanitarian visas, the definition provided at p.8 will apply with the deletion of first cousins.

- for purposes of refugees/humanitarian visas, the definition provided at page 8 will apply with the addition of second cousins.

Page 9 - "sponsor":

The definition will be extended so as to include a provision whereby a child may have an adult person or an organisation undertaking a sponsorship on his or her behalf.

Page 9 - "sponsorship":

Paragraph (a) will be amended so as to replace the words "not later than 2 years" with the words "not later than a reasonable period".

Page 10 - "spouse"

A question was raised as to whether the terms covers each of several wives of a polygamous marriage. The policy has allowed the recognition of one of the wives nominated by the husband as the spouse. It follows, that the "spouse" is not necessarily the first wife, and that the other wives are not recognised as spouses or as de facto spouses. We understand that the definition of "spouse", at page 10 when read together with proposed regulation 7 at page 15, translated that policy. We will nevertheless take up this question with the drafting officer to put the matter beyond doubt.

Yours sincerely

W J GIBBONS
First Assistant Secretary
Development and Systems Division

22 November 1989

APPENDIX H

LETTER OF 20 NOVEMBER 1989
FROM DEPARTMENT OF IMMIGRATION,
LOCAL GOVERNMENT AND ETHNIC AFFAIRS

Department of Immigration, Local Government and Ethnic Affairs
Benjamin Offices
Chan St Belconnen, A.C.T. 2617

Ms Robina Mills
Secretary
Joint Select Committee
on Migration Regulations
Parliament House
CANBERRA ACT 2600

Dear Ms Mills

I was asked by the Committee to indicate the status of the variations between current policies and the policies behind the proposed regulation listed in the statement attached to the letter from the Minister (Senator Ray) to the Chairman of the Committee, dated 14 November 1989.

Prescribed Changes in Circumstances:
- unannounced.
- new provisions of the Act (paragraphs 11S(1)(a) and 11T(2)(a)) required a policy to be developed, without which these provisions would be inoperative.

Extended Eligibility Temporary Entry Permits (EETEP):
- unannounced.
- new provisions of the Act (paragraph 11P(4)(a)) required a policy to be developed to provide for the circumstances where the bar on grant of resident status may be lifted.

Restrictions on the grant of entry permits to certain illegal entrants:
- unannounced.
- change in policy to complement new section 11T of the Act, to discourage illegal entrants from going underground and to enhance the enforcement of the Act.

Prescribed diseases for purposes of subparagraph 11A(1)(d)(i) of the Act:
- unannounced.
- clarification of policy by replacing the current contentious Regulation 26 which lists specific diseases and conditions with generic listing. It follows the revision of the health criteria (see below).

P.O. Box 25, Belconnen, A.C.T. 2616 Telephone (062) 64 1111. Telex 62037

Health Criteria - Schedule 1, items 9 and 10:
- unannounced.
- clarification of policy due to the structural difference between a regulatory scheme and policy guidelines.

Waiver of health criteria
- unannounced.
- clarification of policy due to the structural difference between a regulatory scheme and policy guidelines.

Restrictions on re-admission:
- unannounced.
- clarification of policy due to the structural difference between a regulatory scheme and policy guidelines.

Health and character requirements for New Zealand citizens seeking to sponsor family unit members to Australia:
- unannounced.
- correction of inconsistency between the policy on grant of resident status in Australia and the policy on migrant entry.

Prescribed Class of Persons - definition of "prescribed non-citizen" in subsection 11ZD(7) of the Act:
- unannounced.
- a change in policy flowing from the amendment of the Act.

Business Migration:
- announced.
- a change of policy for the more effective operation of the policy.

Refugee Visa or Entry permit:
- implicit in announced policy.
- consequential of the regulatory scheme.

Grant of temporary entry permits to holders of certain student visas or entry permits:
- unannounced.
- consequential to the amendment of the policy in relation to "prescribed non-citizen" (see above).

Transit visas:
- unannounced.
- correction of inconsistency between transit and visitor visas.

Border visa:
- unannounced.
- consequential to the new provision in section 11Z of the Act.

Medical treatment visa:
- unannounced.
- the policy change in relation to surrogate mothers was necessary due to legal uncertainty associated with surrogate motherhood. The clarification in policy on donors for organ transplants was necessary for the more effective operation of the policy.

Changes related to temporary residence - entertainer/media staff, sportspersons and medical practitioners.
- unannounced.
- correction of inconsistencies in and the clarification of current policy.

In relation to various matters raised by the Committee with departmental officers in relation to regulation 2 of the proposed regulations, I attach a paper setting out departmental comments and responses.

Yours sincerely

W J GIBBONS
First Assistant Secretary
Development and Systems Division

20 November 1989