JOINT STANDING COMMITTEE ON MIGRATION REGULATIONS

SPECIAL REPORT No. 1

RECOMMENDATIONS TO THE MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

SEPTEMBER 1991

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TERMS OF REFERENCE

The Joint Standing Committee on Migration Regulations was established on 17 May 1990 to inquire into and report upon:

(a) regulations made or proposed to be made under the Migration Act 1958;

(b) all proposed changes to the Migration Act 1958 and any related acts;

(c) such other matters relating to the Migration Act 1958, regulations or reports as may be referred to it by the Minister for Immigration, Local Government and Ethnic Affairs.

MEMBERS OF THE COMMITTEE

Dr Andrew Theophanous, MP (Chairman)
Mr Philip Ruddock, MP (Deputy Chairman)
Senator Barney Cooney
Senator Vicki Bourne
Senator Jim McKiernan
Senator John Olsen
Dr Robert Catley, MP
Hon Clyde Holding, MP
Rt Hon Ian Sinclair, MP
Mrs Kathy Sullivan, MP

Legal Consultant

Dr Kathryn Cronin

Staff

Ms Robina Mills, Secretary
Mr Tony Fortey
Ms Cassandra Paulus

PREFACE

The Joint Standing Committee on Migration Regulations, as part of its terms of reference, has determined that, where necessary and appropriate, it will provide advice to the Minister on matters where for reasons of urgency or otherwise it is not practicable to await the tabling of a report to Parliament.

Often the issues of concern to the Committee arise during the course of an inquiry. However, sometimes issues not the subject of specific inquiry are considered and if it is decided that further consideration is warranted by the Minister and his Department and possible amendment required the Committee has agreed that it will notify the Minister accordingly. The Committee has further determined that any such letters of advice will be tabled in Parliament at the earliest opportunity.

To date, only one such letter has been transmitted to the Minister. That letter was tabled in November 1989 and was included in the **Change of Status** Report tabled in May of this year. That letter included a number of recommendations relating to the Committee's inquiry into change of status on marriage or de facto grounds, recommendations which the Committee was concerned to put to the Minister prior to a deadline of 30 November 1990 and before it was possible to finalise its full report on the issue.

This "Special Report" includes two letters of advice to the Minister, one on the current refugee/humanitarian arrangements and one relating to a number of other issues. The former arose out of the Committee's current inquiry into refugee/humanitarian arrangements and the latter was prompted by correspondence to the Committee, direct references from the Minister's office and a consideration of issues arising from decisions of the Immigration Review Tribunal.

Supplementary information relating to the second letter is included in this report.

A. Theophanous

Andrew Theophanous, MP
Chairman

4 September 1991

TABLE OF CONTENTS

PART A

LETTER TO THE HON GERRY HAND MP

DATED 17 JULY 1991

REFUGEE/HUMANITARIAN ISSUES

PARLIAMENT OF AUSTRALIA
JOINT STANDING COMMITTEE ON MIGRATION REGULATIONS

PARLIAMENT HOUSE
CANBERRA ACT 2600
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FAX. (06) 277 4844

The Hon Gerry Hand, MP
Minister for Immigration, Local Government
and Ethnic Affairs
Parliament House
CANBERRA ACT 2600

Dear Minister

The Committee has been taking additional evidence on its refugee/humanitarian inquiry over the past few weeks. The Committee will now prepare a report for finalisation and tabling at a later date. However, an issue of immediate concern to the Committee is the delay in the lodgement of applications and their processing.

The Committee has noted that the delay in processing applications for refugee status is exacerbating the problems created by an increased number of applications for refugee status. The Committee also recognises that both the preparation and assessment of applications for refugee status is a time-consuming exercise. The Committee notes and approves of the commitment to achievement of a situation where all refugee applications will be determined within a period of six months as expressed by Mr Gibbons at the public hearing on 3 July 1991.

However, the Committee is particularly concerned that undocumented arrivals may be held in detention for long periods of time before their applications are submitted. The Committee considers that strict time limits should apply for the lodgment of claims by undocumented arrivals and their determination. Such a requirement will of necessity mean that such claimants must have available to them adequate interpreting facilities and access to legal assistance.

The Committee is investigating the options in relation to processing delays in determination of refugee claims. However, in the interim the Committee makes the following recommendations:

(a) that those people arriving at the border without appropriate documentation be required to submit a written notice of intention to apply for refugee status at the earliest opportunity and at most within 48 hours;

(b) that such claimants be required to submit a full application within 28 days from date of arrival, with the possibility of applying for a further extension of 28 days in appropriate circumstances;

(c) that the Government provides increased assistance to such organisations as the Legal Aid Commissions and the Refugee Advice and Casework Service, in order that claimants are able to meet the requisite deadlines;

(d) that border claimants be given priority in the assessment of their applications;

(e) that for border claimants a period of three months be the target time for the initial determination of their claim and that priority be given by the Refugee Status Review Committee for the determination of any appeals from border claimants.

The Committee will provide the Parliament with a full report on the refugee/humanitarian issues at the earliest opportunity. In the interim, I would be grateful for your response on the matters raised above.

Yours sincerely

Dr Andrew Theophanous, MP
Chairman

17 July 1991

PART B

i) LETTER TO THE HON GERRY HAND MP

DATED 15 AUGUST 1991

ii) ATTACHMENT: DISCUSSION PAPER

PARLIAMENT OF AUSTRALIA
JOINT STANDING COMMITTEE ON MIGRATION REGULATIONS

PARLIAMENT HOUSE
CANBERRA ACT 2600
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FAX: (06) 277 4844

Hon Gerry Hand, MP
Minister for Immigration, Local
Government and Ethnic Affairs
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Minister

Following your reference to the Joint Standing Committee on Migration Regulations of a letter regarding the application of the balance of family test, (file reference Q90/20246), and the Committee's obligation under its terms of reference to consider in broad terms the Act and Regulations, the Committee, at a meeting on Wednesday, 14 August 1991, considered a number of issues arising from submissions and evidence it has received during the course of its inquiries.

The Committee has decided to advise you on these matters in this letter and will incorporate this advice in a short special report to Parliament to be tabled next week.

Section 121 - Aggregation

The Committee is aware of certain difficulties in the operation of s121 of the Act. In practice the provision does not appear to work as it was intended. The difficulties with the provision appear to arise because of Departmental processing arrangements. At the time of the Tribunal review many applicants are illegal entrants, their permits having expired after they lodged applications for a further entry permit. Certain of these applicants do not know to apply for a processing entry permit. In other cases the Department has neglected to determine the processing entry permit application (Regulation 22A), others may have failed to qualify for a processing entry permit (Regulation 131), others may have been granted a processing entry permit, but the term of such permit expired before the Tribunal review date. Such 'processing illegals' cannot hope to qualify for most entry permit classes. In the circumstances, the Tribunal, using the test set down in **Re Mah**, S90/00008 will be unwilling to adjourn proceedings to allow applicants to lodge a further entry permit application.

To deal with these problems, the Committee recommends that the Minister reconsider the advice concerning processing arrangements suggested in the Select Committee's second report that:

> "The processing permit should cover the time period up to and including the final determination date before the review authorities or if no appeal is lodged, expires on the final day set down for lodging the appeal."

In addition the Committee recommends that the Minister consider amending Section 22A so that those applying for further temporary entry permits are also taken to apply for a processing entry permit. The Committee considers that these changes will ensure that all applicants will be taken to apply for a processing entry permit. Applicants will not be disadvantaged because they do not know to apply for such permits. The changes also ensure that any processing permit term will cover the review period.

The amendments will, in the Committee's view, allow Section 121 to work and will ensure that the Section provides an appropriate fail-safe provision for applicants faced with ever-changing regulations and a complicated regulatory scheme.

Balance of Family Test

The Committee also considered the existing regulations defining the manner in which the balance of family test is applied. The Committee endorses the policy behind the balance of family test and does not wish in any way to undermine the controls in this class. However, the regulation appears at present to work an injustice in certain cases, particularly where the step-children of sole parents or the estranged children of a partner are counted against the parent applicant.

The Committee therefore recommends that the Minister amend Regulation 38 to provide that in the circumstances we have prescribed the following children are not counted against the applicant for the purpose of the balance of family test:

(i) the step-children of a widowed, separated or divorced parent;

(ii) the estranged children of the spouse of a principal applicant.

Extended Eligibility Temporary Entry Permit (Family)

The Committee is also mindful of the need to control the numbers eligible to qualify for change of status in Australia and generally approves of the restrictions imposed in the EETEP categories. However, once again the Committee's attention has been drawn to unintended injustices deriving from cases in the Family EETEP class.

The Committee considers that it is not appropriate to require certain aged-dependent, remaining, special need or orphan relatives to apply overseas and therefore recommends that the requirement in Regulation 127(a)(iii) that such relatives qualify "as the result of a death or permanent incapacitation" be deleted.

Special Need Relative

In its deliberations on these matters the Committee also considered submissions and evidence pertaining to the special need relative visa class. The Committee has heard evidence concerning problems with this definition in the Regulations. The Committee is concerned about the position of minor children, resident in Australia, who arguably have a "special need" for continuing contact with a parent, but whose need for assistance does not meet the regulatory requirement for a "special need", affecting the child. **Re Campbell**, S90/00087, is illustrative of the problem in this area.

The Committee is concerned about the Campbell case profile, but is presently undecided whether such cases can be appropriately dealt with under the Minister's residual discretion or whether fine tuning of this Regulation is required. The Committee would be assisted in its further deliberations on this matter if you were to provide information concerning the incidence of such cases and the Department's procedures for dealing with them.

Complexity of the Scheme

Finally, the Committee is concerned at the ever increasing complexity of the regulatory scheme. The Committee accepts your predecessor's comments concerning the necessity for amending and refining the regulations in order to correct any faults and shortcomings in the legislation. However, the Committee feels that many changes made to the regulations have not always rectified existing problems but have created new problems or compounded existing ones.

The Committee has received evidence of instances where the implications of the regulatory amendments do not appear to have been properly considered. This is particularly evidenced in amendments to Regulation 146, devolving responsibility for the assessment of overseas qualifications onto the "responsible Australian authority". This decision added significantly to the work load and responsibilities of the Central Trades Committees (CTC) and the National Office of Overseas Skills Recognition (NOOSR). The consequences of this amendment do not appear to have been adequately considered before implementation, nor proper resources for the function provided. The amendment has also significantly affected the scope of an applicant's review rights.

The Committee is also concerned about the complicated provisions and arrangements for travel-only visas and entry visas and the recent changes to Section 47 of the Migration Act. This last change has been made, although not proclaimed, without the Department disclosing the consequential regulations and arrangements which will govern change of status. The Committee accepts the need for changes to be made to the Regulations.

The Committee's concern is not with the fact of change but the procedures adopted to effect those changes. The Committee recommends that all future changes be implemented with proper care, attention to the wider context of the changes and with timely deliberation. The legal and migration consequences ought to be fully considered by the Department's experts before regulations are gazetted or statutory amendments are drafted and submitted to Parliament.

Yours sincerely

Andrew Theophanous, MP
Chairman

16 August 1991

DISCUSSION PAPER

Aggregation

1 Section 121, the aggregation provision, is one of the fail safe mechanisms in the Act. It allows the Immigration Review Tribunal to adjourn a review so as to permit a review applicant to make an application for an entry permit of the same or a different permit class. Many of these applicants would otherwise be unable to lodge a further entry permit application (Sections 36 & 37). The Tribunal has stated (Re Mah 90/00008, 19 September 1990) that it will only exercise this discretion when the applicant appears to have a 'real possibility' of satisfying the criteria for the new permit class.

2 In cases where the section is invoked the original review will have been adjourned. The party has 10 working days within which to lodge an application for a new, or the same, entry permit. The Minister considers the new application and if the Minister refuses the new entry permit application, the original review is resumed. The Tribunal is able to review the original refusal decision and aggregate with it the new permit refusal decision. If the party fails to lodge the new application within the 10 days provided the original review is resumed and determined.

3 The aggregation provision is designed to allow the Tribunal to remedy errors which presently occur when applicants have applied for the wrong permit class - for example a spouse PEPAE instead of a spouse EETEP. The section permits applicants to apply for a different permit or to apply again for the same permit class. The applicant may not have satisfied the criteria at the date she/he originally applied but could now satisfy the permit criteria or a new permit's criteria. The permit criteria themselves may have changed or the applicant's personal circumstances may have altered since the original application date. This situation commonly occurred in the Family EETEP class - Regulation 127 was amended on the 14th August 1990 to delete the requirement that family EETEP applicants quality for the permit after arrival in Australia.

4 In practice, the Section 121 provision does not always work in the manner outlined above. At the time of the Tribunal review almost all applicants are illegal entrants. They cannot hope to qualify for most entry permit classes. The classes potentially available for illegals, entrants, including these processing illegals are the Family EETEP classes and the December 1989 permit.

5 Section 121 applicants are illegal entrants because their permits have expired during processing. They are not illegal entrants who are seeking to avoid Departmental scrutiny. They became illegal in the time taken to process their applications to extend or change their immigration status. Most applicants apply to extend or vary their stay towards the end of the term of their permits. Some will not know to apply for a processing permit. Others may not qualify for it (Regulation 131). Many are taken to have applied for a processing permit when they lodged their original permit application (Regulations 22A, 22B). The Department recently reminded officers that they must decide such deemed processing permit applications (PAM Instruction 30/5/91). Prior to this few decisions on processing permits appear to have been made. Even if the processing permit has been granted, the terms of stay granted are often insufficient to take applicants up to the Tribunal hearing date.

Balance of family test

6 The balance of family test requires the balance of the principal's family to be in Australia (Regulation 3). Regulation 38 plus s47 of the Act define the manner in which such balance is to be determined:

6.1 Sub-paragraph (1) of Regulation 38 provides that the balance is satisfied where the parent's children residing in Australia

(a) is not fewer than the total number resident overseas; or

(b) is greater than the number resident in any one overseas country.

6.2 Children includes the children of a spouse and where a child's whereabouts are unknown the child is deemed to reside in the parent's country of residence.

7 The Committee received a number of letters regarding the operation of the balance of family test, including one referred to the Committee by the Minister's office. The balance of family test was also the issue in the only case reported to Parliament to date in which the Minister has exercised his discretion under Section 115 to permit migration entry to a person whose case fell outside the Migration Regulations.

8 It appears that the test as it currently stands can operate harshly in some circumstances, particularly where one or both partners have been married previously and there are children of the former marriage. The following case studies illustrate the problem.

Case study 1

9 D is an Englishwoman who had lived in Australia for 24 years from 1960. Two of her three children were born in Australia and all live permanently here. D returned to the UK in 1984 to nurse her terminally ill mother, who died in 1986. D remarried in the UK to a man who had 4 children resident there. D's permanent residence permit lapsed when she failed to return to Australia within 3 years from the date of leaving. The Minister exercised his discretion in this case and approved D's application.

Case study 2 (forwarded from the Minister's office)

10 X has recently widowed and her daughter wished to sponsor her to come to Australia as she was in the best position to look after her mother. Another daughter still lives in the UK but has a dependent child and is separated from her husband. She is therefore not in a position to support her mother. An unmarried brother lives in Canada. X does not qualify because only one of her three children lives in Australia.

11 The Immigration Review Tribunal has determined a number of cases which discuss the balance of family test:

11.1 **Re Roscoe** in which an applicant failed the balance of family test because there were 3 children from his wife's previous marriage. The marriage and the children were abandoned because of a history of domestic violence. The children's whereabouts were unknown. The only child of the applicant and his wife lives in Australia.

11.2 **Re Ah Poh Tan** in which an applicant whose husband has died, applied to come to Australia where 2 of her 4 children live. She failed the balance of family test because she has 3 stepchildren in Malaysia and Singapore.

12 These cases have been determined against the applicant. Although the Tribunal has recognised that the provision works unjustly at times, it must act within the law and the law as it stands means that such applicants do not qualify.

EETEP (Family)

13 It appears to the Committee that the requirements to qualify for an Extended Eligibility (Family) Temporary Entry Permit are unnecessarily restrictive. To qualify for the permit, the applicant must be an aged dependent relative, a remaining relative, a special need relative or an orphan relative, and must have become so as the result of a death or permanent incapacitation.

14 This requirement forces applicants to return overseas to apply for migrant entry within the preferential family category as an aged dependent, remaining, orphan or special need relative, where the condition that the person qualifies as a result of a death or permanent incapacitation does not apply.

Special Need Relative

15 The Committee has had a number of representations made to it regarding the definition of a "special need" relative. Many submissions relate to children who are Australian citizens or permanent residents, but who have a parent normally resident overseas and who wishes to stay permanently in Australia in order to be near the child or children.

16 This case profile is well illustrated in Re Campbell (S90,00087) where Campbell is a US citizen who came to Australia to visit his young children. Campbell and his wife were divorced. She had returned with the children to live in Australia after the separation. After spending time with the children Campbell decided that he would like to remain in Australia and assume a degree of parental responsibility for his children. His ex-wife was also keen for this to happen.

17 However, because children are not deemed to have a "special need" for the presence of a parent, applicants in Campbell's situation do not qualify under the Regulations for permanent entry on this basis.

18 The Committee is still considering this matter.

PART C

DISSENTING REPORT

SENATOR J MCKIERNAN

DISSENTING REPORT BY SENATOR JIM McKIERNAN TO SPECIAL REPORT OF THE JOINT STANDING COMMITTEE ON MIGRATION REGULATIONS.

I present this dissenting report more as a protest about the way the Joint Standing Committee is operating rather than as direct opposition to the Recommendations and Suggestions contained in the letters from the Committee to the Minister dated 17th July and 16th August, 1991.

I have previously expressed my views on the nature and content of these letters by way of letters from me to the Chair dated 22nd July, 1991 and to the Deputy Chair dated 15th August, 1991. I attach these letters of mine as part of my dissenting report.

My letters record my objections to the apparently adopted practice of the Committee to raise matters directly with the Minister by way of letter without substantial supporting evidence. Further I did not, at the time of writing, consider the subject matter of the letters to be of such an urgent nature that the subject matter should be addressed in this way. I felt that the matters could and should be raised in the normal manner by way of a report to the Parliament.

I further object to the deadlines that were imposed upon me to respond to the draft letters from the Chair and Deputy Chair. These matters are mentioned in my letters.

Because the Senate was Sitting on the 14th August, 1991, I was unable to attend a meeting of the Committee in Parliament House, Canberra. This meeting determined that the two letters from the Committee would form the basis for a Special Report to the Parliament. I was not then made aware of this decision.

A Meeting of the Committee scheduled for lunchtime on 21st August, 1991 was cancelled, by decision of the meeting of 14th August, 1991. Neither I, nor my office were informed of this cancellation.

I became aware of the fact that the Committee had determined to present a Special Report to the Parliament when I was given a copy of the draft at the commencement of a Committee Public Enquiry in Melbourne on Wednesday 28th August, 1991. I was then informed that the Special Report would be presented to the Parliament on 5th September, 1991 - eight (8) days after I was informed that such a Report was being prepared.

A one (1) hour meeting to consider the report is planned for 9.00 am on Thursday 5th September, 1991. A matter of hours before the report is presented to the Parliament. It is obvious, because of the logistic requirements of the Parliament, that the Report will have already been printed at the time the Committee considers it. There will be no ability for Committee Members to amend or vary the contents of the Special Report.

I have made a very deliberate attempt to keep this Report succinct and directly related to the matters I consider to be salient. I could, given a lighter personal workload, elaborate in much more detail on my concerns about how the Committee is functioning.

I am giving consideration to my future on the Committee.

Jim Mc Kiernan

JIM McKIERNAN
SENATOR FOR WESTERN AUSTRALIA

29th August, 1991

PARLIAMENT OF AUSTRALIA • THE SENATE

Jim McKiernan J.P.

Labor Senator for Western Australia

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22 July 1991

Dr Andrew Theophanous MP
Chairman
Joint Standing Committee
on Migration Regulations
Office 14
Broadmeadows Railway Station Centre
1100 Pascoe Vale Rd
BROADMEADOWS 3047 Victoria

Dear Dr Theophanous

I regret that prior commitments made me unable to communicate my views on the draft refugee/humanitarian letter dated 17 July 1991, to Minister Hand, prior to the deadline of Friday, 19 July 1991.

Whilst I agree with the principles contained in the five recommendations included in the letter, I am not convinced that enough substantiating evidence is offered to convince the Minister that he should act, at this time, to implement the recommendations.

I therefore ask that my opposition to the letter (interim report) be recorded.

Yours sincerely

Jim McKiernan

JIM McKIERNAN
Senator for Western Australia

C.C. Ms Robina Mills
Secretary
Joint Standing Committee on Migration Regulations

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Mr Phillip Ruddock MP
Acting Chairman
Joint Standing Committee on Migration Regulations
Suite RG 115
Parliament House
CANBERRA ACT 2600

August 15 1991

Dear Phillip

I thank you for the copy of your draft letter to the Minister for Immigration, Local Government and Ethnic Affairs, which was forwarded to me by Committee Secretary, Ms Mills, following the Committee's deliberations on Wednesday August 14 1991.

You are aware that I was unable to attend this meeting.

I have read the draft letter and do not consider the issues that it addresses to be of sufficient urgency to warrant the forwarding of such a letter to the Minister.

The writing and delivery of letters from a Parliamentary Committee conveys a sense of urgency. I do not accept that such urgency exists in the headings contained in the draft letter.

I am firmly of the view that the matters addressed

- Section 121 - Aggregation
- Balance of family test
- Extended Eligibility Temporary Entry Permit (Family)
- Special Need Relative

could be addressed by the Committee in proper context, in a Committee report to the Parliament.

This is the second such occasion in very recent times that I have opposed such letters being forwarded to the Minister from the Committee.

I would also place on the record my objection to the deadline for replies that are imposed upon Committee members. On the previous occasion I was physically unable to meet this deadline, and on this occasion meeting it has caused me some difficulty.

Yours sincerely

JIM McKIERNAN
Senator for Western Australia

cc Dr Andrew Theophanous MP
Chairman