

**HUMAN  
RIGHTS  
COMMISSION**

**REPORT NO. 13**

**Human Rights and the  
Migration Act 1958**

**April 1985**

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- Report No. 1 *The Australian Citizenship Act 1948* (August 1982)  
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Report No. 3 *Testamentary Guardianship in the Australian Capital Territory* (April 1983)  
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Report No. 5 *Review of Crimes Act 1914 and Other Crimes Legislation of the Commonwealth* (August 1983)  
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*Page*

## **PART IV OF THE ACT — MISCELLANEOUS**

<b>8. Discretion, Delegation and Review .....</b>	<b>80</b>
8.1 The Discretions Listed .....	80
8.2 Criteria for the Exercise of Discretions .....	84
8.3 Review .....	87
<b>9. Recommendations .....</b>	<b>91</b>

## **Appendixes**

I. The Migration Act 1958 (1981 reprint) and subsequent amendments (Nos 72 and 22 of 1984, 112, 84 and 73 of 1983, and 51 of 1982) .....	99
II. Relevant Regulations from Migration Regulations .....	182
III. Relevant sections from Racial Discrimination Act .....	187
IV. Relevant Articles from the International Covenant on Civil and Political Rights .....	189
V. Relevant Principles from the Declaration of the Rights of the Child .....	193
VI. Relevant Paragraphs from the Declaration on the Rights of Disabled Persons .....	194
VII. Submissions and their Contents .....	195
VIII. Table of Public Hearings .....	200
IX. List of Witnesses .....	201
X. Case Studies .....	203
XI. The Villawood and Maribyrnong Immigration Detention Centres — Visits in September and October 1984 .....	209

Human Rights Commission  
6th Floor, A.M.P. Building  
Hobart Place  
Canberra City, A.C.T. 2601

17 April 1985

The Hon. Lionel Bowen, M.P.  
Deputy Prime Minister and Attorney-General  
Parliament House  
Canberra, A.C.T. 2600

Dear Attorney-General,

Pursuant to paragraph 9(1) (a) of the Human Rights Commission Act 1981, the Commission has reviewed human rights aspects of the Migration Act 1958 and relevant regulations, manuals, instructions and other documents. In addition, the Commission invited submissions and inquired, pursuant to paragraph 9(1) (b) (ii), into related administrative practices of the Department of Immigration and Ethnic Affairs.

In accordance with the requirements of the Act, I now present this report to you.

Yours sincerely,

A handwritten signature in dark ink, reading "Roma Mitchell". The signature is fluid and cursive, with a long horizontal stroke at the end.

*Chairman*  
for and on behalf of the  
Human Rights Commission

## FUNCTIONS OF THE COMMISSION

Section 9 of the Human Rights Commission Act 1981 reads:

**9.** (1) The functions of the Commission are—

- (a) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to any human rights, and to report to the Minister the results of any such examination;
- (b) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and-
  - (i) where the Commission considers it appropriate to do so — endeavour to effect a settlement of the matters that gave rise to the inquiry; and
  - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect a settlement of those matters — to report to the Minister the results of its inquiry and of any endeavours it has made to effect such a settlement;
- (c) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;
- (d) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;
- (e) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination;
- (f) to promote an understanding and acceptance, and the public discussion, of human rights in Australia and the external Territories;
- (g) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting human rights and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;
- (h) to perform-
  - (i) any functions conferred on the Commission by any other enactment;
  - (ii) any functions conferred on the Commission pursuant to any arrangement in force under section 11; and
  - (iii) any functions conferred on the Commission by any State Act or Northern Territory enactment, being functions that are declared by the Minister, by notice published in the Gazette, to be complementary to other functions of the Commission; and

(j) to do anything incidental or conducive to the performance of any of the preceding functions.

(2) The Commission shall not—

(a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or

(b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a).

(3) For the purpose of the performance of its functions, the Commission may work with and consult appropriate non-governmental organisations.

## **LIST OF ABBREVIATIONS**

AAT	Administrative Appeals Tribunal
ACROD	Australian Council for Rehabilitation of Disabled
AFP	Australian Federal Police
AIMA	Australian Institute of Multicultural Affairs
APS	Australian Protective Service
ARC	Administrative Review Council
ASIO	Australian Security Intelligence Organisation
DAS	Department of Administrative Services
DIEA	Department of Immigration and Ethnic Affairs
DORS	Committee — Interdepartmental Committee on Determination of Refugee Status
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
IRP	Immigration Review Panel
PNC	Prohibited Non-citizen
SAT	Security Appeals Tribunal
The Act	The Migration Act 1958 (as amended)
TEP	Temporary Entry Permit
UNHCR	United Nations High Commissioner for Refugees



## EXECUTIVE SUMMARY

1. Complaints relating to the Migration Act 1958 (the Act) and practices under it have been a continuing feature of the Human Rights Commission's (HRC) work, and have resulted in four reports on particular aspects of the migration process: Human Rights and the Deportation of Convicted Aliens and Immigrants (Fourth Report, June 1983); The Observance of Human Rights at the Villawood Immigration Detention Centre (Sixth Report, August 1983); Deportation and the Family (Eighth Report, September 1984); and the Human Rights of Australian Born Children (Tenth Report, January 1985). A more comprehensive approach seemed to be required, and the result is this report (see paragraph 1).
2. The Commission set itself to review the legislation under section 9(1) (a) of the Human Rights Commission Act rather than inquire into acts and practices of the Department of Immigration and Ethnic Affairs (DIEA) (section 9(1) (b)). Accordingly, it has not followed particular matters through beyond establishing that change in law or practice should and could be made to ensure better observance of human rights (paragraph 2).
3. The Commission acknowledges with thanks the assistance it has received from DIEA during its inquiries and welcomes the fact that DIEA has indicated a wish to observe human rights in implementing the Act. It believes Australia's immigration practices stand up well to international comparison, but as indicated in the report and in the paragraphs below it has nevertheless identified parts of the Act, and of associated practice, that need change in order to improve the observance of human rights (paragraph 38).
4. The Commission recognises that some of its recommendations have resource implications — indeed this was on occasions a reason for DIEA objecting to them. Examples are the need for interpreters, welfare workers and legal aid. The Commission recognises the resource implications, but its task is to draw attention to imperfect observances of human rights, wherever these may be found. Where it has identified a need for action to ensure better observance of human rights, it looks to governments and their agencies to accept the obligation and do the best they can to implement it (paragraph 39).
5. The Commission gratefully acknowledges the 137 written submissions from individuals and organisations, and the work done by DIEA and others, to assist it in its inquiries (paragraphs 4-9).
6. Human rights are involved in the exercise of many of the powers and machinery provisions contained in the Act. No less than 13 of the Articles of the International Covenant on Civil and Political Rights (ICCPR), four of the Principles of the Declaration of the Rights of the Child and six of the paragraphs in the Declaration on the Rights of Disabled Persons are involved, as well as section 9 of the Racial Discrimination Act (paragraphs 40-43).
7. The Commission finds the Act to be largely a machinery measure, with an emphasis on processes relating to entry to, and enforced departure from, Australia. The Act does not contain a statement of principles but works by conferring extensive discretions on the Minister and officers of the Department. The Commission considers the criteria on which the discretions should be exercised should be stated in the legislation (paragraphs 21-23, 29 and 289-291).

8. The Commission considers exercise of the discretions should, in addition to being controlled by criteria contained in the Act, be subject in the main to review by an independent body. It notes that the Administrative Review Council (ARC) is reviewing the Act with the object of proposing new review arrangements (paragraphs 61-63 and 306-318). While leaving review arrangements to the ARC, the Commission is of the view that:
- reasons should be required by the Act to be given in respect of exercise of the major discretionary powers (paragraphs 299-305 and 318)
  - statutory criteria for the exercise of discretions should be incorporated in the Act (paragraph 304), examples being —
    - the issue of visas (paragraphs 81-87)
    - cancellation of visas (paragraph 141)
    - deportation (paragraphs 215-240)
    - change of status (paragraphs 176-188 and 199-200)
    - cancellation of a Temporary Entry Permit (TEP) under section 7 (paragraphs 199 and 300)
    - more comprehensive provision for review by an independent tribunal such as the Administrative Appeals Tribunal (AAT) (paragraph 318).
9. The two groups whose human rights are most at risk in the administration of the Act are disabled persons and persons who have become Prohibited Non-Citizens (PNCs) (paragraphs 44-52).
10. The main recommendations made to improve the observance of the human rights of persons with disabilities relate to —
- removing the discrimination against disability in applications to migrate to Australia (consideration currently is seen to start from exclusion rather than admittance) and using the ordinary selection criteria (paragraphs 109-111)
  - repeal of Migration Regulation 26, which defines a list of 'prescribed diseases' that includes disabilities, and ending the confounding of disability and public health (paragraphs 100-106)
  - limiting to health factors the reporting requirements on masters of vessels (paragraph 169)
  - withholding an entry permit only on health (not disability) grounds (paragraph 169).
11. Non-citizens enjoy less rights than do citizens and the Commission is of the view that to the maximum extent possible they should enjoy the same legal, as well as the same human rights as do citizens (paragraphs 189-191).
12. In relation to PNCs, it is the view of the Commission that as far as practicable their rights should be the same as those of other non-citizens, particularly in such matters as detection and custody — see particularly paragraphs 192-214. The paragraphs just cited contain numerous specific proposals to ensure better protection of the rights of PNCs, including:
- a right of appeal to an independent body (paragraphs 185-188)
  - observance of the right to privacy (paragraph 204)
  - assessment of genuineness of marriage consistent with the requirements of ICCPR Articles 17 and 23 (paragraph 188)
  - no discrimination on grounds of race in detection, custody and deportation (paragraphs 201-203)

- introduction and full observance by DIEA of guidelines in relation to arrest and search of premises, and early bringing before a court (paragraphs 205-208)
  - advice in their own language of the reasons for arrest (paragraphs 207-208)
  - provision of a system of conditional release (bail) (paragraphs 208-210).
13. The Commission welcomes the new emphasis on the family in immigration policy, believes it is in accordance with the requirements of the ICCPR and considers this emphasis has not yet adequately been carried through to a consideration of deportation policy (paragraphs 57-60). Particular recommendations relate to:
- making greater efforts to reduce delays in family reunions (paragraphs 92-95)
  - automatic acceptance as de facto couples of persons who have lived together for a year (paragraph 58)
  - allowing entry on the basis of demonstrated long—term and continuing companionship (paragraphs 59-60)
  - abolishing if practicable the assurance of support arrangements (paragraphs 96-99)
  - respect for privacy and the family unit (paragraphs 254 and 268).
14. The Commission approves the announcement by the Government that one of the nine underpinning principles of immigration policy is non-discrimination. Staffing levels at overseas posts, however, appear to be discriminatory and should be reviewed to reflect more adequately the volume of demand (paragraphs 89-91).
15. Refugee status should where practicable be determined by the UN High Commissioner for Refugees (UNHCR) and those whose situation is most desperate and irreversible should be selected from the groups identified by the High Commissioner (paragraphs 117-132).
16. The possibility of change of status for temporary entrants is provided by section 6A of the Act and is a welcome amelioration of the stringency of entry conditions. However, given its humanitarian objectives, the Commission believes human rights would more effectively be observed if application for change of status could be made even if the TEP had expired, provided a deportation order is not in existence. A TEP should not expire until the application for a change of status has been processed, the decision communicated to the applicant and, where the application has been refused, the applicant has had a reasonable time to leave Australia voluntarily (paragraphs 178-183). The Commission would prefer reinstatement of the amnesty provision which was repealed in 1983. If it cannot be restored, guidelines consistent with the relevant human rights should be included in the Act to allow change of status (paragraph 200).
17. Deportation decisions are provided by the Act (section 18) to be at the absolute discretion of the Minister or his delegate. While the Commission accepts that great care is taken before decisions are made to deport (there were 829 deportations in 1982-83), it considers human rights would be better observed if:
- the recommendations in its Fourth Report on human rights in deportation of convicted non-citizens were fully implemented (paragraphs 218-220)
  - Australian Security Intelligence Organisation (ASIO) advice was required by the Act to be obtained before deporting on national security grounds (paragraphs 222-225)
  - section 18 specified the grounds on which the general power of deportation may be exercised, to promote evenness of administration and review by courts and tribunals on a legislated basis (paragraphs 227-230)

- deportation orders remained valid for 3 years (rather than indefinitely), after which they could be renewed only after an internal review (paragraphs 233-234).
- 18.** Enforcement of the Act within Australia is one of DIEA's most difficult tasks, and naturally leads to the risk of violation of human rights in the process of searching, arresting, and holding persons in custody. The main recommendations relate to:
- ensuring that social workers and others may perform their proper professional functions without risk of offending against the 'harbouring' offences in section 30 (paragraph 245)
  - ensuring that wherever possible DIEA officers do not use force, but leave this function to police officers (paragraphs 252-254)
  - keeping to a minimum the time PNCs are kept in custody prior to deportation (paragraphs 260-263)
  - providing in the Act for a system of conditional release (bail) for PNCs (paragraphs 208-210 and 264-266)
  - the need for continuing progressive implementation of the recommendations in the Commission's *Report No 6, The Observance of Human Rights at the Villawood Immigration Detention Centre* (paragraphs 270-272)
  - the exercise of restraint in questioning persons suspected of being PNCs or deportees (paragraphs 273-277).

# 1. INTRODUCTION

## 1.1 The Origin and Scope of the Review

1. Since its creation on 10 December 1981, the Human Rights Commission has received a continuous flow of complaints, made both under the Human Rights Commission Act 1981 and under the Racial Discrimination Act 1975, relating to various aspects of migration. In the financial year 1982-83 the complaints gave rise to two major inquiries by the Commission. The first dealt with the observance of human rights of detainees and deportees held at the Villawood Detention Centre. The second addressed human rights issues relating to the deportation of permanent residents of Australia who committed serious crimes. Apart from the evidence of direct relevance to the subject matter of the investigations, the inquiries brought to light evidence relating to infringements of human rights in other areas of migration. In addition, the number of migration-related complaints received by the Commission has increased substantially during the last two years and, at present, it constitutes about 25% of the total number of complaints being received by the Commission on human rights grounds.

2. In view of the evidence assembled during the two above mentioned inquiries and the increasing number of complaints in the migration area, the Commission decided to conduct a full-scale review of the Migration Act 1958 and relevant regulations, manuals, instructions and other documents and administrative practices of the Department of Immigration and Ethnic Affairs (DIEA) to see if any are inconsistent with or contrary to human rights as defined by the Commission's Charter. At this point, it needs to be stressed, however, that the review was not designed to embrace all matters that are dealt with by DIEA. It was directed at the human rights issues covered by or closely related to the Migration Act 1958 (the Act). It did not extend to other legislation administered by DIEA, or to its migrant settlement, welfare, education and other 'ethnic affairs' functions. Nor did the review extend to following up in detail the complaint-type matters raised in submissions: the matters were treated as identifying problems in the provisions of the Act or associated practices and the complaints were followed up separately if the writer of the submission so desired. In some matters which were raised in submissions DIEA has indicated that its practices take account of the relevant human rights. In others it has not. The Commission has not regarded issues raised with it as necessarily proven — there has been neither time nor the necessary resources to conduct the inquiries that would have been required — but it has made recommendations based on the issues unless satisfied that there was no need, and in order to draw the issues involved to attention.

## 1.2 Methodology

3. The review was announced in May 1983. Advertisements inviting interested persons and organisations to lodge submissions with the Commission were placed in the national, metropolitan and some provincial newspapers, and in 22 ethnic newspapers. In addition a substantial number of letters were sent to, and a number of meetings were held with, various departments including DIEA, statutory authorities and non-government organisations active in migration matters.

4. In response to its invitation, the Commission received some 137 written submissions from individuals and organisations. The nature of submissions varied. Some of them dealt comprehensively with a range of human rights aspects of the Act, others dealt with particular issues only, e.g. discrimination against disabled or homosexual people or the intake of refugees from South East Asia, while others were specific complaints relating to individual cases. Copies of all public submissions and transcripts of

proceedings from the public hearings were made available to DIEA, which responded with a 370 page submission directed at a number of important issues which had been identified by the Commission in correspondence with DIEA. The DIEA also provided extensive comments on the Commission's draft report, but did not comment on government policy or on the legislation. Nor did it respond to specific issues relating to individual cases that were raised in the written submissions and in the oral evidence. A table giving details of submissions and their contents is presented in Appendix VII.

5. After receiving the written submissions, the Commission held public hearings. Some 120 witnesses gave evidence at seven public hearings held in all capital cities except Darwin and Hobart. A consultation was held in Hobart. One witness was subpoenaed to attend and furnish information at the Sydney hearings. Appendix **VIII** tabulates details of the hearings.

6. In addition, during the evidence-gathering process the Commission has:

- analysed the Migration Act 1958, Migration Regulations, relevant departmental manuals, instructions and administrative practices;
- reviewed Australian and overseas legal cases and literature of relevance;
- subpoenaed and examined over 100 files from the central, regional and overseas offices of the DIEA pertaining to individual cases brought to the Commission's notice;
- reviewed its own files containing migration related complaints;
- had discussions with DIEA officers responsible for particular areas or cases;
- interviewed one of the Chairmen and two members of the Immigration Review Panel (IRP);
- attended a section 38 detention hearing; and
- visited Maribymong Immigration Detention Centre on 26 September and Villawood Immigration Detention Centre on 5 October 1984.

7. While the review was in progress, the Migration Amendment Act 1983 (No. 112 of 1983) was passed. It implemented a number of the recommendations made by the Commission in its Report No. 1 'The Australian Citizenship Act 1948' and, in particular, in Report No. 4 'Human Rights and the Deportation of Convicted Aliens and Immigrants'. The amendments removed from the Migration Act 1958 the distinction between aliens and immigrants in relation to entry and deportation controls and gave all non-Australian citizens the same status in relation to those controls. The Migration Amendment (Emigration of Certain Children) Act 1983 (No. 73 of 1983) repealed Part **III** of the Act, following enactment of the Family Law Amendment Act 1983 (No. 72 of 1983), which included provisions relating to children overseas, or proposed to be taken overseas. This report is based on the Act, as amended.

### **1.3 Acknowledgments**

8. DIEA has made a number of changes of an administrative nature since the commencement of the Inquiry. For example, in the Central Office, branches dealing with review of decisions were separated from enforcement branches in order to increase their independence. Some changes are also being introduced in the administrative practices of the Sydney Office. The Commission appreciates the general nature of the changes and endorses their direction. It is, however, too early to judge to what extent the changes will actually improve the observance of human rights. A note is made, at the appropriate places in this report, of the points to which the Commission's attention has been drawn during the review, and of changes which the Commission has been advised are now made or being made.

**9.** The Commission thanks all who helped in the review, and especially those who provided written submissions or gave oral testimony at the public hearings. Of particular assistance were the submissions made by (in alphabetical order):

- Amnesty International
- Australian Association for Better Hearing
- Australian Association for the Mentally Retarded
- Australian Council for Rehabilitation of Disabled
- Australian Institute of Multicultural Affairs
- Councils for Civil Liberties of NSW and Queensland
- Departments of Foreign Affairs and Immigration and Ethnic Affairs
- Ethnic Affairs Commissions of NSW, SA and Victoria
- Interagency Migration Group
- National Epilepsy Association of Australia
- New Settlers Federation of Australia
- NSW Social Welfare Workers' Union.

The Commission also had advantage of seeing a draft of the report the Administrative Review Council is preparing on the Migration Act.

**10.** The Commission records its appreciation of the invaluable assistance provided by its staff — to Dr Sev A. Ozdowski, who prior to his departure to take up a Harkness Fellowship in the United States in July 1984, served as Secretary to the Inquiry, to Ms Glenys Roper who researched and developed much of the draft report, to Dr John Hookey and Mr Michael Teh for work on legal aspects of the Report, to Ms Joan Jardine for work on migration issues associated with disabled and mentally retarded people and to Ms Marijke Conrade for assistance in the late stages of preparation. The Commission also thanks Mrs Christine Sarkies, Mrs Jan Churcher and Ms Ros Tassaker for their skill in typing and compilation of the Report. Assistance by Ms Betty Hounslow at the Marrickville Legal Centre and Mr Steve Mark of the Redfern Legal Centre is also gratefully acknowledged. One of the Commissioners, Mrs Ford, undertook the special task of revisiting the Villawood and Maribyrnong Migrant Detention Centres and of preparing Appendix XI.

## 2. THE MIGRATION ACT AND ITS ADMINISTRATION

11. This chapter identifies the major elements of the Australian system of migration in its social context. It aims only at a description of the system, and is not a critical analysis or assessment.

### 2.1 Migration a Continuing Feature

12. Immigration has been a major and continuing element in the history of Australia. However, it was only after the conclusion of the second World War that Australia adopted a large-scale planned program of population expansion through immigration. Since 1947 approximately 4 million people have arrived from some 140 different countries and localities around the world. At present, about 40% of Australia's population was either born overseas or of parents born overseas, and some 27% of our workforce was born outside the country. The post-war migration has materially changed the ethnic character of the Australian population and contributed to the emergence of multicultural Australia.

13. The reasons for migration to Australia have been complex. Some migrated in the hope of making a fortune at the gold fields or just to secure a decent standard of living, others to find a refuge from political persecution, and others to escape legal or family problems. Economic and political factors have played the major role in the post-war migration.'

14. In the years to come, Australia may well become an even more attractive place for migrants. It is seen by many, and particularly by people living in less wealthy neighbouring countries, as a country of opportunity. Attractive features are its stable democratic system of government, a good record in human rights and the multicultural character of the society. Recent developments in communication technology also make Australia more accessible, and its relative isolation is beginning to be seen as an advantage, especially by Western Europeans, at a time of increased international tension.

15. Whereas the numbers of potential immigrants are a product of economic and sometimes political pressures, actual immigration to Australia has been, to a large extent, controlled by the provisions of the law and by the way the law is interpreted and applied.

### 2.2 Legislative Control of Immigration

16. Control of immigration has deep roots in Australian history. As far back as 1855 the Victorian Parliament imposed restrictions on the entry of Chinese, an example which was followed within the ensuing twenty years by New South Wales and Queensland. Subsequently, all the Australian colonies, as they then were, passed fairly comprehensive immigration laws.

17. The desire to guard Australia against coloured and, in particular, Asiatic immigration was one of the most powerful influences drawing the colonies together. At Federation in 1901, s.51 (xxvii) of the Constitution conferred on the Federal Parliament the power to enact laws with respect to 'immigration and emigration'. One of the first legislative measures of the Parliament was the adoption of the Immigration Restriction Act 1901, with almost complete agreement of all parties. The Act was 'machinery' legislation and embodied provisions enabling the executive government to implement a

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I. For more on the history of migration to Australia, see Geoffrey Sherington *Australia's Migrants*, George Allen & Unwin, Sydney, 1980.

'White Australia' policy.' It included a dictation test (carried over from the Queensland legislation), which could be given in any European language, and was used mainly to exclude non-European people. Non-whites were only allowed to enter Australia on a temporary basis under permit. The Act provided also for the exclusion of other classes of immigrants, e.g. criminal, disabled and mentally retarded people or those likely to be a charge on the public purse. In 1920, the Commonwealth Government adopted responsibility for migrant selection and in 1921 took control of all Australian migration operations in the United Kingdom. In the late forties and early fifties, it slightly relaxed many of the rigid restrictions on non-European settlement, e.g. in 1952 it was decided to admit Japanese wives of Australian servicemen under permits valid initially for five years.

18. In 1958 the Parliament passed the Migration Act which is, with some amendments, still in force. The Act abolished the controversial dictation test, introduced a simpler system of entry permits and provided some limited safeguards for the rights of the individual. Careful examination of the Act suggests, however, that it continues the legislative approach adopted by the authors of the Immigration Restriction Act 1901 and is 'machinery' legislation. It is designed to provide the necessary legal and administrative framework for the efficient enforcement of any current immigration policy. It provides a legal basis for the issue of visas, entry permits and return endorsements, and for processes leading to criminal deportation and deportation of persons not lawfully in Australia. It authorises examination, search and detention of specified individuals, and creates offences in relation to entry into, and presence in Australia. But it contains no statement of objectives or principles of immigration policy, no guidelines for selection of migrants, no indication as to how immigration levels should be determined and no statement of the rights of those who have settled in Australia.' Furthermore, the Act gives the Minister and DIEA officers a level of discretion unknown in other legislation and does not provide for a comprehensive review system.

19. An examination of Parliamentary debates on the Migration Bill in 1958 points clearly to the fact that the Bill was seen as an instrument of control to be used for the continuation of policies and administrative practices adopted, and then further developed

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2. For a comprehensive discussion of the White Australia Policy, see Myra Willard *History of the White Australia Policy to 1920*, Melbourne University Press, Carlton, 1978.

3. It is noted that section 6A of the Act, which was inserted in 1980, lays down the conditions on which an entry permit may be granted to an immigrant after entry into Australia, rather than providing an open-ended power.

4. The Parliamentary debates on the Bill disclose racial prejudice. For example, the speech by Mr Bruce (Member for Leichhardt) gives an interesting ranking of migrants to Australia. The first rank of priority is given to British migrants, who were characterised in the following terms:

I was brought up in a community the members of which included immigrants of English, Irish, Scotch and Welsh stock. These people had great foresight, because each of their houses had its own orchard. We lived in a mining village which consisted mainly of one long street. For some time the members of the four sections of the community kept to themselves, but as time went on they intermarried. At that time the average family had about eight children. The younger members of the various sections grew up, intermarried, carried on normal family lives and left their children behind them. They helped to build the real foundations of Australia.

These were thrifty people. They were also very charitable. No family in trouble was refused assistance by the others. They helped each other in every possible way, and their children were brought up to be honest, thrifty and straightforward. They enjoyed very few of the amenities that people today take for granted. All the youngsters attended the church picnics. They also had their dances. The young people could be seen walking out together, as the custom was called in those days, and in due time they would marry and raise families. In this way some of the foundations of our nation were laid by a group of immigrants who are now practically forgotten.

The second priority was given to people from Finland, from Germany and from the Nordic countries because 'they were readily assimilated into the Australian population by inter-marriage with the Australian people'.

The third priority was given to the Southern European people:

I have found the early Italians to be very fine people. From my early experience in the north, I found that the Italian people did not carry knives, but the Sicilians did, and they knew no Australian law. The Italians got a very bad name because of the attitude and outlook of the Sicilian people. . . . Anybody who has studied the history of Sicily knows that these people have had no law but that of the tooth and the knife. They have adopted the policy: 'An eye for an eye and a tooth for a tooth'.

by the authors and administrators of the Immigration Restriction Act 1901. In his Second Reading Speech the Hon. Alex Downer, then Minister for Immigration, stated:

The purpose of this Bill is to consolidate and amend Australia's immigration statutes. *It is nothing to do with the Government's current immigration policy; its primary concern is with the mechanism by which national policy is implemented.* . . . it is a technical document arranged in four parts, containing 67 clauses. The more material portions are those dealing with immigration, deportation, and the emigration of children and aborigines. (Commission's emphasis).

20. The Bill won strong bipartisan support. It was seen as a practical and effective instrument which would ensure that only 'the right type of immigrant' was allowed to enter and stay in Australia, and would enable preference to be given to British immigrants 'to build up a fine race of Australians and to preserve the homogenous Australian community without any marked problems of racial minorities'.<sup>4</sup> The elimination of the controversial dictation test was applauded mainly because the test had proved to be of increasing embarrassment to the government, and because the new, ostensibly non-racist provisions of the Bill in reality maintained strong controls over immigration, especially from Asia.

21. The only substantial criticism of the Bill was made by Mr (now the Rt. Hon. Sir) Billy Snedden, who argued for the introduction of a new concept in migration legislation. He said:

- . . . I do not believe this Bill goes as far as it should go. As a consolidation, it is excellent; as a statement of the law on migration, it falls short. I should have liked to see placed before the Parliament what might be more properly described as a bill for a code on migration. *Such a code should be as near as possible to a comprehensive statement of the rights and obligations of migrants.* This would have a two-fold effect. It is important to the people in Australia who may wish to nominate migrants, and it also has a vital role in being important to people overseas who may wish to migrate to Australia. (Commission's emphasis).

Such a Bill, Mr Snedden said, should include 'the inviolable right of family re-union' and provide a comprehensive and stable statement of immigration law that would make immigration practices much clearer to both prospective immigrants and immigration officers. Mr Snedden was also critical of Ministerial discretions under the Migration Bill 1958 and advocated their substantial reduction.

22. The Migration Regulations (Nos. 35 and 89 of 1959, consolidated in 1981 and amended by No. 244 of 1983), made under section 67 of the Act, are limited in their number and address only a few selected procedural issues. They contain 36 Regulations, and deal in a detailed way with such matters as procedures associated with the arrival of overseas passengers in Australia (including a list of prescribed diseases and mental or physical conditions), the work of Commissioners appointed under section 14 of the Act, assurances of support, immigration centres, and fees charged by DIEA.

## **2.3 Migration Policy and Its Review**

23. In the 'machinery' legislation of the Act and Regulations, the wide discretionary powers conferred on officers are governed by policies which determine how the system is administered. Examples of important policies which fill in the vacuum created by the lack of comprehensive legislation and by the wide discretions included in it are:

- (i) the statement identifying the nine general principles underlying the migration system, made in the Federal Parliament by the Hon. Michael Mackellar, M.P., then Minister for Immigration and Ethnic Affairs on 7 June 1978;

(ii) the annual decisions about general levels of immigration;

- (iii) determinations of the priority to be given to categories of migrants, e.g. for family reunion, labour shortage or business migration;
- (iv) decisions about the level and character of the refugee intake program;
- (v) the attitude to be adopted in relation to the settlers, e.g. assimilation versus integration, and the general level and nature of migrant services;
- (vi) the offer of amnesties for prohibited non-citizens.

24. Migration policies have been modified over the years. Almost from the time the 1901 legislation was enacted, there was a gradual retreat from the absolutism of policies associated with the 1901 legislation. A particularly radical change in the policies has taken place in the period since the passing of the Act until now, and especially in the seventies. The alterations have been made in response to changing community attitudes and interests, economic and employment conditions, situations in other countries and the increasingly multicultural nature of our society. From time to time policy changes are followed by the related amendments in the legislation. For example, adoption of the principle of non-discrimination was followed by the removal from the Act of discrimination between aliens and other migrants in the criminal deportation provisions.

25. In the present system of migration administration, there are three different levels of policy decisions. First, there are policy decisions endorsed by the Cabinet. They deal with the most important issues of a substantive nature and their general thrust is usually publicly announced by the Minister. Second, there are refinements of the existing policies that are formulated by DIEA and are subject to ministerial endorsement. Such policies concern more important issues associated with the implementation of Cabinet endorsed policies, e.g. reallocation of staff to meet new commitments. Third, DIEA is responsible for changes in administrative and procedural rules. The latter are not usually subject to public announcement, but are communicated through the issue of instructions and through periodical up-dates to the departmental manuals.

26. The binding nature of policy decisions is doubtful, as the High Court case, *Salemi v. Minister for Immigration and Ethnic Affairs* 1977 (137 CLR 396) illustrates. It was assumed by the High Court that Salemi was a person eligible for change of status within the terms of the 1976 amnesty, and that the Minister was unwilling to implement the policies he had made in announcing the amnesty. Yet it was held that nothing in the Act, the common law or elsewhere gave the amnesty substantive legal force. Barwick C.J., in holding that Salemi was not entitled to the benefit of the rules of natural justice, commented:

It is regrettable that because the Minister does not wish to extend the amnesty to the applicant, and indeed has assigned an untenable reason for not doing so, he has given ground for a sense of grievance and disappointment . . . The Minister's statement was no more than a statement of policy. Statements of policy as a rule do not create legal obligations, though they may understandably excite human expectations as distinct from lawful expectations.'

Members of the High Court were equally divided in opinion in this case, so that the views of the Chief Justice prevailed. The result was that the discretion of the Minister to deport prohibited non-citizens under section 18 of the Act remains unfettered by the Minister's own policy statements and the rules of natural justice. The Commission notes that the Judicial Committee of the Privy Council declined to follow the reasoning of Barwick C.J. in an appeal from Hong Kong on an immigration matter in 1983. In that case, *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] (2 All E.R. 346) the principal issue was whether the prohibited non-citizen was entitled to a fair hearing, rather than the legal status of policy decisions. The High Court may avail itself of the opportunity to reconsider the decision in *Salemi's* case, at least insofar as it relates to the question of

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5. 137 CLR 406. For more comprehensive discussion of the Salemi case, see *Legal Service Bulletin* (August 1980) 193.

whether the prohibited non-citizen is entitled in certain circumstances to rely on the rules of natural justice, when giving judgment in the appeal from the Full Federal Court in *Kioa and Others v. Minister for Immigration and Another*, unreported, Melbourne, 3 October 1984. The High Court has already given special leave to appeal in this matter. As well as raising issues of the rights of prohibited non-citizens to natural justice, the case raises fundamental questions about the relationship of human rights principles to deportation decisions.

27. It has already been noted that a feature of the Act is the wide and relatively undefined discretionary powers vested in the Minister. In the absence of statutory criteria for the exercise of discretionary powers, policy considerations may be and are taken into account in exercising the powers. The questions that arose in *Green v. Daniels* (1977), (51 ALJR 463) which turned on the conflict between policy and statutory criteria, do not generally arise in immigration cases. However, relevant circumstances must be considered in each particular case, and the proposals the Commission makes later in this report (see chapter 8) would have the effect of defining in the Act the basis on which powers should be exercised.

28. Many of the cases arising in the courts and the Administrative Appeals Tribunal concern ministerial and departmental attempts to apply policy, rather than to ignore it. Criminal deportation cases in the AAT take policy into account, despite the absence of a specific statutory duty to be bound by it. In *Drake v Minister for Immigration* (1979) (24 ALR 577 at p.590) in the Federal Court of Australia, Bowen C.J. and Deane J. held that:

the Minister was entitled to be guided by any general relevant Government policy which was not inconsistent with the provisions or the objects of the Migration Act.

29. The AAT, which does not exercise a supervisory role in criminal deportation cases so much as a jurisdiction to determine whether the decision appealed from was correct or preferable, must make its findings on the material before it at the date of the hearing. It must not merely decide whether the decision appealed from conformed with Government policy: *Drake's* case (supra) at pp.589 and following and p.599. It must be borne in mind that AAT reviews on merits, and is not exclusively concerned with the question whether the original decision contained an error of law. In this sense it is unlike a court. Furthermore, its jurisdiction is limited in the immigration field, being confined for most practical purposes to criminal deportation appeals. Where a departmental statement as to its practice appears to the AAT to be inconsistent with Ministerial policy as settled at the political level, that statement can be disregarded: *Re: Georges and Minister for Immigration* (1978) (1 ALD 331 at 333) per Fisher J.

## **2.4 Manuals and Instructions**

30. In addition to the Act and Regulations, the migration system includes a wide range of departmental manuals, instructions and defined administrative practices.

31. The manuals are important reference source documents developed by DIEA to provide guidelines for use by its officers.

32. Some of them contain over 300 pages. They are kept in loose leaf folders as they are subject to frequent amendment. They recently became available for public inspection at immigration offices (except for restricted sections), and are available at offices of the Australian Government Publishing Service. Recent changes in administrative law and, in particular, the Administrative Decisions (Judicial Review) Act 1977 and the Freedom of Information Act 1982 brought about a significant expansion of matters covered by the manuals. The manuals address themselves principally to procedural matters which officers are likely to encounter in the day to day discharge of their duties. They do not

always provide rigid and all-embracing instructions, but may allow a measure of discretion to be exercised by officers having regard to the particular situation and individual circumstances. The manuals used by the DIEA are:

- (i) Determination of Refugee Status. Notes for the Guidance of Interviewing Officers
- (ii) Examination of Passengers and Crew at Airports and Seaports
- (iii) International Movement Control Inspection Manual
- (iv) Medical Standards for Selection of Migrants (prepared by Department of Health)
- (v) Migrant Entry Handbook
- (vi) Notes for the Guidance of Medical Examiners of Persons Seeking Entry to Australia
- (vii) Private Overseas Students and Trainees Handbook
- (viii) Residence Control Manual
- (ix) Resident Re-Entry Handbook
- (x) Visitors and Temporary Residents Handbook
- (xi) Grant of Resident Status Handbook.

33. Finally, over 400 instructions issued by various Branches of DIEA are in force. Approximately 10% of the instructions are restricted. The rest have become available for public inspection under the Freedom of Information Act 1982. The instructions cover a variety of issues associated with the operation of DIEA, including charges for services, deportation, issues associated with marriage, de facto and homosexual relationships, change of status, security checking and welfare grants. The instructions are subject to frequent changes, and deletions and new instructions are produced from time to time.

34. Administrative practices vary in different regional DIEA offices. For example, the DIEA submission to the Commission indicated that there were substantial differences in administrative practices relating to enforcement between the Sydney and Melbourne offices. During 1982 a total of 48 children were held at the Villawood Immigration Detention Centre in NSW, while the Victorian region has never detained any children. In NSW, 987 general search warrants under section 37 of the Act were issued in 13 months to December 1983, while in Victoria approximately 130 warrants were issued in eight months to June 1983 (however, since then warrants have been issued in Victoria at the rate of about 800 a year). While the NSW office issues warrants to DIEA officers, the Australian Federal Police and customs officers, the Victorian office issues warrants only to DIEA officers. The number of warrants issued in the other States was much lower.<sup>6</sup>

## 2.5 The Clients

35. Having examined the major elements in the Australian migration system, there is a need to consider briefly the clients of the system. The majority of DIEA clients are people with some kind of overseas connection. They could be people who migrated to Australia some time ago and are now sponsoring relatives; they include people who came here temporarily and are seeking an extension of their entry or work permits or a change of status; and people who are overseas and intend to come to Australia. Many of the clients were born in non-English speaking countries and their proficiency in the English language is often limited. The 1981 Census reported that 1,347,831 people over the age of 15 years spoke another language at home. Of these, 46,443 did not speak English at all and 252,546 had only very limited knowledge of the language. Thus, nearly 300,000 Australian residents and citizens cannot speak English. Other sources indicate that over half a million people of ethnic backgrounds cannot write English. Furthermore, a number

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6. The information in the paragraph is taken from the DIEA Submission, p. 267.

of empirical studies have pointed to both the lack of knowledge and understanding of the Australian law among migrants and to the general disadvantage they suffer in the legal system. For example, A. Jakubowicz and **B. Buckley**, after examining legal needs of migrants, availability of interpreting and information services, relationship between migrants and the police, problems associated with migrants appearing before the courts, position of migrants in employment, industrial accidents, housing, consumer affairs and some other issues, concluded in their report, 'Migrants and the Legal System', that there exists 'a consistent pattern of disadvantage, discrimination and deprivation, inherent, it appears, in the very condition of being a Migrant' .'

## 2.6 Conclusion

**36.** The foregoing review of the major elements of the system points clearly to its complexity. **The** key role is played by policy decisions, some of which are not publicly announced or easily available for public access. The Act itself is 'machinery' type legislation and contains mainly procedural provisions which may be used to implement any policy. In addition, the legislation gives to the Minister and **DIEA** an unusual level of discretion without adequate provision for review. The manuals and instructions contain a labyrinth of specific rules instrumental in implementation of the policies at the DIEA office level. It is also clear that a substantial proportion of DIEA clients are people who are not proficient in the English language and whose knowledge and understanding of the Australian legal system is limited. Their position in the system is characterised by systematic disadvantage.

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7. A. Jakubowicz and B. Buckley, *Migrants and the Legal System*, Commission of Inquiry into Poverty, AGPS, Canberra, 1975.

### **3. OVERVIEW: HUMAN RIGHTS AND THE MIGRATION ACT**

37. The preceding chapter has identified the major elements in the migration system as it has developed under the Act. This chapter brings together, under five main headings, the broad conclusions of the Commission that have emerged from its detailed examination of the text of the Act, Regulations, Instructions and Manuals and from its consideration of the evidence and the many submissions put before it. Exposition of the main themes will be found reflected in the detailed consideration of particular aspects of the migration system contained in the following chapters and reference will be made later in this chapter to the places at which this more detailed consideration is given.

38. The Commission has identified significant areas of law and practice that require change if human rights are to be fully observed in the execution of Australia's immigration policy. This is not to say that Australian practice is, by international standards, bad. On the contrary, the information available to the Commission suggests that Australian practice stands up well to international comparison. But Australia is a country to which people migrate, and to which they come as visitors in increasing numbers. Accordingly, Australian law and practice should be nothing less than impeccable. The Commission believes that without large change, and without unreasonable use of resources, Australia could have a Migration Act, and implement it, such that law and practice could become a model for other countries. The Commission urges the Government, the Minister, and the Department to respond positively to the recommendations it has included in the report.

39. The Commission recognises that implementation of some of its recommendations may require the allocation of additional resources. Indeed, DIEA has used this as a ground for objecting to some of its recommendations. Thus interpreters cannot be made available to suspected prohibited non-citizens who are being detained, or welfare workers to prohibited non-citizens in detention, without resource allocations. Likewise with legal aid. On the other hand, the Commission would not be discharging its function if it were not to draw attention clearly and unflinchingly to the requirements of the human rights included within its Charter. The Commission recognises that the implementation of human rights represents a challenge not only in the policy and legal spheres but also in the resource sphere. Indeed, it would be regrettable were there to be no challenge. It will naturally accept that there are occasions when the available policy and administrative resources, legal or legislative resources and staff or monetary resources do not permit immediate and full implementation of some human rights. It also accepts that immigrants, prohibited non-citizens and others involved in the migration system can only expect a fair allocation of scarce resources, but its conclusion has been that on not infrequent occasions they do not receive that. Further, shortage of resources is not an excuse for failing to set a course in the right direction. It is not for the Commission to water down its identification of human rights and their implications, but rather for governments and their agencies to accept the obligations in principle and then to do the best they can to implement them.

#### **3.1 The Relevant Human Rights**

40. Human rights within the jurisdiction of the Commission are those defined in the International Covenant on Civil and Political Rights (ICCPR), in the Declaration of the Rights of the Child, the Declaration on the Rights of Disabled Persons and the Declaration on the Rights of Mentally Retarded Persons. Each of these international human rights instruments is annexed to the Human Rights Commission Act 1981 and the relevant

provisions are contained in Appendixes IV–VI. In addition, the Commission is required by the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984 to assist in the elimination of discrimination on grounds of race and sex.

**41.** It will be noted that 'human rights' for the purposes of the Commission are sometimes legal rights, by which is meant rights ultimately enforceable in a court, and sometimes rights where implementation relies on other means. Many human rights are legal rights — for example many common law and statutory rights to freedom of the person and to such matters as the guarantee of fair trial in courts. Other human rights are only legally enforceable in the last resort, as are the rights not to be discriminated against in the Racial Discrimination Act and the Sex Discrimination Act. In these cases, legal enforcement only comes after a process of conciliation. For other human rights with which the Commission is concerned there is no legal enforcement, but other means are used. Thus many of the civil and political rights which are discussed in this chapter and later in the report are derived from the provisions of the ICCPR and are implemented either through the conciliation processes of the Commission or through reports to the Government and Parliament. Similarly, a person with disabilities who is discriminated against may have rights defined in the Declaration on the Rights of Disabled Persons annexed to the Human Rights Commission Act, but they cannot be enforced in courts of law: the remedy is conciliation and, ultimately, in a report by the Commission to the Parliament. In this report, the word 'rights' has to serve many grades of meaning. It is intended that the sense in which it is used will be clear from the text and it is hoped that where there may be ambiguity the point has been covered by appropriate indication in the text.

**42.** The 1983 amendments of the Migration Act eliminated a number of discriminations based on grounds of either race or sex in its provisions. The Commission records its pleasure at the action taken so promptly by the Government, although it notes the many complaints of discrimination on the grounds of race or sex, in the administration of the provisions of the Act, made in submissions to the Inquiry. It expresses the hope that the Government may act with effectiveness in relation to the provisions in the Act and practices under the Act which either are inconsistent, or contain the possibility of inconsistency, with human rights.

**43.** The following table summarises the human rights provisions which the Commission has found apply to provisions in the Act, or to practices under that Act, and also notes the later sections in this report which deal in detail with the issues.

**Human Rights Relevant to the Migration Act**

<i>Provision ICCPR Article</i>	<i>Description of Right</i>	<i>Areas Affected</i>	<i>Chapter Reference</i>
2	All individuals within a State to have their rights recognised without distinction of any kind	Entry into Australia PNCs Enforcement	(5.3) (5.5) (7)
7	No-one to be subjected to cruel, inhuman or degrading treatment	Entry into Australia PNCs Criminal deportation Deportation Enforcement Change of Status	(5.3) (5.5) (5.1) (6) (7) (5.4)

<i>Provision</i>	<i>Description of Right ICCPR Article</i>	<i>Areas Affected</i>	<i>Chapter Reference</i>
9.	Everyone entitled to liberty and security of person and not to be subjected to arbitrary arrest or detention.	Entry into Australia PNCs Enforcement Deportation	(5.3) (5.5) (7) (6)
10.	All persons in custody to be treated with humanity and respect.	Enforcement PNCs	(7) (5.5)
12.	Persons lawfully within a State to have liberty of movement and freedom to choose residence.	Definitions Entry into Australia Return Endorsements	(4) (5.3) (5.2)
13.	An alien lawfully in Australia to have a right of review.	Discretions, Delegation and Review	(9)
14.	All persons have a right to a fair trial.	PNCs	(5.5)
16.	Everyone to be recognised as a person before the law.	Enforcement PNCs Change of status	(7) (5.5) (5.4)
17.	No-one to be subjected to interference with privacy, family, home or correspondence.	PNCs Enforcement	(5.5) (7)
23.	The family is entitled to protection by the State.	Issue of Visas Change of Status PNCs Deportation Entry into Australia	(5.1) (5.4) (5.5) (6) (5.3)
24.	Every child to be protected without discrimination.	PNCs Deportation.	(5.5) (6)
26.	All persons to be equal before the law and to be equally protected by the law.	Return endorsements Change of Status PNCs Discretion, Delegation and Review	(5.2) (5.4) (5.5) (9)
27.	Ethnic, religious and linguistic minorities to be able to enjoy their culture and religion.	Entry into Australia	(5.3)

#### **Declaration of the Rights of the Child**

<i>Principle</i>	<i>Description of Right</i>	<i>Areas Affected</i>	<i>Chapter Reference</i>
1	Children to enjoy all the rights declared without discrimination.	Used in association with other Principles.	
2	The child to enjoy protection and to be given opportunities to develop	Deportation	(6)

<i>Principle</i>	<i>Description of Right</i>	<i>Areas Affected</i>	<i>Chapter Reference</i>
6.	The child to grow up in the care of his or her parents and not to be separated from his or her mother.	Issue of Visas Deportation PNCs Enforcement	(5.1) (6) (5.5) (7)
8.	The child to be among the first to receive protection and relief.	Deportation Enforcement	(6) (7)

#### **Declaration of the Rights of Disabled Persons**

<i>Paragraph</i>	<i>Description of Right</i>	<i>Areas Affected</i>	<i>Chapter Reference</i>
2.	Disabled persons to enjoy all the rights declared without discrimination.	Used in association with other paragraphs.	
3.	The human dignity of disabled persons to be respected and other fundamental rights to be the same as those of other fellow-citizens.	Entry into Australia	(5.3)
4.	Disabled persons to have the same civil and political rights as other human beings.	Issue of Visas Entry into Australia Change of Status	(5.1) (5.3) (5.4)
8.	The special needs of disabled persons to be taken into consideration at all stages of planning.	Issue of Visas	(5.1)
9.	Disabled persons to live with their families and not be subjected as far as residence is concerned to different treatment.	Issue of Visas Deportation	(5.1) (6)
10.	Disabled persons to be protected against treatment of a discriminatory nature.	Issue of Visas Deportation Entry into Australia	(5.1) (6) (5.3)

#### **Racial Discrimination Act and Convention**

<i>Section</i>	<i>Description of Right</i>	<i>Areas Affected</i>	<i>Chapter Reference</i>
9.	Unlawful to do any act which involves a distinction or exclusion based on race that nullifies or impairs enjoyment of human rights.	Administrative discrimination PNCs	(3.5) (5.8)

### 3.2 Civil and Political Rights

44. Evidence to the Commission indicates that in the migration process the main human rights in jeopardy in the field of civil and political rights are:

- the right not to be subjected to inhuman or degrading treatment (ICCPR Art. 7)
- the right not to be subjected to arbitrary arrest or detention (ICCPR Art. 9)
- the right to be treated with humanity and respect while in custody (ICCPR Art. 10)
- the right to liberty of movement when lawfully in Australia (ICCPR Art. 12)
- the right to protection of the family by the State (ICCPR Art. 23)
- the right to equal recognition and protection by the law (ICCPR Art. 26)

45. Two groups in particular have experienced infringements of their civil and political rights under the ICCPR as a result of the provisions of the Act and its administration. Disabled persons are discriminated against both in applying for visas, especially for permanent residence and in the administration of the entry permit scheme (see section 5 of this chapter and chapters 5.1 and 5.3 below). The rights of the PNCs may be infringed during search, arrest and detention procedures, when they apply for change of status or when they become subject to deportation (see chapter 5.8 below).

46. *Disabled Persons.* The starting point for the consideration of migration applications involving disability is seen by many to be exclusion. Thus DIEA policy for selection of migrants is that all applicants must meet certain health standards. Applications for permanent residence, from families where one member is disabled, will generally be rejected. The Commission agrees with the view put to it in oral evidence and in submissions that the current emphasis on the disabilities, rather than the abilities, of disabled persons should be reversed so that, in accord with paragraph 10 of the Declaration of the Rights of Disabled Persons, the effect is not to discriminate merely because someone is disabled. That is not to say that people with physical disabilities or those who are intellectually disadvantaged should be given an automatic right to immigrate. Rather, the proposition put to the Commission in oral evidence and in written submissions was that disability *per se* should not be an automatic bar to immigration. This matter is further discussed, and is the subject of a recommendation, in paragraphs 107-109.

47. Even where a disabled person does obtain a visa to come to Australia he or she is subject to discriminatory treatment in relation to the grant of an entry permit. When the person arrives with a visa disclosing that he or she has a listed disability a specially endorsed entry permit will be issued. If the disability is not listed on the visa the person may be subjected to embarrassing questioning which, it was suggested to the Commission, at times could be likened to interrogation and may be refused entry.

48. If for some reason a person with a disability does not receive an endorsed entry permit and enters Australia he or she becomes a prohibited non-citizen under section 16(1) (c) (i) of the Act and is liable to prosecution. The Commission understands that the particular diseases or conditions listed in Regulation 26 are those which are capable of escaping detection and the intent of section 16(1) (c) (i) taken with Regulations 26 is to prevent concealment of medical disabilities of migrants on arrival in Australia. The Commission considers that these provisions discriminate against disabled persons and that section 16(1) (c) (i) and Regulation 26 should be repealed. It considers that penalties for fraudulent concealments of diseases or conditions which pose a threat to public health are already adequately provided for in section 27(1) of the Act.

49. *Prohibited Non-citizens (PNCs).* The table set out in the previous section of this chapter indicates clearly that the human rights of PNCs are involved in relation to many of

the functions carried out under the Act. The main areas where PNC rights are at risk are in relation to the rights:

- not to be subjected to cruel or inhuman treatment
- to liberty and security of person
- to liberty of movement
- to a fair trial
- to recognition as a person before the law
- to privacy
- to peaceful assembly
- to protection of the family
- to protection of the child.

**50.** European countries have had considerable experience in dealing with migrants who do not have the status of permanent residence, e.g. because they are temporary or 'guest' workers. A seminar held in Geneva in April 1983 to review the rights of migrants in an irregular situation made the following recommendations:

1. Steps should be taken, both at a national and an international level, to ensure that migrants in an irregular situation enjoy their fundamental human rights. This, however, should not imply a de facto recognition of the legality of their status.
2. Any migrant subject to expulsion by the laws of a State shall have his fundamental rights as well as rights arising from past employment respected and any process of expulsion shall be carried out in a humane way that preserves his dignity and shall not infringe upon his rights. Every person subject to expulsion will be allowed a reasonable period of time for repatriation or resettlement in a third country.
4. Without limiting the scope and nature of fundamental human rights, nations expelling migrants in an irregular situation should extend to the migrant the right to be heard and the right not to be detained arbitrarily.'

The Commission notes that these recommendations were made in relation to 'guest' workers but considers they could with benefit be applied to PNCs in Australia. There is no suggestion in the recommendations of the seminar that recognition of the fundamental human rights of PNCs should bring with it a de facto recognition of the legality of their status. But there is emphasis on their human rights. A difficult distinction needs to be maintained between recognising that PNCs have broken the law and as such are subject to whatever sanctions it contains and, on the other hand, recognising and respecting the basic human and legal rights they have as persons.

**51.** In later chapters of the report the particular problems affecting PNCs are discussed. Here, it is sufficient that the Commission emphasises that there are significant areas of practice, and of law, where PNCs appear to receive less than the standard of treatment required for a full observance of human rights. The irregular and undefined status of PNCs means that their treatment is very much at the discretion of DIEA officers and those administering migration detention centres. Thus they may be arrested without warrant and taken into custody where they may be held for periods substantially in excess of the one week envisaged by the Act. Those who apply for change of status may find themselves in substantial difficulties while processing, often very lengthy, is being completed. Those who do not have, or are not subsequently granted, a temporary entry permit have an ambiguous legal status. They are frequently not permitted to work and may be ineligible for social security benefits. Thus they may be forced into debt and to live in conditions which do not necessarily respect their dignity as persons. Many PNCs, because

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I. The Rights and Obligations of Migrants in Receiving Countries — Preservation of the Fundamental Human Rights of Undocumented Migrants', (1983) XXI *International Migration* 2. The subject is discussed further at paragraph 200.

much of section 6A(1) applies only to holders of temporary entry permits, are ineligible to apply to legalise their status, although the Commission recognises that in some cases the strict requirements of the Act are not adhered to. In other cases the privacy and dignity of PNCs as individuals can be threatened by investigation of the genuineness of their marriages to Australian residents or citizens. They may also suffer deportation notwithstanding the fact that they have children born in Australia who as such have the status of Australian citizens and may not be deported.

52. Each of these matters is the subject of recommendation in later sections of the report. The Commission, having in mind that Australia has ratified the human rights Covenants, considers that, notwithstanding his or her irregular situation, any person within Australia is entitled to the enjoyment of fundamental human rights. The irregular and undefined situation of PNCs in Australia has led to treatment which clearly infringes the basic human rights of PNCs who, because of their circumstances, have little opportunity for redress of these infringements. The Commission *recommends*, therefore, that the status and rights of PNCs be clarified in the Act and in related legislation, e.g. the Social Security Act, and that information as to their status and rights be prepared for use by them, social workers and legal advisers. Detailed recommendations as to particular rights are made in Chapters 5.8, 6.2, 8.2 and 8.3.

53. *Legal and Interpreter Assistance.* It was brought to the notice of the Commission that PNCs and others who experienced difficulty in relation to administration of the Act are not always able to obtain legal assistance or the assistance of interpreters in their dealings with officers of DIEA or with police. Difficulties can occur at the point of entry into Australia, when a person arriving without a visa claiming refugee status may be severely disadvantaged by lack of English and insufficient understanding of his or her legal status. Similar problems can arise when a person is confronted by an officer with a search warrant, or by an arresting officer. Other points of difficulty occur during the period of custody at a detention centre, and during section 38 court hearings, when language barriers may cause difficulties and where legal advice or representation may not be readily available.

54. The Commission calls attention to the human rights involved, in terms of having available legal assistance at times of need, of having a right to use one's own language and to the assistance of interpreters where communication is impeded or impossible because of language difficulties. The Department has commented that it supports the concept of PNCs having interpreter assistance, and outlined some of the difficulties it -faces. Nevertheless, the Commission received numerous indications of difficulties in this area and *recommends* that a review be undertaken, and the results published, of legal and interpreter assistance available at critical points in the process of administering the Act, with the object of ensuring that people affected by the provisions of the Act have their legal and language rights adequately protected. In relation to section 41, which gives rights of access to legal advice, see paragraphs 271-272 below.

55. *Social Welfare Assistance.* It was also brought to the notice of the Commission that the situation of PNCs who are seeking change of status can become extremely difficult, and that they frequently require welfare assistance. It was put to the Commission by welfare workers that in some instances they are apprehensive of committing offences against section 30 of the Act while performing their professional duties.' The Commission draws particular attention to this in paragraphs 244-245 below, but here records that there are situations in which it appears that persons are unable to obtain assistance from social workers to which, on the grounds of humanity and fair dealing, they are entitled. The

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2. See for example Submission No. 45 from the Ethnic Childcare Development Unit.

Commission *recommends* that this matter be the subject of consideration by DIEA with the object of ensuring that, as a result of the administration of the Act and associated legislation, particularly the Social Security Act, persons within Australia are not put into a situation where they are, in effect, subject to inhuman or degrading treatment by virtue of their status as PNCs or their equivocal position while seeking change of status. The Department has made the point that PNCs are not lawfully within Australia and may not deserve permits to work, etc. The Commission recognises the logic of this point, but reaffirms its view that section 6A requires amendment to regularise the position of PNCs (see Chapter 5.7) and that, given the difficulty of reaching decisions on change of status, those involved should not be penalised while the application is being processed, particularly where the person has in fact been self-maintaining.

### 3.3 The Rights of the Family

56. Increasingly, governments have been moving towards an immigration policy in which the family plays an important role. A substantial proportion of migration under the reduced migration programs of recent years has been designed to allow members of families who are still overseas to join the members now resident in Australia, and the Commission welcomes this as consistent with human rights. However, the Commission wishes to point out that evidence given in submissions indicated that processing delays have prevented reunion of families for long periods — sometimes years — and that spouses and children have been denied permission to migrate to Australia. Moreover, as this orientation towards the family for migration purposes becomes more pronounced it reveals as inconsistent certain **DIEA** practices which focus on the individual to the detriment of the family. This may be observed particularly in relation to enforcement practices, both in arrangements made for custody of persons likely to be deported and in relation to actual decisions about deportation. The Commission has received many complaints from individuals who invoke the protection of Article 23 of the ICCPR, or the Principles contained in the Declaration of the Rights of the Child. They suggest that as the family is, by Article 23, to be regarded as the natural and fundamental group unit of the society and is entitled to protection by the State, and as children are to be given special protection to grow up in the care of their parents, decisions taken in relation to a particular individual, if they result in custody and deportation, can infringe these human rights. As the Institute of Family Studies has pointed out, any arbitrary definition of 'the family', e.g. to cover only parents and children, is 'unhelpful and misleading in that it defines out of existence many family forms that are a reality and which social policy and social arrangements must take into account'.<sup>3</sup>

57. In two recent reports — *Report No. 8 Deportation and the Family: A Report on the Complaints of Mrs R. Roth and Mr C.J. Booker* and *Report No. 10 Human Rights of Australian Born Children: A Report on the Complaint of Mr and Mrs Au Yeung* — the Commission has drawn attention to the rights of the family and of the child. It repeats its recommendations, expressed in those reports, that it should only be in extreme circumstances that an established family is broken by deportation of one of its members, especially where there is an Australian born citizen member child in the family. Family circumstances also arise when applications for change of status are made under section 6A (1) (e), on strong compassionate or humanitarian grounds. The Commission *recommends* that to the grounds of compassion and humanitarianism be added the grounds of human rights relating to the family, and to children, which are embodied in both the ICCPR and the Declaration of the Rights of the Child. The Commission notes DIEA's advice that 'humanitarianism' encompasses 'human rights' and that adoption of the recommendation

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3. Institute of Family Studies, *First Annual Report 1980-81*, p.5.

would not change the law materially. The Commission, however, considers the Act should explicitly incorporate a reference to human rights as defined for the purposes of the Commission.

58. *De Facto Couples.* With the enactment of the Sex Discrimination Act 1984, discrimination on the grounds of marital status, which is defined to include de facto marriages, is prohibited. It has come to the notice of the Commission that difficulties have arisen because of the need of DIEA to establish whether a couple is in a genuine de facto married state. The Commission has in process a project which will attempt to reach agreement on a definition, for the purposes of Commonwealth law and practice, of a de facto spouse. Meanwhile, it *recommends* that DIEA recognise as de facto couples those who have lived together for a year. The Commission notes that DIEA sets out the factors to be taken into account in the Grant of Resident Status Handbook (para. 4.13) and the Migrant Entry Handbook (para. 5.2.15) and that it intends to revise these in the light of the provisions of the Sex Discrimination Act. It would also be desirable for DIEA to consult with the Department of Social Security, to achieve the maximum degree of compatibility in working rules relating to the determination of de facto status.

59. *Companions.* In view of the strong emphasis on family in immigration policy, and of the right to freedom of association, the Commission supports an extension that would allow immigration to Australia of a person based on demonstrated and enduring companionship with another person resident in Australia. The Commission was told of cases where a person, often advancing in years, has sought approval for the migration of a friend to share a household in Australia. The point was made that in such cases where no sexual bond exists, no recognition is given to the needs of a single person to live on a basis of friendship with another single person. While recognising that there could in this be risks of circumventing normal controls of migration, the Commission sees no reason why an Australian resident or citizen should not be able to obtain approval for the migration of a friend from overseas to share a household in Australia. Homosexual couples represent one form of established companionship. Although in Western Australia, Queensland and Tasmania homosexual relations in private between consenting male adults are still a criminal act, the Commission considers that where a genuine bond can be shown to exist, the law and policy should be administered in such a way as to allow a homosexual person overseas to join his or her long term and demonstrated partner in Australia, with due regard being had to the state of the law in Western Australia, Queensland and Tasmania. The Commission is of the view that persons in a permanent homosexual relationship are discriminated against in a way that is inconsistent with Article 26, if they are not accorded the same rights of reunion as are married and de facto couples in the matter of reunion.

60. Given that the Government now sees the family as being an important element in the migration program, the Commission *recommends* that its implications for closely analogous groupings, as sketched above, be taken into account in developing law and practice. This applies not only to the control procedures but also to the opportunities given to persons in a situation analogous to that of a family to join their companions in Australia, where genuine and enduring bonds of friendship or companionship can be established. In this connection, the Commission draws attention to the perceptive and humane comment of the Institute of Family Studies quoted in paragraph 56 above. It believes genuinely and permanently established groups of the kind described in the previous paragraph can and should be regarded as families for purposes of administering the Act. The alternative is anomalies that cannot be justified in terms of equal administration of the law. Despite the admitted difficulties of administering these principles, the Commission believes effective administration is practicable, and that their adoption would remove an unnecessary anomaly in existing practices.

### 3.4 Discretions and Review

61. As indicated in chapter 2, the enactment of legislation to control migration was one of the earliest functions of the Commonwealth Parliament. Wide powers were given to the Minister, who was also empowered to delegate extensively to departmental officers. Whereas most legislation of more recent origin has contained some directions as to the basis on which discretions should be exercised and appeal, on the merits, to the AAT is often available, no such provision exists in the Migration Act. Indeed, one of the main grounds of criticism made during the Commission's hearings was that the same discretion tended to be exercised differently by different officers and that there was insufficient provision for review. It was felt that the extensive powers conferred in the Act, which include inter alia the powers to search, seize, arrest, detain and deport should be subject to external review on the basis of criteria contained in the legislation itself. At present there is, for most of the discretions contained in the Act, neither a statement of the criteria by reference to which the discretions should be exercised nor provision for external review. While the AAT has the discretion to review decisions under sections 12 and 48, its power is only to make recommendations. The main provisions in the Act which grant the Minister or his delegate or officers and authorised officers discretionary powers are listed in chapter 8 below.

62. In chapters 4-6 the Commission discusses the human rights issues potentially associated with the exercise of these powers. It observes that many of them contain little or no protection of the persons in respect of whom they are exercised, and their families. This fact in itself makes it desirable that there be some form of external and independent review. Most of the powers are related to possible ultimate expulsion, and accordingly would be subject to the requirement of Article 13 of the ICCPR that an alien lawfully in Australia is, before expulsion, to have a right to review. In other cases, e.g. where the rights of the family are involved (Article 23), the provisions of Article 2.3(b) would apply. Article 2 requires an effective system of remedies for violations of human rights, notwithstanding that the violation has been caused by persons acting in an official capacity. Although the immigration review panels have done useful work and represent a significant step forward, they are tied into DIEA's administrative system and are not seen by the community generally as independent bodies.

Further, they do not have power to review some of the provisions the Commission has identified as placing human rights most at risk, for example, the powers exercisable regarding entry to Australia and the powers of search, arrest, detention, and deportation. The Commission *recommends* that early action be taken to establish an independent and external system of review, such as is provided by the AAT in most of its jurisdiction, for the major discretions exercised under the Act. The Commission makes this recommendation because it considers human rights would best be observed by a full and independent review on its merits. It will be recalled that it left this matter open in its Fourth Report, on the deportation of non-citizens convicted of serious offences.<sup>4</sup> See also paragraphs 306ff.

63. Prima facie, the AAT would be a suitable body to review the exercise of discretions under the Act, but the volume of potential complaints may be such as to warrant a supportive system of appeal bodies such as now exists in relation to the Social Security Act. The Commission understands that the Administrative Review Council has been inquiring into the desirability of making discretions under the Migration Act reviewable, and accordingly refrains from making recommendations as to the precise machinery. This should not be interpreted as modifying the firm view of the Commission that the various discretions contained in the Act should be reviewable, and where

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4. See Human Rights Commission, *Report No. 4 Human Rights and the Deportation of Convicted Aliens and Immigrants*, AGPS, Canberra, 1983. paras 18-22.

necessary be the subject of fresh decision. It comments in more detail on this in chapter 8 below (see especially paragraph 318).

### 3.5 Discrimination

64. The final major theme that emerges from the Commission's review of the Act relates to the element of discrimination. The Commission notes with approval that the Minister has now formally declared that migration policy is to be applied on a basis which is non-discriminatory.<sup>5</sup> DIEA advised that:

The principle of non-discrimination means that policy is applied consistently to all applicants regardless of their race, colour, nationality, descent, national or ethnic origin, sex or religious beliefs.

The Commission notes that in human rights terms it is important to add to the foregoing list persons who suffer from disability, both mental and physical, and also children. These are covered by international human rights instruments included in the charter of the Commission and the Commission *recommends* that they be included in the list used in the administration of the Act. It also notes that DIEA has responded to the effect that the interests of the Australian community should be weighed against those of individuals. The Commission's view is that human rights should at all times be observed and that it is in the best interest of the Australian community that this be so. These matters are further discussed in paragraphs 100-110 and 166-169.

65. The Commission has also welcomed the provisions in the Migration Amendment Act 1983<sup>6</sup> that are designed to remove discrimination on the grounds of race and sex from the main Act.

66. Regrettably, there still appear to be areas where an element of discrimination is present either in the legislation itself or in the way in which the legislation is administered. Persons who suffer from a physical or mental disability, and also their families, appear to be penalised by the provisions determining the acceptance of individuals and families for migration (see chapter 5.1). The way in which the point of entry controls are exercised also appears to be discriminatory (chapter 5.3). It appears that disability can be a factor militating against a successful application for change of status under section 6A(1).<sup>7</sup> The Commission notes with pleasure, however, that section 13 of the 1958 Act has been repealed, with its offensive provision allowing deportation of any person who had been an inmate of a mental hospital within 5 years of entry.

67. Although migration policy is not, in the view of the Commission, subject to the provisions of the Racial Discrimination Act, its clear view is that the administration of the Act should not offend against the provisions of the Racial Discrimination Act. Section 9 provides that it is unlawful for a person to do any act involving a distinction or preference based on grounds of race, colour, or national or ethnic origin that has the effect of reducing the enjoyment of any human right on an equal basis with all other people. Thus any administrative action preferring persons of one race to another as migrants, may be unlawful under section 9 of the Racial Discrimination Act. The Commission has noted that the numbers of persons of non-European origins who are deported, and who are detained in the migrant detention centres, are substantially more than are those of European origin (see paragraph 201 below). On the face of it, this may be the result of discriminatory administrative processes, and the Commission believes that action should be taken at an administrative level to ensure that search procedures and custody bear

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5. DIEA Submission, para. 3.1.5.

6. Act No. 112 of 1983.

7. Evidence from Mrs Rigby, Transcript of Proceedings, Canberra, Thursday 15 December 1983, pp. 406-7.

roughly equally on all racial groups. (This matter is discussed at greater length in section 5.8.)

In chapters 5.4 and-6.2 the Commission draws attention to the problem of Australian born children. Existing legislation provides that any child born in Australia, unless specifically exempt as in the case of children of diplomats accredited to Australia, becomes thereby an Australian citizen. When the parents of such a child become liable for deportation a conflict of rights arises. The parents have by some action rendered themselves liable to deportation but the child has a right to remain in the country of its birth and of which it is by law a citizen. It is the view of the Commission that although it may strictly be claimed by DIEA that deportation of one or both of the parents does not, if the child accompanies the parent(s), involve deportation of the child, that claim of the Department is to say the least disingenuous. In its *Report No. 10 Human Rights of Australian Born Children: Deportation of Mr and Mrs Au Yueng* — the Commission discusses this issue at length and recommends that where there is an Australian born child the family should not, unless the circumstances are exceptional (and these circumstances should be defined in the legislation), be deported.' The Commission observes that the problem of PNC overstayers in Australia, and the subsequent question of their deportation, is in part a product of the inadequacy of DIEA's follow-up measures in relation to persons whose temporary entry permits have expired. DIEA should ensure adequate and systematic checking of overstayers. If this course is not possible, the only alternative is to consider whether the birth in Australia of a child to persons who are not citizens or permanent residents, should automatically confer citizenship on that child. The Commission recognises that this could result in substantial numbers of children having no nationality or a nationality which bears no relationship to his or her Australian upbringing. Having in mind that Article 24.3 of the ICCPR provides that every child has a right to acquire a nationality, an exception might need to be made so that a child which would otherwise be stateless would become an Australian citizen (with a right then to remain with his or her parents).

**69.** The Commission commends the present Government and Minister for the initiatives they have undertaken to ameliorate the harshness of the Act and to eliminate certain of its discriminatory provisions. It expresses the hope that the enlightened trend now begun will be continued by including provisions and ensuring practices that make the Act a model for the world of non-discriminatory control over migration and entry into Australia.

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8. Human Rights Commission, *Report No. 10, The Human Rights of Australian Born Children: A Report on the Case of Mr and Mrs R.C. Au Yeung*, AGPS, Canberra, 1985.

## **PART I OF THE ACT PRELIMINARY**

## 4. DEFINITIONS

70. Sections 5 and 5A define the keywords used in implementing the Act.

71. The Commission notes with pleasure the recent change to section 5(1) (by the Migration Amendment Act 1983) which removed discrimination between non-citizens on grounds of national origin. Introduction of the change was recommended by the Commission in its reports 'The Australian Citizenship Act 1984' (paragraph 38[11]) and 'Human Rights and the Deportation of Convicted Aliens and Immigrants' (paragraph 48[10]).

72. The definition of 'Territory' in section 5(1) excludes external territories other than the territory of Christmas Island which, by section 5A(2), is deemed to be part of Australia for the purposes of the Act. The definition of 'Territory' in section 5(1), taken with subsections (2), (3), and (4), indicates that those parts of the Act relating to entry to and departure from Australia are inapplicable to the external territories other than Christmas Island. Those other Territories have their own migration laws, which control entry to those territories.

73. The Commission draws attention to the possibility that territories other than Christmas Island may impose controls on migration from outside Australia which are inconsistent with Australia's international obligations, for example because they are discriminatory on grounds of race. It considers that, notwithstanding the measure of autonomy the territories enjoy, the Minister and Department are finally responsible for any controls the territories may exercise and that they should keep the position under careful note. The other problem raised by giving territories other than Christmas Island a degree of autonomy is that they may restrict movement between mainland Australia and the Territory. Article 12(1) provides that:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

The Commission has had drawn to its attention restrictions applying to movement to and residence on Norfolk Island which may not be consistent with the provisions of paragraph 1 of Article 12 quoted above or with the Racial Discrimination Act. It accordingly *recommends* that consideration be given to ensuring freedom of movement within Australia, including to and from the Territories, possibly by including an overriding provision implementing Article 12 of the ICCPR. It recognises that restrictions are allowed by paragraph 3 of Article 12 to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and would accept reasonable restrictions on these grounds. In this regard, it has not reached a view on the appropriateness of existing Norfolk Island restrictions, which are under consideration and may need to be the subject of a separate report.

74. The Commission notes that under section 5(2) (b) a person who disembarks from an aircraft at a proclaimed airport and is within the boundaries of such airport is deemed not to have entered Australia. Such a situation may have important human rights implications, in particular when the person wishes to seek refugee status in Australia. This issue will be discussed fully in chapter 5.3 below.

**PART II OF THE ACT ENTRY,  
PRESENCE AND DEPORTATION OF  
NON-CITIZENS**

## 5. MOVEMENT TO AND PRESENCE IN AUSTRALIA

### (PART II, DIVISIONS 1 AND 1A)

75. This chapter of the report deals with human rights aspects of the movement of people into Australia. By far the largest part of movement into Australia is under visitors' visas, of which 474,388 were issued in 1982. The number of people arriving in Australia with visas for permanent residence was 93,177 during 1982-83.

76. The Commission is of the opinion that it has no power to review the over-all *policy*, as distinct from the administration of that policy, of the Government relating to the selection of migrants, refugees and visitors. Neither the human rights recognised under the Human Rights Commission Act nor the rights to freedom from discrimination conferred by the Racial Discrimination Act and the Sex Discrimination Act require the Government in *policy* terms to select or refrain from selecting particular persons for migration to Australia. However, rights under both Acts are relevant to the *administration* of the programs determined by the Government. The Commission notes that in relation to sex discrimination, section 26 of the Sex Discrimination Act provides specifically that it is unlawful to discriminate against another person on the grounds of sex, marital status or pregnancy in the administration of any Commonwealth law or the conduct of any Commonwealth program.

77. In this chapter, human rights aspects of the provisions in the Act relating to the issue of visas, entry into Australia, change of status and return endorsements are considered. So also are the administrative practices developed by DIEA in the implementation of these provisions.

#### 5.1 Issue of Visas

##### Sections 11A, 11B and 11C (Division 1A)

78. Every non-exempt non-citizen requires a visa for travel to Australia. Visas do not of themselves constitute a right of entry into Australia. The right of actual entry is conferred by the entry permit system (see section 3 of this chapter). Rather, visas are issued overseas by DIEA posts and operate to regulate overseas embarkation and indicate to officers processing arrivals in Australia that advance formalities for travel and entry have been satisfied. Visas establish the type of entry permit to be issued and the period of stay to be authorised.

79. Visas are of two types. The first type is for applicants who wish to migrate to Australia, i.e. seek permanent residence, the second for temporary entry. Applicants may be issued with a visa for *permanent residence* if they satisfy certain eligibility, selection and processing requirements. People may apply to migrate in various categories — the main ones being family, labour shortage and business, independent, refugees and special humanitarian program and special eligibility migration categories. In 1982-83, 293 551 people applied for visas for migration to Australia. 93 177 people actually arrived.

80. The second type of visa, for *temporary entry* as a visitor to Australia, may be granted to eligible applicants who wish to travel to Australia as tourists, to see friends and relatives, for pre-arranged medical treatment or for business. Visas for those who seek *temporary residence* in Australia may be granted to people who wish to work for a specific period or to students who intend to pursue a course of study in Australia. In 1982, 474 388 visitors' visas were issued. In the same period, 60 606 visas were issued for temporary residence. Applications processed for students for study in 1983 totalled 24 500.

81. *The Issue of Visas.* Section 11A(1) does not indicate how or on what basis the decision to grant or refuse a visa is to be made. Applicants are therefore unable to establish, under the Act, what factors may be considered in deciding whether they are eligible for visas.

82. The decision as to whether an application for a visa will be accepted or rejected is a discretionary one. Guidelines for its exercise by officers are not statutory but are contained in DIEA handbooks and Policy Control Instructions. The Migrant Entry Handbook provides guidelines for the assessment of applications from people seeking permanent residence. The two Temporary Entry Handbooks contain information on and advice for considering applications from people who wish to visit or who seek temporary residence. Although the handbooks and instructions are publicly available under the Freedom of Information Act, they are difficult and time consuming to consult and their existence and availability is not referred to in the legislation. Moreover, the terminology employed by the Act is different from that used in the handbooks and instructions.

83. Evidence to the Commission suggested that people affected by decisions made under the Act were often confused about how and on what basis these decisions were made and about who was responsible for the decision. Limited English language facility and lack of experience of the Australian legal and administrative system further exacerbated the problem and led to perceptions of arbitrariness and allegations of discrimination.

84. The Commission comments further in chapter 8 below on the wide discretions under the Act and the lack of statutory guidelines for their exercise. It *recommends* that criteria for the exercise of discretion in making decisions regarding the issue of visas be included in the legislation.

85. *Implementation of Immigration Policy.* Visas are the means by which DIEA posts overseas implement the broad immigration policies determined by the Government. Statements of immigration policy, and annual projections for the expected size and composition of the migrant and refugee intake, are generally announced by the Minister for Immigration and Ethnic Affairs. These then become the basis for the assessment of eligibility for the issue of visas. The policy announced for 1983-84, for instance, sought to minimise the impact of immigration on unemployment while still maintaining the Government's commitment to family reunion migration for Australian citizens and permanent residents. In practical terms, this involved imposing more stringent selection criteria for applicants for the labour shortage and business migration category so as to reduce the numbers from 24% to 6% of migration visas issued.

86. It is the view of the Commission that DIEA officers are subject, in carrying out the Government's policies and in exercising their discretions under the Act, to the provisions of the Racial Discrimination Act and the Sex Discrimination Act, and to the obligations implied by the Human Rights Commission Act.

87. In evidence to the Commission it was claimed that information on policy guidelines and changes to policy which affected the eligibility of applicants, was often not available. Agencies claimed that they were frequently unable to advise their clients of exact visa eligibility requirements because they were unable to obtain up-to-date information on policy changes, for instance where the requirement for facility in English language had been relaxed or whether sponsors of spouses and dependent children needed to be employed. The observance of human rights and the absence of discriminatory practices cannot be supervised or guaranteed unless those affected by decisions made by DIEA know both how and on what basis the decisions were made. Guides to current

policy need to be available in a consolidated and readily accessible form and updated immediately when policy is changed at any time by Ministerial or other decision.

88. The most recent statistics provided by DIEA indicate that for 1982-83, out of 293 551 applications for migrant visas, 241 451 or 82% were rejected. The Commission notes that where the present processing workload obtains an approval rate of only 18%, a concise and accessible statement of current policy, together with the abovementioned statutory criteria for the exercise of discretion in the issue of visas, might deter those clearly ineligible from applying and thus reduce the current processing delays experienced by many visa applicants. The Commission *recommends* that a detailed, consolidated statement of current immigration policy which forms the basis for the issue of visas be made publicly available, and regularly brought up to date. The Commission was advised by DIEA that its practice has been to publish separate documents relevant to particular policy areas, and to publish further information in the Gazette as required by the Freedom of Information Act. These are welcome and useful, but it would see advantage in there being available also a more general consolidated account of the whole system.

89. The Commission notes with approval that the Government has included, as one of the nine principles underpinning current immigration policy, the principle of non-discrimination. This means that 'policy is applied consistently to all applicants regardless of their race, colour, nationality, descent, national or ethnic origin, sex or religious beliefs'.

90. The Commission raises the question whether DIEA's staffing of overseas posts contravenes the stated principle of non-discrimination in that it appears to be based on preferred sources rather than on volume of applicants. The Commission was able to obtain only incomplete statistics for overseas posts from DIEA. However, information available from published monthly statistics and DIEA's annual reports suggests that there is a marked discrepancy between the proportion of work related to the processing of applicants and the proportion of staff at relevant overseas posts. This is illustrated by the following table, in which the proportions of staff and applicants are compared.

#### Comparison of Proportions of Staff and Applicants at Overseas Posts

	<i>Visitors' Visas 1982</i>		<i>Permanent Residence 1983-84</i>	
	<i>Staff</i>	<i>Applicants</i>	<i>Staff</i>	<i>Applicants</i>
U.K. & Ireland	41.0	22.1	36.4	18.0
Asia	30.6	26.3	23.4	39.9
North Europe	23.0	15.6	15.7	6.2
Middle East	—	—	4.0	8.8

N.B. Percentages expressed as a proportion of total staff and total visa applicants at overseas posts.

91. The Commission considers that if non-discriminatory policies are to be pursued, there is a *prima facie* need to provide equal access to all applicants and that staffing levels at overseas posts, where selection and processing occurs, should take due cognizance of volume of demand. DIEA commented that geographical and resource factors preclude the possibility of equal access for all applicants, and that efforts are made to minimise inequality of access. While the Commission accepts this, it nevertheless is of the view that the matter requires attention and *recommends* that staffing levels at overseas posts be reviewed with the object of ensuring that they are not in effect resulting in discriminatory

implementation of policy. It suggests that the outcome of the review could usefully be made public, in view of the disquiet expressed to the Commission on the matter.

## 5.2 Visas for Permanent Residence

92. *Family Reunion.* Under the immigration policy as announced for 1983-84, the greatest number of visas issued for permanent residence in Australia will have been in the family migration category. Statistics for the period indicate that the number of people migrating in this category was between 36 000 and 38 000 or 58% of the total. In the family migration category, applications for visas to migrate to Australia may be sponsored by permanent residents or citizens of Australia. They may sponsor applications by spouses, unmarried children, fiances/fiancées, parents, non-dependent children and brothers and sisters. The Commission acknowledges DIEA's strong humanitarian commitment to the reunion of the family in its immigration policy. But it observes also that the greatest number of complaints received in submissions about infringements of human rights occurred in this category.

93. Evidence to the Commission<sup>2</sup> indicated that the long delays experienced by many applicants in having sponsorships processed — over 18 months in some cases — caused considerable hardship to the separated members of families. The Commission *recommends* that in order to conform with the spirit and intention of Article 23 of the ICCPR, and in order to give credibility to DIEA's humanitarian commitment to the family, efforts be made to reduce delays which keep families separated for long periods, if necessary by the allocation of additional resources for the purpose. No good purpose is served, and longer term harm may be done to both the program and the individuals involved, if reasonable resources are not allocated to achieve expeditious handling of applications.

94. It was suggested to the Commission in several submissions that the sponsorship system, through which people may be issued with visas to migrate in the family migration category, infringes human rights in a number of respects. In order to sponsor a family member, an Australian permanent resident or citizen must satisfy eligibility criteria dependent upon financial situation, accommodation and employment. The assessment of a sponsor's eligibility is a subjective judgement made by the processing officer. The Migrant Entry handbook states that 'it is not possible to lay down hard and fast rules on when a sponsorship is not to be accepted; officers must exercise judgement in each case'. It goes on to state further that 'the check on income levels [of sponsors] should not be so tight that sponsorship becomes the preserve of the rich'

95. The Commission notes<sup>3</sup> that the exercise of this discretionary power could result in the refusal of some sponsorships and the enforced separation of immediate family of a spouse and/or dependent children of Australian permanent residents or citizens. The denial of family reunion, particularly with respect to spouse and/or dependent children, is inconsistent with Article 23 of the ICCPR which provides that the family is entitled to the protection of the State, and the similar provision in Principle 6 of the Declaration of the Rights of the Child. The Commission is of the opinion that any eligibility conditions for the sponsorship of a spouse and/or dependent children by an Australian citizen or permanent resident, which may result in the enforced separation of that family, will infringe the rights of the family under the ICCPR. The family, as the fundamental group unit of society (ICCPR, Article 23) has priority. Immediate members, even if disabled,

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2. See for example Submission No. 2 from Mr G. Rogers, No. 48 from the Indo-China Refugee Association and No. 61 from Mr A. Markus.

3. *Migrant Entry Handbook*, paras 16.7.7-16.7.8.

4. This possibility is referred to in Submission No. 48 from the Indo-China Refugee Association.

should not be prevented from joining up with spouses or parents in Australia, although the Commission would accept some limitations, e.g. on grounds of national security or contagious disease. Further, the Commission draws attention to the power given to the Minister by section 13(9) of the Citizenship Act (as amended by No. 129 of 1984). It allows the Minister to confer citizenship on a spouse or person under the age of 18 and the power ought in its view to be exercised to implement human rights. Accordingly, the Commission *recommends* that there be no impediment to the sponsorship for permanent residence of the spouse and/or dependent children of an Australian citizen or permanent resident, unless there are exceptional circumstances, e.g. a threat to national security.

96. *Assurances of Support.* As part of the family reunion arrangements an assurance of support (formerly termed a maintenance guarantee) is required from an Australian sponsor for the migration of certain categories of relatives including fiancés, some special need relatives, older parents and aged dependent relatives, but not spouses or dependent children. Under the assurance of support, the sponsor undertakes to support the migrant relative for a specified period (usually ten years) after arrival in Australia. If the sponsor is unable to maintain the relative, which can occur because of changes in the sponsor's family, marriage break up or sickness or conflict between generations, the sponsored person may receive a Special Benefit payable under the Social Security Act. Any Special Benefit normally is repayable by the sponsor, although persons other than the sponsor may also give the assurance. In either case, the sponsor becomes liable to recovery action in respect of special benefits paid to the sponsored person.

97. The Commission was told that the requirements of the assurance of support have, in some circumstances, the effect of denying family reunion to poorer Australia residents who do not have the financial means to undertake the commitment for 10 years. This group includes pensioners and those attempting to establish themselves in Australia, including people fleeing war-torn homelands or people from less developed countries. These latter groups have often been unable to bring personal possessions or savings with them to Australia. They are further disadvantaged insofar as the parents they are sponsoring often have no transferable income in the form of pension or savings. In some circumstances, the obligation to repay the Special Benefit means that some sponsored persons in genuine need refrain from applying for it. (Special Benefit is the only Social Security payment which is repayable.)

98. The requirement of an assurance of support also discriminates between elderly migrants of less than ten years residence who have become Australian citizens and all other Australian citizens. The assurance of support is designed to take the place of the retirement pension which elderly migrants are ineligible to receive until they have been resident in Australia for ten years, regardless of whether they take out Australian citizenship or not. This class of citizen is therefore not accorded the same rights as all other Australian citizens.

99. It also appears that the present administration of the scheme may be largely unlawful. The Commission understands that assurances of support are probably legally ineffective after the sponsored person has become absorbed into the community, a situation which almost certainly arises with the acquisition of Australian citizenship, and may well apply on the completion of a term of residence considerably less than 10 years, notwithstanding that the Migration Act now relies (since the Migration Act Amendment Act 1983) specifically on the aliens rather than the immigration power. The Commission has been advised however that assurances of support are often enforced even where these qualifications have been met.<sup>5</sup> In human rights terms, the system can have the effect of

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5. See especially Submission No. 38 from the Income Maintenance Guarantee Group, No. 48 from the Indo-China Refugee Association, No. 55 from the Arabic Maintenance Guarantee Group and No. 120 from the Welfare Rights Centre.

restricting family reunion and could in some cases be racially discriminatory, e.g. in relation to people from less developed countries who may have few savings and who may be reluctant to place the onus for their support on relatives in Australia already hard pressed with other commitments. The Commission *recommends* that the assurance of support system, including the arrangements for recovery of Special Benefits, be reviewed and if possible discontinued but without affecting the family reunion policy.

100. *Disabled Persons.* The Commission received submissions to the effect that disabled persons are discriminated against both in applying for visas, especially for permanent residence, and in the administration of the entry permit scheme (for entry permit aspects, see section 3 of this chapter).

101. All persons seeking permission to migrate to Australia, i.e. seeking a visa for permanent residence, are required to meet certain health standards. The health standards are drawn up by the Department of Health in consultation with DIEA. The standards are set out in the Department of Health's internal manual 'Medical Standards for Selection of Migrants'. The manual currently in use was drafted in 1971, but is not available for public inspection. It is understood that a revised manual is in the process of being prepared, and that it will be published.

102. Failure to meet the health standards generally results in refusal of an application for a visa. This may occur even if only one member of the family unit has a health problem and even where that member does not intend to migrate. Applications in the family migrant category are reconsidered where health standards are not met. Where there are special circumstances, particularly compassionate ones, the usual standards may be waived. The main factors taken into account in any reassessment include:

- 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
- 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.'

103. If a visa is granted for a person with a disability, or to a family including a person with a disability, then the disability is stated, and there is a special endorsement on the entry permit. Section 16(1) (c) (i) of the Act provides that if a person with a prescribed disease or a prescribed physical or mental condition enters Australia without a special endorsement on the entry permit, and is therefore in Australia with an undisclosed disease or condition, the person immediately becomes a PNC. As noted in paragraph 48 above, the intent of the section, taken with Migration Regulation 26, is not to lay down the criteria on which persons will be refused entry on medical grounds but rather to prevent misrepresentation and the concealment of medical disabilities of migrants on arrival in Australia. The effect of the section is not only to prevent such a misrepresentation and concealment but also to permit consideration of the removal from Australia of individuals who do, in fact, actually deceive immigration authorities in this regard. A person with a prescribed disease or condition who is approved for entry to Australia is simply given the special endorsement and may enter without becoming a PNC.

104. It seems, however, that the prescribed conditions are no different from many other conditions for which migrant entry would generally be refused. The rationale for selecting the particular diseases or conditions to be listed in Regulation 26 seems to be that they are all capable of escaping detection and thus could be concealed. Further, there are

other undetectable conditions which are not prescribed but which also, if detected, would cause refusal. The Commission can see no reason why section 16(1) (c) (i) and Regulation 26 should be retained in their present forms. While it might be argued that they have a purpose to serve in regulating the entry of people with conditions dangerous to public health at actual points of entry (see section 3 below) they play no role in assessing whether health standards are met for immigration purposes. Such assessment is carried out independently. As currently drafted, the legal provisions reflect a confounding of public health and disability considerations. They serve only to confuse applicants and create the impression that people with prescribed diseases or conditions are absolutely prohibited from coming to Australia.

105. The Commission *recommends* that diseases or conditions, at least to the extent that they fall within the definition contained in paragraph 1 of the Declaration on the Rights of Disabled Persons, should no longer be prescribed for the purposes of section 16(1) (c) (i) of the Act. Regulation 26 might well be repealed and other action taken in relation to disease which would give ground for refusal to enter, e.g. because of risk of contagion.

106. In relation to the health standards themselves, the Commission *recommends* that the revised entry manual now in preparation be critically examined with a view to separating out health and disability considerations. For example, the fact that a person has epilepsy or diabetes or has lost a limb is not necessarily indicative of the state of that person's *health* and, as stated below, disability *per se* should not be used as a basis for rejecting applications for permanent residence. Disability organisations in Australia could usefully be involved in such a review.

107. There is another difficulty associated with section 16(1) (c) (i). As mentioned earlier, if a person with a prescribed disease or condition enters Australia without receiving a specially endorsed entry permit, either through deliberate concealment or, it seems, through inadvertence, then he or she automatically becomes a PNC. The Commission was advised in oral evidence of at least two cases where individuals in such circumstances, one who had been in Australia for over twenty years, lived in fear of detection by DIEA.<sup>7</sup> If the concern is to have a legislative provision which would allow a right of action against individuals who deliberately conceal a disease or condition which is likely to pose a threat to public health, then this would already seem to be accommodated within the terms of paragraphs (b) or (ba) of section 16(1) which provide, inter alia, that if a person produces a document that was obtained by false representation in order to secure entry to Australia or to secure a visa or return endorsement then he or she shall be deemed to be a PNC.

108. The Commission is of the view that the present position whereby applications are initially subject to an objection on health grounds and then reconsidered, if appropriate, on the basis of any special humanitarian circumstances is unsatisfactory. Both in oral evidence and in written submissions, the Commission was told that decisions in such circumstances are often based on misconceptions about the true nature of the disabilities involved and that the determination of humanitarian circumstances is often inconsistent, with the case by case decision-making process sometimes giving rise to anomalies.<sup>8</sup> This can lead to disillusionment with the system when cases of special humanitarian entry are widely publicised in the media and people whose applications have been rejected consider

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7. Transcript of Proceedings, Melbourne, Tuesday 15 November 1983, p. 127.

8. Transcript of Proceedings, Melbourne, Tuesday 15 November 1983, p. 121; Transcript of Proceedings, Perth, Thursday 8 December 1983, p. 406; Transcript of Proceedings, Canberra, Thursday 15 December 1983, pp. 407-9; Submission No. 95, Australian Association for the Mentally Retarded Inc. (A.C.T.) p. 2; and Submission No. 29, National Epilepsy Association of Australia and Australian Council for Rehabilitation of the Disabled, p. 7.

that their circumstances are the same as, if not better than, those of a person allowed entry, and that for some reason they have been discriminated against.

**109.** It is clear from the views of disabled organisations presented to the Commission in oral evidence and in written submissions that they perceive the legislation as making exclusion the starting point for the consideration of all migration applications involving prescribed disabilities, although DIEA commented that disability is not an automatic bar to migration.<sup>9</sup> The matter is discussed at paragraph 46. The Commission agrees with the view put to it in oral evidence and in submissions that the current emphasis on the disabilities, rather than the abilities, of disabled persons should be reversed so that, in accord with Paragraph 10 of the Declaration on the Rights of Disabled Persons, the effect is not to discriminate merely because someone is disabled. That is not to say that people with physical disabilities or those who are intellectually disadvantaged should be given an automatic right to immigrate, any more than any other applicant. Rather, the proposition put to the Commission in oral evidence and in written submissions was that disability *per se* should not be, or even appear to be, an automatic bar to immigration.<sup>10</sup> The Commission endorses this view. It *recommends* that a disabled person seeking to immigrate should be assessed on the basis of the ordinary selection criteria applicable to every other applicant. If these criteria are met, he or she should not have to make out a special case for entry on the basis of any 'outstanding qualities' or 'compassionate or humanitarian' considerations. Other recommendations relating to disability are contained in paragraphs 64 and 169.

**110.** With regard to a family with one member who has a disability, it is unfair to reject the family's application purely on the basis of that disability. Full and fair account should be taken of the contribution which other members of the family will be able to make in Australia and of the support they will provide to the disabled person. At present this is only one of the factors to be taken into account along with those mentioned in paragraph 102 above, and the contribution is required to be significant. In family reunion cases, the anguish which is caused by rejecting a family's application on the basis of one member's disability is considerable. Family considerations, not the disability *per se*, should be paramount and a family with a disabled member should not be at a disadvantage compared with any other family. That is to say, normal family entry or reunion criteria should apply. The Commission nevertheless acknowledges that there will be instances where immigration might not be appropriate, for example where the severity of a disability of a single unskilled person with only an ageing parent in Australia is such that the person would be unable to be self-supporting. Clearly in such circumstances, an individual would not meet the ordinary selection criteria.

**111.** DIEA commented that the ability of a family to settle in Australia will be affected by the disability of one member. It stated that factors such as this should be taken into account and that it would not be in the interests of applicants to provide for the unconditional acceptance of disabled people. The Commission reiterates that it is recommending only that disability *per se* should not be used as the basis for excluding people, not that disabled people should be given an automatic right of entry. Further, the Commission notes that while a whole complex of factors are relevant to the way in which a disabled individual and his or her family will adapt to life in a new country, the majority of these factors will also be relevant to all newcomers. Although in some cases particular disabilities may bring their own problems, the Commission fails to see why, as a general

9. For example, Transcript of Proceedings, Melbourne, Tuesday 15 November 1983, p.125; Submission No. 14; Australian Deafness Council, Western Australia, p.4; Submission No. 29, The National Epilepsy Association of Australia and the Australian Council for Rehabilitation of the Disabled, p.2; and Submission No. 68, the Australian Council for Rehabilitation of the Disabled, p.9.

10. *ibid.* and see also Transcript of Proceedings, Perth, Friday 9 December 1983, p.445.

rule, disabled people and their families should be subject to any other test of their ability to cope with migration and capacity to adjust to life in Australia than other applicants (see sections 19.5.6 and 19.5.7 of the Migrant Entry Handbook). Where rejection of an application is contemplated on the basis of problems associated with a particular disability, assumptions made by interviewing officers about presumed difficulties should not be the sole basis for a decision. In such circumstances, an organisation representing that disability group in Australia could perhaps be consulted before a final decision is made.

*112. Deportees.* Applicants applying for visas at overseas posts need to satisfy eligibility and selection requirements before they will be granted visas for permanent residence in Australia. People who were deported as PNCs from Australia are, generally, not eligible to apply to migrate until they have been absent from Australia for five years. DIEA comments that this is not an inflexible policy, however, and advised that deserving cases would be considered on their merits. Nevertheless, in cases where deportees leave an Australian citizen dependent child in Australia, it may well be that the child is separated from its parents for a period of at least five years in contravention of Principle 6 of the Declaration of the Rights of the Child. This issue will be dealt with further in section 5 of this chapter.

*113. Sex Discrimination in Applications.* The members of a family applying for a visa for permanent residence derive their eligibility from the principal applicant. However, the recognition of the man as the principal breadwinner in visa applications discriminates in some cases against his spouse where her qualifications would attract a higher score in the points assessment. This matter was raised with the Commission during its inquiry and the Commission was advised by DIEA that it assesses families on the basis of regarding the principal applicant as the person with the highest score, regardless of sex. The Commission notes that this would now be required by the Sex Discrimination Act.

*114.* The requirement of a firm job offer for certain applicants in certain categories such as non-dependent children is unrealistic in a situation where processing delays may mean that the job must be held open for over a year, especially during periods of high unemployment. This requirement also seems to militate against a genuine family-oriented migration program.

*115.* Selection requirements include an assessment of the applicant's settlement prospects. This requires a judgment by the interviewing officer about the capacity of the person or family to cope with migration and to adjust to Australian society and whether the family is supportive and cohesive. It was suggested in submissions to the Commission that the considerable discretionary powers exercised in making this judgment may be utilised subjectively against particular racial groups or against attributes of the applicant which the officer personally considers to be unacceptable. The basis of migrant entry, including matters of the kind mentioned above, should be reviewable by an independent body such as the AAT at the instance of a relative or sponsor resident in Australia, and the Commission so *recommends*.

*116.* It is noted that the Migrant Entry Handbook states that 'if a rating of unsatisfactory or serious settlement risk is given the applicant must be refused regardless of the score obtained on the economic/employment assessment'. To the extent that such ratings may be discriminatory on grounds of race or sex, e.g. it may be assumed without specific testing that because an Asian woman has had no activity outside the home, she will be unable to settle satisfactorily in the more open Australian community, the Commission notes that they are unlawful under the Racial Discrimination Act and the Sex

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*II. Migrant Entry Handbook, para. 9.5.13.*

Discrimination Act and accordingly may not be made. The Commission notes that DIEA's Legal Manual instructs officers to take human rights considerations into account and *recommends* that specific attention be drawn to the requirements of the Racial Discrimination Act and the Sex Discrimination Act.

### 5.3 Refugees and the Special Humanitarian Program

117. Refugee resettlement comprises a significant proportion of new settler arrivals in Australia. In 1983-84, 16 000 refugees arrived in Australia to take up permanent residence. The 1984-85 program, of 16 000, includes 8 000 places for refugees from Indo-China. Available places in this program are allocated to various countries of first refuge in South East Asia by reference to such factors as the size of the camp population, the views of the United Nations High Commissioner for Refugees (UNHCR), the scale of refugee exodus policies of and requests from the countries of South East Asia, the number of places in refugee camps and persons known to be of interest and concern to Australian sponsors. Other designated programs are for East Europe, Latin America and the Middle East for which 1 000, 750 and 750 places respectively have been allocated for 1984-85. A further 3 000 places will be made available for the Special Humanitarian Program which resettles individual members of minority groups suffering human rights violations or discrimination and who are not eligible for refugee or migrant entry to Australia.

118. In addition, the Government has developed the Orderly Departure Program from Vietnam as an alternative to the departure of boat people. This program brings people from Vietnam to Australia through flexible application of the family reunion migration policy in accordance with their special situation.

119. Australia is a party to the 1951 Geneva Convention Relating to the Status of Refugees as amended by the 1967 Protocol which defines a refugee as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

120. Australia considers that it has sovereign responsibility to administer its refugee policies in accordance with its own priorities and criteria. In its submission to the Commission, DIEA stated that it was necessary:

to make judgments about the basis on which some applicants within mass flow situations should be selected for refugee resettlement in this country and others rejected . . . Successive Australian governments have reaffirmed the need for Australia to make its own selection of applicants both on the basis of humanitarian needs (i.e. claims to refugee status as assessed by Australia within its own procedures and against its own experience) as well as on other criteria such as links with Australia. Only in this way has it been judged that Australia is selecting from amongst refugee groups those whose situation is most desperate and irreversible.<sup>2</sup>

121. Refugee status accordingly is considered on a case by case basis. Claims for refugee status from people who are *inside* Australia are considered by the DORS Committee solely on the basis of criteria laid down in the Status of Refugees Convention (paragraphs 157-165). Resettlement in Australia for refugees interviewed by DIEA officers outside Australia is based firstly on the applicant succeeding in establishing a claim to refugee status; and on being assessed as eligible within one or more of the three priority categories for access to the Australian program, i.e. being a refugee does not give

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<sup>12</sup>. D1EA Submission, paras 8.2.4-8.2.5.

automatic rights to migrate to Australia. Policy Control Instruction 61 entitled 'Guidelines for the Determination and Processing of Refugees' advised that 'people who do not come within any of the three categories or have been accepted for resettlement elsewhere, should not be considered further as refugees' .<sup>13</sup> Thus there is a difference between the handling of persons who present overseas as refugees, and those who present in Australia. For those overseas who establish their status as refugees:

- Priority 1 category is for people who have family in Australia;
- Priority 2 is for those who have close links with Australia;
- Priority 3 is for people with resettlement potential or humanitarian claims.

122. For refugees overseas, it must first be determined that the applicant has refugee status. Only after that can any processing of sponsorship occur. Assessments of claims are, of necessity, subjective judgments" made by officers in the field. They are based on the UN Convention definition of a refugee and a three paragraph elaboration in DIEA's Policy Control Instruction 61 of what constitutes fear of persecution. Evidence to the Commission<sup>14</sup> drew attention, in this respect, to the difficulties faced by officers with regard to obtaining the necessary, up-to-date information for making assessments in fluid political situations.

123. It was also noted that applicants may be disadvantaged in their claims by limited linguistic or cultural ability. The process of deciding whether a person is a refugee is dependent on that person declaring himself or herself a refugee. This requires a knowledge that the element of self-declaration is essential to set the process in train. While interviewers are counselled that questions *may* be couched in the language appropriate to the applicant's background, education etc., the reality is that fear, limited formal education or cultural differences will lead to questions not always eliciting the most appropriate response or the most compelling reasons.<sup>15</sup>

124. Case by case determination means that interview assessments of claims for refugee status are crucial. The Commission considers that, as well as ensuring that DIEA officers are fully briefed about the current political situation, instructions should require that interviewers recognise any linguistic, cultural or educational factors which may prejudice the presentation of an applicant's claim. For persons claiming refugee status outside Australia, the Commission *recommends* that the definition of refugee, for the purpose of determinations of refugee status, be included in the Act. It was advised by DIEA that its practice is, if requested, to provide an explanation of reasons in cases where claims for refugee status are rejected. It *recommends* that consideration be given to making decisions on determination of refugee status subject to review at the request of relatives in Australia by the new review machinery proposed by the Commission (see Chapter 8.3).

125. Once a person is determined as having refugee status, resettlement processing commences. This includes an assessment of settlement suitability and a requirement to meet health standards as set out in the Migration Entry Handbook.

126. Evidence to the Commission suggested that the assessment of settlement suitability might, in some circumstances, prejudice the resettlement chances of some refugee national groups. In relation to Indo-Chinese refugees it was claimed that the

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13. Policy Control Instruction 61, para. B5.

14. The Commission received evidence of cases where different determinations on refugee status were made for members of the same family. See Submission No. 114.

15. The Commission acknowledges in particular the valuable submission made at the public hearing in Canberra on 27 February 1984 by Mr Rod Plant. Submission No. 114.

16. A case study presented by Amnesty International in Submission No. III highlighted the problems encountered by interviewers when applicants did not respond well to questions.

profiles of national groups provided in background papers prepared by DIEA in conjunction with the Department of Foreign Affairs were not properly researched" and discriminated against certain racial groups by presenting a sliding scale of settlement acceptability on national grounds with Vietnamese seen as most suitable. The Commission requested copies but DIEA said it was unable to identify such papers. It advised that there are background papers on political and human rights conditions in Indo-China prepared by the Department of Foreign Affairs; cultural background papers prepared by the Department of Education; and information papers on refugees prepared by DIEA. It indicated that none of these are used in the process of refugee selection. The Commission accepts these explanations but feels it appropriate to record the complaint.

127. DIEA stated that:

in general terms applicants who have immediate relatives in Australia would not be refused refugee entry on settlement grounds unless their background was such that it was assessed that it was definitely not in their interests or the interests of the Australian community for them to be resettled in Australia. When there are large numbers of applicants seeking resettlement, who have no ties with Australia, and not all can be accepted, some priorities must be established and those whose background is such that they would be likely to experience the least amount of difficulty in Australia are accepted.'

128. However, submissions to the Commission have argued that profiles of national groups, numbers of staff allocated to posts in Indo-China, frequency of visits to various refugee camps and extension of Priority 3 selection, i.e. not requiring sponsorship, have operated in such a way as to disadvantage the resettlement opportunities of certain national refugee groups in Indo-China and lead to their disproportionately long internment in refugee camps.'

129. The Commission, as noted above in paragraph 76, has no power to review the overall policy of the Government relating to the selection of refugees. It recognises Australia's humanitarian commitment to the world-wide refugee problem and acknowledges that Australia resettles more Indo-Chinese refugees per capita than any other country and accepts that there are limits to the number of refugees than can be admitted. It *recommends* nevertheless that, as for overall migration policy (paragraph 67), the matters mentioned above be reviewed to ensure that refugee policy is administered in a non-discriminatory manner. The Commission also considered the question raised with it whether case by case determination of refugee status necessarily implements DIEA's stated intention of selecting, from refugee groups, those whose situation is most desperate and irreversible. The Commission was advised that the UNHCR does not have the function of making determinations of refugee status under the Convention, and that particularly in relation to persons in Indo-China it makes no formal assessment. It was also advised by DIEA that the group in greatest need are those who fall within the Convention definition of refugee, and it accepts that judgment. Accordingly it considers DIEA should continue to assess refugee status and endorses its policy of determining, within that category, the most desperate and irreversible cases and then proceeding to the normal processing procedures.

130. The Commission draws attention to the fact that applicants for refugee resettlement, or resettlement under the Special Humanitarian Program, suffer considerable hardship during long processing delays. In some countries, knowledge of the

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17. Submission No. 114. The background papers 'have been frequently criticised, particularly from groups such as the Ethnic Communities' Council, in terms of sloppy research, inaccuracies and bias creeping in'.

18. Letter from DIEA — 15 June 1984.

19. See for instance the evidence relating to Kampuchians, Lao and Hill Tribe Refugees in Submission No. 114.

application can result in persecution and loss of civil rights. If the application is rejected, these people may be in an extremely precarious and unprotected position. The Commission has been advised by DIEA that, in countries where gross violations of human rights occur, applicants' eligibility for all categories of permanent residence is considered concurrently and that processing is expedited. It endorses that practice, and supports an emphasis in the last resort on humanitarian considerations rather than the technical requirements of the Convention.

131. Refugee resettlement applicants are required to meet the same health standards as other persons applying for visas for permanent residence. The Commission makes the same observations and recommendations with regard to refugee disabled persons as it does for other disabled persons seeking migrant entry to Australia — see paragraph 109 above. It was advised by DIEA that where refugee resettlement eligibility is dependent on meeting the same standards as are set down for other categories of applicants for permanent residence, these standards are administered sympathetically with due consideration for the special problems of refugees. It welcomes this and *recommends* that refugees with disabilities be assessed on the selection criteria applicable to other refugee applicants and that there should be no additional requirement for 'outstanding qualities', or 'compassionate' grounds, etc.

132. The Commission received a number of submissions drawing attention to the special problems in relation to education encountered by unaccompanied young refugees who are resettled in Australia. Many of these young people (usually in the 18-19 age group) had their education seriously interrupted in the past and wish to complete it in Australia. However, the present system for educational assistance ignores the special problems of this group. They are unable to obtain unemployment benefits or tertiary education assistance and are ineligible for adult education assistance grants. The Commission notes that DIEA is aware of, and concerned about, the problem and expresses the hope that arrangements may be made in the near future to provide income support for unaccompanied young refugees who wish to complete their education.

#### **5.4 Visas for Visitors and Temporary Residents**

133. The visa system for visitors is designed 'to prevent abuses of policy by people not intending genuine visits'." Accordingly the assessment of visitor bona fides is given high priority when considering visitor visa applications. Applicants whose bona fides are considered doubtful, e.g. are suspected of being likely to overstay or engage in illegal employment, will be refused a visa. The Temporary Entry Handbook, Part 1 notes that 'a very small proportion of visitor applicants worldwide may seek to enter Australia as visitors with the intention of engaging in employment and for overstaying. The degree to which this is a problem varies markedly between different posts',<sup>21</sup>

134. DIEA provided the Commission with statistics of numbers of applications for visitors' visas by country which were rejected mainly on the grounds of doubtful bona fides." As percentages of numbers of individual applications some examples for 1982 of numbers rejected were:

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20. *Temporary Entry Handbook*, Part 1, Visitors and temporary residents, para. 2.1.2.

21. *ibid.* 2.9.1.

22. DIEA Submission, Part C, pp. 26-31.

Country	% Rejected	Country	% Rejected
Colombia	100%	Indonesia	8.0%
Turkey	76%	Malaysia*	2.0%
Bolivia	73%	Canada	1.0%
Tonga	62%	New Zealand	1.0%
Iraq	45%	Papua New Guinea	1.0%
Pakistan	33%	South Africa	0.20%
Philippines	19%	United Kingdom	0.20%
Fiji	17%	U.S.A.	0.20%
Hong Kong	11%	Japan	0.08%

\* Statistic is for 1981

135. The Commission notes the disparity between the percentages in statistics provided. Assuming that most were rejected on the grounds of doubtful bona fides, it questions the efficiency of these assessments in the light of percentages of overstayed visitors estimated to be in Australia. It was estimated for example that 27% of overstayed visitors were from the United Kingdom." Yet only 0.2% of applicants for visitors' visas had been rejected primarily on the grounds of being likely to overstay or to engage in employment, and this despite the large DIEA representation in the U.K. (paragraph 90). Indonesia, Malaysia, and USA similarly had small application rejection rates yet were strongly represented in estimates of overstayers in Australia.

136. This would seem to indicate that posts identified as high risk by DIEA are not necessarily those from which the greatest number of overstayers originate. The Commission draws attention to the *Report of the Auditor General on an Efficiency Audit of Control of Prohibited Immigration by the Department of Immigration and Ethnic Affairs* which concludes that 'The production of reliable lists of prohibited migrants would enable the identification of characteristics of potential immigrants so that judgments made on issues of visas at overseas posts could be based on specific risk factors'." The Commission is of the view that, in the light of the above and the obvious disparity between rejection rates for different countries, it may be construed that assessments for granting or rejecting visitors' visas are made in a racially discriminatory manner.

137. The Commission notes in this respect advice given by DIEA for assessing the genuineness of visits in which it is stated that 'Posts may use as a guide their own profiles of people whose bona fides may be doubtful and produce other informative aids which are useful under local conditions'." DIEA practice is to provide overseas posts with information on PNCs deported from Australia from which posts develop their own analysis and profiles. However, in view of the disproportionate racial representation of PNCs apprehended compared with the actual racial representation of PNCs estimated to be in Australia (see paragraph 201 below), the Commission considers that this system is likely to have discriminatory results." The Commission draws attention to the finding of the Auditor General that DIEA has not to date been able to provide 'an accurate and up-to-date record of overstayers'." The Commission reiterates its view, stated above at paragraph 67, that the administration of the Act should not offend against the provisions of the Racial Discrimination Act. The Commission notes, and supports, the substantial

23. *ibid.* p. 143.

24. *Report of the Auditor General on an Efficiency Audit of Control of Prohibited Immigration by the Department of Immigration and Ethnic Affairs*, AGPS, Canberra, 1984. para. 1.2.

25. *Temporary Entry Handbook*, *O. cit.*, para. 2.1.5.

26. Submission No. 88 deals with the case of genuine visitors from India whose visa application was rejected because of their mistaken identification with a particular profile.

27. *Report of the Auditor General. op.cit.*, para. 2.3.

efforts DIEA is making to develop more accurate records of overstayers, and notes also DIEA's view that figures such as those mentioned above do not show discriminatory practice. It *recommends* that profiles for assessing visitor bona fides be based on a reliable and accurate record of overstayers and that any practice relating to the assessment of the bona fides of applicants for visitors' visas be administered in a non-discriminatory manner.

138. The Commission received evidence that some applicants for visitors' visas who appeared to have satisfied necessary requirements were rejected without reason by DIEA. The Temporary Entry Handbook, Part 1 states that 'when sought, reasons for non-approval of visitor applications should be provided to unsuccessful applicants unless the information is of a sensitive nature.'" The Commission acknowledges that to confer a right of appeal by overseas applicants against adverse visitor visa decisions is not feasible. Nevertheless, it considers that all applicants are entitled to be informed of the reasons for rejection. It notes DIEA's advice that current practice is that visa applicants are informed of reasons for non-approval, and endorses the desirability of the practice. With regard to 'information of a sensitive nature', the Commission notes the difficulty of making decisions about applications for very controversial visitors, e.g. persons accused of war crimes or a person 'whose visit would be sensitive in the context of Australia's foreign relations' •" However it draws attention to the much publicised case of Professor Hidaka from Japan who was repeatedly refused a visitor's visa, but ultimately, after a change of Government, was allowed in. It points out that refusals of this nature, in the absence of specifically stated reasons, can generate a great deal of rumour and adverse publicity especially where the decision is later reversed. It records advice received from DIEA that its current practice is wherever possible to give reasons, even in cases of a sensitive nature, and expresses the view that this should continue to be done. In paragraph 300 the Commission recommends that amendments should be made to the Administrative Decisions (Judicial Review) Act so that reasons would have to be given if requested.

139. The Commission received evidence about problems encountered by students with temporary residence visas for the private overseas student program which is administered by DIEA to help people from other countries acquire qualifications and skills.' In some cases visas have been refused for dependent spouses and children of overseas students studying in Australia. The Temporary Entry Handbook, Part II advises officers that spouses and minor unmarried children may accompany or join students if they meet health requirements where the period of stay is over twelve months and an assessment is made of their bona fides concerning departure from Australia. De facto spouses may accompany students provided the relationship is assessed as genuine.' The Commission considers that overseas students in Australia are equally entitled to protection of their human rights and *recommends* that decisions made by DIEA with regard to the spouse and/or dependent children of overseas students be consistent with Article 23 of the ICCPR which would, for example, give students a right to have members of their family come with them provided adequate arrangements for support were made (in relation to requiring reasons to be given for TEP decisions, see paragraph 175).

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28. *Temporary Entry Handbook*, op. cit., paras 2.3.3.

29. *ibid.* para. 4.12.

30. Submission No. 24.

31. It was submitted that processing delays have meant that overseas students sometimes waited so long to obtain visas that the course of study had already commenced and they had to withdraw. The Commission considers that for DIEA to conform to the spirit and intention of its private overseas student program every effort should be made at overseas posts to identify and react to heavy processing workloads which occur when students seek visas to commence study at the beginning of the academic year.

32. *Temporary Entry Handbook*, Part II, Private Overseas Students and Trainees, paras 3.1.2. 3.2-3.3.

**140. Cancellation of Visas.** Under section 11B of the Act, the Minister or an authorised officer may, in his absolute discretion, cancel a visa at any time. This power is neither limited by guidelines for the exercise of this discretion in particular circumstances nor by access to appeal if the visa is cancelled. The Commission notes that the Federal Court in *Gaillard' s Case* (1983) 49 A.L.R. 277 has ruled that the words 'in his absolute discretion' are not surplusage, but give the Minister unqualified power (see paragraph 283). It accepts this as the legal position but is equally firmly of the view that no Minister in a democratic society, or with the Human Rights Commission Act in operation, would fail in the exercise of those powers to respect human rights.

**141.** The Commission has received evidence of cases where it is claimed that legitimate travellers have had visas cancelled en route to Australia because of representations from their Government for political purposes which bear no relation to that person's visit.<sup>33</sup> DIEA advised that cancellation in these cases would be a rare event and would almost certainly be connected with a serious threat to the Australian community, e.g. terrorism or criminal activity. In these circumstances, the Commission *recommends* that criteria for the exercise of discretion in making decisions regarding the cancellation of visas be legislated and that the cancellation of a visa be subject to review by an independent body such as the AAT (as similar recommendation is made in respect of s.7, which applied to TEP holders and contains a similar conferment of absolute discretion on the Minister — see paragraph 175).

## **5.5 Return Endorsements**

Sections 11A, 11B and 11C (Division 1A)

**142.** Non-citizen permanent residents who have left Australia and wish to resume residence are required to have prior authority to return. This authority is granted in the form of a return endorsement. Return endorsements may on request be granted by an authorised officer under section 11A(1)(b) of the Act to a person residing in Australia, or a person who has resided in Australia and wishes to return.

**143.** Return endorsements, like visas, do not entitle the holder to enter Australia, as entry is subject to the grant of an entry permit on arrival.

**144.** Residents leaving or absent from Australia and wishing to return may obtain: Return endorsements: for those who have lived in Australia with resident status for at least twelve months and, in the case of applicants overseas, have been absent for less than three years. The return to Australia must be within three years from the date of last departure from Australia and the endorsement can be used on any number of occasions.

- (b) Resident (return) visas: for those who have had resident status for less than twelve months and, in the case of applicants overseas, have been absent for less than twelve months. The visa nominates a specific date for travel and usually permits a journey of less than twelve months duration.

**145.** The Commission is pleased to note that decisions made under sections 11 A(1)(b) and 11B to grant or refuse return endorsements and to cancel them are subject to review by appeal to the Immigration Review Panel. However, it notes the limitations of this form of review and takes this up further in chapter 8 below.

**146.** The purpose behind the issue of return endorsements and resident return visas is to exclude non-residents who are not considered to be bona fide settlers in Australia in that they, in reality, reside outside Australia. If a permanent resident of twelve months standing or more does not return within three years, permanent resident status is forfeited

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33. See, for example, Submission No. 58, the case of Dr Vjekoslav Vrancic.

and re-entry can only be obtained by a fresh application to migrate to Australia. The Commission received evidence that this requirement has prevented long term permanent residents from spending periods of more than three years overseas with family members and then returning home. The consequence of these arrangements could be that former permanent residents may be prevented, e.g. by changes in migration policy, from returning to their place of residence.

**147.** It is noted that Article 12 of the ICCPR, although not specifically covering the case of a permanent resident, provides that no-one is to be arbitrarily deprived of the right to enter his own country. Early drafts of Article 12(4) dealt only with the right of nationals to enter the country of their nationality. However, this formula was deemed to be too limited by those seeking to assure the right of return to persons who had established their home in a country where they were not nationals. Article 12(4), unlike the European Convention on Human Rights, protects permanent residents who are nevertheless non-citizens, as well as citizens.<sup>34</sup> The Commission believes that a non-citizen whose period of permanent residence has reached a nominated period, say three or five years, will, by virtue of that residence, have provided sufficient evidence regarding his or her true country of residence and *recommends* that this should not be a consideration in situations where return endorsements may be cancelled or the issue of a replacement return endorsement refused. The Commission has in mind that in many cases the reason for not becoming an Australian citizen is not disaffection or lack of loyalty, but rather an unwillingness to renounce all allegiance to a country of origin, e.g. because of family members there."

**148.** The Commission received evidence, and has had complaints, that return endorsement requirements discriminate against an Australian citizen with either a permanent resident spouse or a formerly non-resident spouse who had not lived in Australia long enough to qualify as a permanent resident. A non-citizen resident spouse who travels overseas does not enjoy the same rights of unrestricted travel and re-entry as the spouse who is an Australian citizen. The non-citizen spouse remaining outside Australia beyond the authorised period may forfeit permanent resident status even if he or she has been married to an Australian citizen and resided in Australia for a considerable period. A period of separation may occur if the formerly non-resident spouse leaves Australia before acquiring permanent residence, and wishes to return with the resident spouse. The necessity to apply again to migrate may lead to the separation of the family in these circumstances. An alternative available since amendment of the Citizenship Act in 1984 (see section 13) is for the spouse to obtain citizenship by virtue of that fact. The Commission expresses the hope that these provisions will be used in such cases to improve the observance of **human** rights in such areas as protection of the family as a **unit**.

**149.** A permanent resident must apply for a return endorsement if that person wishes to accompany his or her Australian citizen spouse outside Australia and be entitled to return again. Where travel requirements are urgent, processing periods to obtain a return endorsement for the spouse to be permitted to re-enter Australia may be crucial. The Commission *recommends* that a permanent resident be entitled to return with his or her Australian citizen spouse regardless of length of time spent outside Australia, in cases where the marriage remains intact, or in the event of the death of the Australian citizen spouse. It notes DIEA's advice that to accept this recommendation could create administrative difficulties, **but** considers they could and should be overcome without involving the delay of months or even years apparently associated with existing

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34. See Stig Jagerskiöld, 'The Freedom of Movement' in *The International Bill of Rights: The Covenant on Civil and Political Rights*, ed. Louis Henkin, Columbia University Press, New York, 1981. p. 180.

35. For a note on this aspect, see Human Rights Commission *Report No. 1 The Australian Citizenship Act 1948*, AGPS, Canberra, 1982, where the Commission recommended that the oath or affirmation of allegiance should not include renunciation of all other allegiance (paras 31 and 38(6)).

arrangements. It also notes DIEA's advice that it can issue endorsements rapidly in an emergency, and expressed the hope that processing arrangements generally in this area will be streamlined.

## **5.6 Entry Permits**

### **Sections 6-11 (Division 1)**

150. The definitive document allowing a non-citizen to be in Australia is the entry permit, which is issued by the Minister or an officer of DIEA under powers conferred by section 6 of the Act. A prior condition to the issue of an entry permit, which it seems is imposed administratively, is normally the possession of a valid visa or return endorsement — see sections 1 and 5 of this chapter. Other sections in Division 1 allow for the cancellation of entry permits (section 7), for change of status of temporary permit holders (section 6A) and for exemptions from the permit system, e.g. for consular and diplomatic representatives (section 8).

151. *Section 6.* Section 6 provides that all non-exempt non-citizens must have valid entry permits if they are to be lawfully in Australia. A non-citizen who enters and/or remains in Australia without a valid entry permit becomes thereupon a PNC and is liable for deportation. Entry permits are usually granted immediately on arrival in Australia upon presentation of a valid visa to a DIEA officer at the port of entry. Entry permits may be given either for permanent residence or for temporary stay, and Temporary Entry Permits (TEP) may be subject to certain conditions, such as those relating to work in Australia (sub-sections (6) and (6A)).

152. Entry permits are issued at the discretion of 'an officer' (section 6(2)) and, apart from particular situations spelled out in section 6A(1), there are no statutory guidelines which structure, guide or define the manner of exercise of the discretion. Refusal to issue an entry permit at the port of entry, in practical terms, means that a person is not allowed to enter Australia, as decisions to refuse entry are not subject to review.

153. DIEA was asked by the Commission to provide relevant statistics on entry permits and, in particular, information on the number of entry permit refusals by nationality of applicant in order to assess both the extent of the problem and the possibility of discrimination on the basis of racial or national origin. DIEA informed the Commission that such statistics are not available, that the number of refusals at point of entry is small and would render nationality figures of no statistical value; and that there is no question of discrimination on the basis of racial or national origin. The Commission welcomes the statement about non-discrimination but notes that the problem has been raised and accordingly *recommends* that comprehensive statistics be kept by DIEA to assist in planning, implementing and administering its immigration program effectively and to ensure that no discrimination is involved.

154. *Immediate Arrival.* A number of problems which arise at the point of entry were brought to the Commission's attention as being contrary to or inconsistent with human rights. One problem relates to people arriving in Australia without visas, because in such circumstances they may be refused entry permits. It seems that of about 1 million arrivals of foreign nationals in January-November 1984, some 18 000 arrived without visas. Of those, only 40-50 were stowaways or claimed refugee status. Many (some 16 000) sought entry for a few days en route to another country. Thus the number of possible refugees is relatively small and DIEA advised that only 48 persons were actually refused entry during the period.

155. Despite their physical presence in Australia, people refused entry permits upon arrival are, for the purposes of the Act, deemed not to have entered Australia;

- (i) if arriving by air, as long as they remain within the boundary of a 'proclaimed airport' (section 5(2)(b));
- (ii) when they are being taken from a 'proclaimed' airport for the purpose of being kept in custody at a place outside a proclaimed airport (sections 36A(8) and (9));
- (iii) if arriving by sea, as long as they stay on board a vessel (section 5(2)(a)); or
- (iv) when they are being taken ashore for the purpose of being kept in custody (section 36(4)).

Despite the fact that they are deemed not to have entered Australia, they are subject to the powers of DIEA officers outlined in paragraphs 151-152.

156. These provisions flow from Australia's sovereign right to admit or refuse to admit non-citizens on such terms and conditions as it sees fit. There may, however, be situations where the provisions pertaining to this sovereign right conflict with Australia's humanitarian obligations under the 1951 Refugee Convention and raise important human rights considerations. Article 2(1) of the ICCPR requires countries to ensure to all individuals within their boundaries the rights recognised by it. It is *recommended* that, consistent with Australia's obligations under the ICCPR, DIEA should take continuing care to ensure that the small minority of arrivers in Australia who remain in the position of being deemed not to have entered Australia are accorded the right to equal treatment with others under the law (ICCPR Article 26), the right to security of person (ICCPR Article 9) and the right to freedom from degrading treatment (ICCPR Article 7).

157. *Section 6A: Refugees.* An issue raised frequently during the Commission's inquiry is associated with the relatively small number of persons who arrive from overseas at a 'proclaimed' airport or are on a foreign vessel in an Australian port and make it known that they wish to apply for refugee status and residence in Australia. Section 6A(1)(c) of the Act provides that a person who the Minister has determined meets the criteria of the 1951 Convention or of the 1967 Protocol relating to the Status of Refugees may be granted permanent residence in Australia. To engage Australia's legal obligations under the Convention or the Protocol, the applicant for refugee status must be within Australia and the Commission was advised that in some cases the technical legal position under the Act of being deemed not to have entered Australia was relied on to expel the person without further inquiry or review.<sup>37</sup> DIEA noted, however, that it was not aware of such cases and advised that where examination of claims is likely to take a considerable time a TEP would in most cases be given.

158. Refusal to entertain an application for refugee status and the subsequent refoulement (expulsion or return) could in some circumstances amount to 'cruel, inhuman or degrading treatment' (Article 7 of the ICCPR). It could also be contrary to Article 33(1) of the 1951 Convention which includes a reference to the principle of 'non-refoulement':

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

**DIEA** advised the Commission that the Determination of Refugee Status (DORS) Committee is fully alive to the basic human rights of 'barrier applicants' and that the former UNHCR Legal Officer in Australia commented that 'while Australian law does not

<sup>36</sup>. Australia ratified the 1951 Convention Relating to the Status of Refugees in 1954, and the 1967 Protocol thereto in 1973. The latter removed certain geographical and time limits contained in the 1951 Convention, thus greatly widening the applicability of the protection offered to individuals by the Convention.

<sup>37</sup>. See Submission No. 46 from the Department of Foreign Affairs. DIEA, however, said it was not aware of instances where a claim had not been considered because of the technical legal position. See also Submission No. III from Amnesty International.

prohibit summary expulsion of refugee status applicants by border authorities, in practice all who request asylum at the border are allowed to remain while their claims are processed'.

**159.** It is somewhat anomalous that the 'entry' problem associated with application for refugee status at 'proclaimed' airports does not apply to boat arrivals under section 5(2)(a). In such cases, 'entry' simply means disembarking. Thus persons arriving unlawfully at any point on the Australian coastline, e.g. Indo-Chinese boat people, are considered to have entered Australia (albeit unlawfully) for the purposes of the Act. The same result would apply to persons arriving at an airport not 'proclaimed' under section 5(2)(b).

**160.** Also relevant is the fact that Australia has, since 1979, advocated internationally the need for the progressive development of the concept of 'temporary refuge' whereby, in situations of massive flows of persons seeking protection, all countries should admit all protection-seekers arriving at their frontiers, at least on a temporary basis while durable solutions to their plight are found.' The temporary refuge thus accorded would also allow time for a determination to be made as to whether the persons concerned were in genuine need of protection.

**161.** The Commission believes that all persons physically arriving in Australia and who have a colourable claim to refugee status should have the right to a proper determination of their case. While it recognises the difficulties DIEA experiences in assessing the genuineness of claims for refugee status, it nevertheless *recommends* that the Act be amended to enable any person who reasonably seeks the status of refugee upon arrival to be given a TEP until his or her claim is considered in Australia. If refugee status is determined, the person should be eligible for permanent residence in Australia under section 6A(1)(c). The Commission notes that the UN Convention does not preclude return where a person's life or freedom is not threatened, but is of the view that if genuine refugee status has been established, return should not take place against the wishes of the person involved and that, consequent on the foregoing recommendation, the power to issue an entry permit and allow refugee status should then be exercised.

**162.** Evidence presented to the Commission suggested that there are often difficulties during the first contact with police or DIEA officers by a person arriving in Australia without a visa who could reasonably make a genuine claim for refugee status: It was claimed that, during the initial dealings, such persons are neither informed of the procedures in Australia nor put in touch with such community organisations as Amnesty International which could possibly assist them. It was suggested that many of the DIEA officers perceived their role to be the prevention of abuse of the Act rather than the establishment of whether or not there is a genuine case for hearing by the DORS Committee. Cases were given of deportees who were not given interviews with a DORS Committee representative, and who were returned to countries where it was likely they would face, at the very least, detention.' The Commission deplores the provision in the International Movement Control Inspection Manual which requests the Inspector 'not to ask a person if he/she wishes to make a claim to be a refugee' and requires that the person claiming refugee status take the initiative.' Such provision assumes that the person seeking refugee status has in-depth knowledge of relevant applicable Australian

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38. Guy Goodwin Gill, quoted by Christopher L. Avery (Amnesty International) in (Summer 1983) 19 *Stanford Journal of International Law* 2.

39. See Submission No. 46 from the Department of Foreign Affairs.

40. Submission No. III, *op.cit.*

41. International Movement Control Inspection Manual, para. 4.15.5. It notes, however, that DIEA does not require a formal request that expects some element of self-declaration.

procedures, when in fact very few potential refugees realise that they must formally ask for 'refugee status'.

**163.** The evidence suggested further that at times appropriate interpreting services are not available. It was submitted that the use and selection of interpreters appears to vary according to the DIEA official concerned; some officers do not believe interpreters are necessary, some insist on using only official interpreters, some use a flexible approach.<sup>42</sup> Indeed, the International Movement Control Inspection Manual does not require a translator, legal representative or social worker to be present during the complex interviews conducted under sections 1.15.7 — 1.15.9 to assess validity of a claim to refugee status. Furthermore, some applicants for refugee status fear that the official interpreter may be an agent of the government of the country from which they have fled. While the Commission is aware that official interpreters sign a statement of confidentiality, it believes that such fears should be taken seriously by interviewing officers. Perhaps the inclusion of a representative of an impartial agency such as the UNHCR or, failing that, of Amnesty International in the initial interview could help counteract the fear and help people to explain more adequately their particular situation.

**164.** The Commission *recommends* that procedures in relation to the assessment of persons arriving in Australia without visas who claim, or might reasonably claim, refugee status should be along the following lines:

- (a) every practicable effort be made to identify persons who might reasonably claim refugee status, and they and those claiming the status be informed of the meaning of the term and of the procedures associated with applying for it;
- (b) it be mandatory for relevant DIEA officers to advise people who might reasonably seek, or who seek, refugee status of their human and legal rights including:
  - (i) the right to a confidential interpreter;
  - (ii) the right of access to assistance by a relevant community agency;
  - (iii) the right to advice on refugee procedures in Australia;
  - (iv) the right to legal representation.
- (c) it be mandatory for relevant DIEA officers to advise the DORS Committee of interviews with all potential refugees;
- (d) all people seeking refugee status be allowed to put their cases to the DORS Committee for consideration and, when there is a doubt, the matter should be referred to the Committee;
- (e) appropriate interpreting services be provided;
- (f) the standard questions currently asked by Control Officers (Immigration Inspectors) be reviewed and particular attention paid to questions which might ascertain whether or not the interviewee might be eligible for refugee status and thus further interviews;
- (g) access to the UNHCR representative in Australia, or where appropriate to relevant community agencies such as Amnesty International, should be provided to all applicants for refugee status by their being advised of its availability as a matter of normal procedure.

**165.** The Commission wishes at this point to emphasise the importance of providing a structure for the DORS Committee which makes it demonstrable that it has some independence from the executive arm of government. It is, after all, performing a vital assessment function under an international agreement. The Commission notes that the

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42. Submission No. 1 II. op.cit.

UNHCR representative in Australia has observer status on the Committee and customarily attends its meetings. It *recommends* that, to enhance its standing, the Chairman of the Committee be an independent person of some stature and that consideration also be given to providing for an appeal from decisions of the Minister to whatever appeals structure is determined — see chapter 8.3. The Commission also expresses its concern at the recent appointment of a Chairperson from the permanent staff of DIEA in substitution for a person who, although employed temporarily by DIEA, was seen by many as an 'outside' person.

*166. Disabled Persons.* In section 1 on the Issue of Visas there was a discussion of the problems experienced by disabled persons, or families with a disabled member, when seeking to travel to Australia. However, the problems of such people do not end when they have obtained visas. The Commission was told of a number of ways in which the entry permit system appears to work in a discriminatory fashion in relation to persons with disabilities. In the normal case, the holder of such a visa is issued with an entry permit which contains a special endorsement under section 16(1)(c)(i) of the Act. The Commission is glad to note that entry of the holder of an endorsed permit is facilitated. It notes, however, that the facilitative procedure is, at least in some cases, the cause of embarrassment to disabled persons seeking entry and suggests that it be carefully and sensitively reviewed, preferably in consultation with organisations representing persons with disabilities, e.g. Australian Council for Rehabilitation of Disabled (ACROD).

*167.* Sometimes visas will not carry the necessary information and passengers may be detected who are suspected of having a disease or condition prescribed in Regulation 26. This may occur either through inspection or as a result of reporting by the Master or Medical Officer of an overseas vessel as required by Regulation 5(2). In these cases, the passenger is taken aside for assessment of whether Regulation 26, and thus section 16(1)(c)(i), apply. This procedure can be the cause of considerable embarrassment and confusion to the passengers involved, even if they are found not to have a prescribed disease or condition.

*168.* The Commission notes that persons with any of the prescribed conditions are grouped, for the purposes of section 16(1), with persons who have prescribed diseases, persons who seek to enter Australia by fraudulent or other illegal means, persons who have criminal records and those who have been deported from Australia or another country. If for some reason a person with a prescribed disability does not receive an endorsed entry permit, then he or she is liable to deportation under section 18. The Commission understands that there are about one or two deportations a year on this basis.

*169.* Such extreme regulations of the entry of individuals in these circumstances cannot be justified. Paragraph 10 of the Declaration on the Rights of Disabled Persons states explicitly that disabled persons shall be protected against 'all regulations and all treatment of a discriminatory, abusive or degrading nature.' As mentioned in paragraph 101, the terminology of Regulation 26, and consequently of Regulation 5(3) which describes in very broad terms diseases or conditions the master of a vessel must report, reflect a confusion of considerations related to the public health and those related to disability. It is the Commission's view that the only restriction it is necessary to impose in the case of disability is one which denies entry to those who have a condition likely to pose a threat to public health. Accordingly, it *recommends*, in addition to its recommendation in paragraph 64 and 105, that:

- (a) the reporting and inspecting procedures associated with Regulation 5 be limited to cases involving a possible risk to public health (as with Regulation 26 — see paragraph 105);

- (b) persons with disabilities not automatically become PNCs (this would follow from repealing section 16(1)(c)(i) of the Act) — see paragraph 105;
- (c) an entry permit not be withheld unless the individual concerned has a condition likely to pose a threat to public health.

170. *Entry Refused to Visa Holders.* The possession of a valid visa for travel to Australia does not necessarily guarantee a person's entry into Australia. The discretionary powers granted under section 6(2) authorise officers to refuse an entry permit under certain circumstances. The reasons for refusal will normally be, according to the International Movement Control Inspection Manual, 'ineligibility for entry under policy, doubtful bona fides, failure to hold a return ticket, insufficient funds for maintenance, previously deported or known criminal record'. In some cases the person will be identified from DIEA's warning lists, which relate to characteristics such as criminal record or serious mental or medical disability.

171. Particularly having in mind the cost and length of travel involved in coming to Australia, and the importance of ensuring even-handed administration of the law in accordance with the principles of Article 26 of the ICCPR, the Commission *recommends* that refusal to issue an entry permit to a person arriving with a valid visa be the subject of review by an independent body such as the AAT.

172. *Unmarried Persons.* Persons coming to Australia for permanent residence who are unmarried but have reached marriageable age are issued visas on condition that they will not marry or re-marry before coming to Australia." It is a duty of DIEA officers at the arrival port to inquire whether there has been a change in marital status and, if so, to grant only a temporary entry permit and to counsel the person that unless the spouse can satisfy the requirements for resettlement in Australia, and arrive within two months, that person will be required to leave Australia. The Commission understands that there may often be a substantial delay before a person selected for permanent residence is actually able to travel to Australia. Particularly where there has been a substantial delay of this kind, the Commission is of the view that such a provision may be contrary to Article 23(2) of the ICCPR which provides that the right of all men and women of marriageable age to marry and found a family is to be recognised by law. In the view of the Commission, a genuine marriage, without fraudulent circumstances attached, should be recognised by allowing the new spouse to enter, subject only to the normal health and character checks.

173. Accordingly, the Commission *recommends* that a genuine change in marital status of persons granted visas for permanent residence should not be taken into account when granting an entry permit.

174. *Australians with Non-Australian Passports.* Australian citizens travelling with non-Australian passports may be refused entry if the DIEA officer, in consultation with the Regional Office, is satisfied that the claim is not bona fide, but has been made with a view to gaining entry by fraudulent means.' The onus of proof regarding citizenship is left with the applicant. There is no mention of the use of interpreting services or of allowing legal representation when determining the question of citizenship. Notwithstanding the fact that Australian citizens are not subject to any provisions of the Act, the procedure adopted for determination of citizenship status by DIEA officers at ports of arrival could, at least in theory, lead to a denial of entry for an Australian citizen, although DIEA

43. *International Movement Control Inspection Manual*, para. 4.8.

44. The European Commission has found that Article 12 of the European Convention, which corresponds to Article 23 of the ICCPR, while guaranteeing a right to marry and found a family, does not in itself guarantee right to select the geographical location of the marriage. *App. No. 9773182 v. United Kingdom*, 5 EHRR, 296.

45. *International Movement Control Inspection Manual*, para. 4.9.

advised that it was not aware of such a case and would review it if brought to notice. Nevertheless, if a case were to occur a refusal of entry in these circumstances would be contrary to Article 12(4) of the ICCPR which provides that no citizen is to be arbitrarily deprived of the right to enter his or her own country. In the view of the Commission, the possible deprivation of a citizen of his or her right to re-enter Australia is so important that it *recommends* that refusal of entry to a person who claims to be an Australian citizen be reviewable by an independent body such as the AAT.

175. *Section 7.* The Commission notes that section 7 of the Act gives the Minister an absolute discretion to cancel a temporary entry permit. As a cancellation can have dire consequences for an individual and a family unit, because it may result in deportation or separation of the family, the Commission *recommends* that criteria for the exercise of the discretion to cancel a temporary entry permit be included in the Act, and that the decision be made subject to review by an independent body such as the AAT (a similar recommendation is made in respect of section 11B, which applies to visas and return endorsements, and contains a similar conferment of absolute discretion on the Minister - see paragraph 141, and the reference in paragraph 140 to Gaillard's case, and recommendation (b) in paragraph 300 relating to giving reasons for a cancellation).

## 5.7 Change of Status

### Section 6A, Division 1

176. A substantial proportion of the submissions made to the Commission dealt with issues arising when applications for permanent residence are made within Australia by the holders of entry permits. These applications are for a change of status from temporary entry to permanent resident status. A large and increasing number of applications for change of status are lodged each year with DIEA, as shown in the following table.

Applications for Change of Status

	<i>Number</i>	<i>UK/Ireland</i>	<i>Asia</i>	<i>Southern European</i>
1978-79	5 903	23.1	27.0	17.2
1979-80	9 153	28.2	25.4	15.2
1981	7 776	25.0	19.6	18.4
1982	8 218	32.7	18.1	13.7
1983	14 778	39.2	17.9	10.5

These figures exclude applications made under the general amnesty (ROSP) declared in 1980. The largest number of applicants is from the United Kingdom and Ireland, followed by persons from Asian countries and from Southern Europe.

177. Change of status applications approved in the same period were also substantial.

Apimugds for Change of Status

	<i>Number</i>	<i>UK/Ireland</i>	<i>Asia</i>	<i>Southern European</i>
1978-79	6 024	21.3	35.1	14.0
1980	6 844	25.3	33.3	13.0
1981	4 470	21.1	25.8	19.1
1982	5 358	32.1	20.0	14.6
1983	7 669	39.2	17.9	11.0

Again, citizens of the United Kingdom and Ireland constituted the largest proportion of those whose applications were approved, followed by applicants from Asian countries and Southern Europe. Although it is difficult to determine precisely how many applications were approved in different eligibility categories, it seems that the family reunion cases were the largest category. In 1981-82 there were at least 3 007 cases in this category (56.1% of all approved applications, while in 1982-83 the number increased to at least 5 044 (65.8%)). Some 20% of the approvals were to people who came to Australia with work permits for temporary stay, and 12-13% on compassionate grounds."

178. It is unfortunate that section 6A is drafted the way it is. It is hedged round with ambiguities and restrictions. There is also a general lack of understanding and confusion as to the rules and administrative practices among people considering applying for a change of status. For example, there was a noticeable level of uncertainty among various lawyers who made written submissions to the Commission as to whether the right to permanent residence could be legally given under the Act to a person who has entered Australia without an entry permit. The evidence presented to the Commission suggested also that officers of DIEA are in many cases reluctant to disclose information to the public about how to apply for change of status, in order to prevent circumvention of the controls. An indication of the DIEA attitude to the change of status applicants is the fact that application forms are not given on request at DIEA counters, but are usually handed over only after initial interview with a prospective applicant. DIEA explained that the main reason for this is that officers attempt to prevent applicants from incurring unnecessary expense, e.g. by paying fees in anticipation of approval.

179. Particular criticism was made of the substantial proviso in paragraphs 6A(1)(c), (d) and (e) that a person applying must be the holder 'of a temporary entry permit which is in force'. The question is whether this means that applicants can only apply for permanent residence if they hold a valid TEP. As discussed at more length in paragraphs 26 and 302, Kioa's case, currently on appeal to the High Court, raises this issue. If only the holder of a current TEP can apply for permanent residence, then those whose TEP has expired, or who entered Australia without a permit, would not be able to apply to have their status regularised. At the present time DIEA policy allows the granting of TEPs to PNCs, or the extension of existing TEPs. However, the Commission expresses concern because with the law as it now is, this practice could change. In any case, it often takes time and may only be done retrospectively, after DIEA has made a decision on the section 6A application. This, in some circumstances, may be inconsistent with the requirements of Articles 7 and 26 of the ICCPR that no-one be treated inhumanely and that everyone is entitled to equal protection and administration of the law.

180. The Commission notes that under Article 10 of the ICCPR everyone has the right to recognition everywhere as a person before the law. However, those who are in Australia without a valid TEP, and who are not Australian citizens, permanent residents or exempt persons, are substantially deprived of their legal rights. Many, particularly those who have been resident for some time, are honourable people who believe they have a justifiable reason for remaining and who have made a success of their stay. In the view of the Commission they should not be deprived of their rights without some recourse, and it *recommends* that paragraphs (c), (d) and (e) of section 6A(1) be amended to allow people without TEP to apply for a change of status.

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46. The decline in Asian applications for change of status in years 1978-79 — 1982-83 may be related to the cessation of boat people arrivals, while the increase in the applications from UK and Ireland citizens could be partly related to the increasing numbers of family reunion cases and to the increasing number of people who came to Australia with work permits for a temporary stay only and applied for change of status under section 6A(1) (d).

181. This recommendation gains added force from the point made in several submissions" that the prerequisite of possession of a current TEP is also a strong disincentive to PNCs coming forward to DIEA. If guaranteed a hearing, it was put that they would be prepared to abide by the decision even if it was unfavourable. As the section now stands, they do not have a legal guarantee that their case will be heard, and often refuse to take the risk of inquiring whether discretion will be exercised in their favour.

182. Further, it should be ensured that while PNCs are having their applications under section 6A(1) considered, they should be issued with valid TEPs which would expire when the Minister's decision had been made. It appears that present practice in most cases is that the PNC is allowed to remain in Australia but is not formally given a TEP. The resulting ambiguity in legal status often causes extreme psychological anxiety and stress on the applicant and is not readily understood by other bodies and Departments, for example the Department of Social Security. Cases have been brought to the Commission's attention of people who have been left with no means of regular support and reach a state of destitution because they are denied both the ability to continue to work or to seek work and at the same time any recourse to benefits." Whatever the legal position, persons have a right to respect and dignity of person, and these appear to be denied.

183. Accordingly, it is *recommended*:

- (a) that TEPs be issued to all those whose applications for change of status have been accepted for consideration and who do not possess a valid TEP at the time of application, except those who are the subject of a valid Deportation Order
- (b) that the TEP of a person whose application for change of status is being considered not expire until the application has been duly processed (including the time taken to complete review processes) and the decision has been communicated to the applicant
- (c) that where the application has been refused, the TEP not expire until a reasonable period after the decision to enable the applicant to make arrangements for voluntary departure from Australia.

Although DIEA has commented that it would be anomalous to issue a TEP in the circumstances outlined above because it would regularise the status of a person unlawfully in Australia, the Commission observes that section 6A itself, by allowing humanitarian considerations to be taken into account, creates the anomaly. It ought not to be resisted, but rather the situation should be regularised as outlined in the Commission's recommendation above. The Commission recognises, however, that some form of proviso would have to be included to deal with applications not made in good faith or with cases where a TEP holder took advantage of the fact and did not co-operate in bringing the process to finality. It could also be desirable for a refined section 6A to authorise the issue for the purpose of considering the change of status application.

184. The length of time taken for consideration of an application for a change of status — normally months and in some cases years" — warrants considering whether unconditional TEPs (TEPs with work permits) should be issued. Without permission to work, all applicants (except the most wealthy) will have to seek income support from the Social Security system and hence become a charge on national revenue. This seems an unnecessary expense for the Australian taxpayer to bear when many applicants are able to

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47. See for example Submission No. 57.

48. See for example Case Study II in Appendix X of this Report.

49. *ibid.*

support themselves if permitted to do so, and when in any case they may be unable to obtain a social security benefit. Accordingly, it is *recommended* that unconditional TEPs be issued to all applicants for change of status.

185. It was frequently submitted that DIEA decisions with regard to change of status are surrounded with secrecy and that unsuccessful applicants rarely, if ever, receive a proper and complete disclosure of DIEA's reasons for refusal. As a result, the applicants often lodge appeals to the Immigration Review Panel, without knowing DIEA's case against them as it takes up to two months to obtain a copy of their file under the Freedom of Information Act, whereas DIEA allows only 21 days from the date of the decision for an applicant to lodge an appeal. In addition, a number of submissions to the Commission claimed that DIEA refused to show copies of files to PNCs or their representatives upon application being made under Freedom of Information legislation.<sup>50</sup> Whilst section 11 of the Freedom of Information Act states that every person has a legally enforceable right to that information, DIEA has defined 'person' as meaning a member of the Australian community and not as including a PNC. The Commission notes with approval that since the commencement of the Inquiry the practice has changed and that now DIEA files are made available to PNCs.

186. Detailed reasons for a particular decision can be obtained under the Administrative Decision (Judicial Review) Act. However, if the applicant wishes an independent review, the recourse must be to the Federal Court or to the (limited) jurisdiction of the Administrative Appeals Tribunal (AAT). Unfortunately, Federal Court applications pursuant to the Administrative Decisions (Judicial Review) Act 1977 are expensive, and few persons applying can afford them. There were only 48 such applications in the previous 12 months and 12 applications the year before. Administrative review under the Administrative Appeals Tribunal Act 1975, which is not expensive and provides an extremely effective remedy against bad administration, does not cover decisions made by DIEA under section 6A of the Act. Accordingly, the Commission *recommends* that decisions made under section 6A be reviewable by an external tribunal such as the AAT or an equivalent body.

187. The Commission notes that an application for change of status from a person in a de facto relationship with an Australian resident is considered under section 6A(1)(e) which requires that the applicant possess a valid TEP and that strong compassionate or humanitarian grounds exist before the case will be considered. Under the provisions of the Sex Discrimination Act it is now unlawful to discriminate on the grounds of marital status, which is defined as including de facto marriages. The Commission *recommends* therefore that applicants for change of status on the grounds of a de facto relationship with an Australian resident be considered under section 6A(1)(b) of the Act.

188. The recently issued Grant of Resident Status Handbook states that 'marriage to an Australian citizen or resident while fulfilling the legal requirements of section 6A(1), does not itself confer an automatic right to resident status the grant of which is discretionary'. The Handbook goes on to say that applications from people in marriages or de facto relationships which are not genuine, i.e. are marriages of convenience for the purpose of obtaining permanent residence, will be refused.' The Commission received evidence that DIEA assessments of whether a marriage or de facto relationship are genuine have sometimes been conducted in a manner which infringed the rights of couples under Articles 17 and 23 of the ICCPR." The thrust of the complaints was that the privacy of applicants was in some cases unreasonably invaded by questioning or surveillance (Article

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50. See for example Submission Nos. 23, 43, 47, 57A and 65.

51. *Grant of Resident Status Handbook*, paras 3.61 and 4.2.2.

52. See for example Case Study II at Appendix X of this Report.

17); that it appeared that there was discrimination against persons in de facto as compared with married relationships; and that the family unit was not respected or protected (Article 23). The Commission *recommends* that assessments of the genuineness of marriages or of de facto relationships be conducted in a manner which is consistent with Article 17 and 23 of the ICCPR.

## 5.8 Prohibited Non-citizens (PNCs)

189. *Non-citizens.* The title of the Migration Act 1958 as amended in 1983 is 'An Act relating to the entry into and presence in Australia of aliens and the departure or deportation from Australia of aliens and certain other persons'. Part II — the major part of the Act — deals with 'entry, presence and deportation of non-citizens' and its primary purpose is to legislate in respect of non-citizens." For the purposes of the Act a non-citizen is defined under section 5(1) as 'a person who is not an Australian citizen'. The term alien is not defined. The Act refers both to a 'person' and to a 'non-citizen' in a sense which would indicate that the definitions are interchangeable.' For the purposes of the Act, a non-citizen is defined as a person who does not hold Australian citizenship and covers such different categories as persons who have or have not entered Australia, who are holders of entry permits, and who are either temporary entrants or permanent residents. The extent to which the term 'alien' may be taken to mean or to include non-citizen is not defined, but the High Court has held that the fact that a person has become totally absorbed in the community does not mean that the person has ceased to be an alien.' The status of becoming or being a non-citizen and the rights that reside in that status are not defined.

190. Non-citizens do not have the same status and rights as citizens even where they have resided permanently in Australia for lengthy periods. They remain subject to some of the provisions of the legislation and its administration for up to ten years and, in some cases it would seem, permanently. Non-citizens are subject to deportation under section 12 and section 14(1) of the Act until they have resided in Australia for an aggregate of ten years. Non-citizens remain permanently subject to the deportation provisions of section 14(2) of the Act. Permanent resident non-citizens always remain subject to certain conditions for the purpose of leaving and re-entering Australia under section 11A(1)(b). Elderly non-citizens whose migration to Australia is sponsored by a relative, subject to the signing of an assurance of support made under section 67(1)(c), are not eligible for a pension during the first ten years of their residence in Australia, even if they become citizens.

191. The Commission considers that the period for which a non-citizen remains subject to certain provisions of the Act is inconsistent with the principles governing Australia's citizenship legislation which recognises that a person has become a member of the community and is entitled after two years to full participation in its rights and benefits. It suggests that the reasons for non-citizens not taking out citizenship after the requisite period are often complex — they involve loyalties to the country of origin, family considerations and even such matters as forfeiture of a previous citizenship may mean loss

53. Australian citizens are subject to the legislation in some cases as for instance in the deportation provisions under section 12(b) and section 14(2) (b) or may be directly affected by the administration of the Act. Under section 6A(1) (b) for instance, the Australian citizen spouse of a non-citizen in Australia who has applied for an entry permit for permanent residence may be subjected to rigorous questioning about the genuineness of his or her marriage. Australian citizen children will be adversely affected by the decision to deport their PNC parents.

54. A comparison of the use of person' in section 5(2) and 'non-citizen' in section 6(1) would indicate that a person is considered to be a non-citizen before he or she enters Australia.

55. However in *Pochi's Case* (1982) 43 ALR 268. Gibbs C.J. said:

... a person's nationality is not changed by length of residence or by an intention permanently to remain in a country of which he is not a national. There are strong reasons why the acquisition by an alien of Australian citizenship should be marked by a formal act, and by an acknowledgement of allegiance to the sovereign of Australia.

of property and pension rights. Failure to become a citizen does not necessarily mean that the person does not intend to be an integrated and loyal member of the Australian community. In this connection the Commission *recalls* the recommendation in its First Report, The Australian Citizenship Act 1948, that the oath or affirmation of allegiance provided for in that Act should not include renunciation of all other allegiance.'

**192.** *PNCs.* Part II, Divisions 1 to 4 of the Act deal with the circumstances in which people may become PNCs and the consequential penalties. Divisions 5 and 7 of Part II deal with the detection, arrest and detention of people who are, or may reasonably be suspected of being, PNCs.

**193.** Under the Act a person will become a PNC if:

- (a) the person enters Australia illegally — without being granted an entry permit (section 6(1))
- (b) the person's TEP has expired or has been cancelled (section 7(3))
- (c) the person ceases to be an exempt person but does not obtain an entry permit to enter Australia (section 8(3))
- (d) the person enters Australia without having an entry permit endorsed with the statement that he or she is recognised as:
  - suffering from a mental or physical condition or prescribed disease
  - a person who has been convicted of a certain crime
  - a person who had been deported (section 16).

**194.** The consequences of being a PNC are:

- (a) a fine of up to \$1000 or imprisonment for up to six months
- (b) punishment by a fine of up to \$1000 for working without permission
- (c) a requirement to leave Australia within a specified time or be liable for a fine of up to \$1000 or up to six months imprisonment
- (d) deportation in addition to being convicted of any offence in relation to being a PNC
- (e) always to remain subject to the deportation provisions of section 18 regardless of time resident in Australia or of family established in Australia
- (f) deportation without benefit of formal review
- (g) that premises in which a PNC, or related documents, are reasonably suspected by an officer of being present may be entered and searched at any time, provided the officer has a warrant
- (h) arrest without warrant if the officer reasonably suspects the person of being a PNC
- (i) a requirement, if in custody, to answer questions which may incriminate the person for the purpose of proceedings under section 42 (but not other provisions of the Act)
- (j) liability to detention for lengthy periods with no right to seek bail
- (k) lack of any right to put a case at section 38 detention hearings
- (l) no entitlement to welfare payments
- (m) no guaranteed access to legal, welfare and interpreting services, i.e. only if the PNC requests the access
- (n) questioning and extensive assessment of a marriage or de facto relationship if

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56. Human Rights Commission, *Report No.* / op.cit.

application is made under section 6A(1) (b) of the Act for permanent residence on the basis of being the spouse of an Australian citizen or permanent resident.

195. Some of these matters are discussed further below. Others are dealt with in other parts of the report, e.g. change of status and work permits in section 5.7, deportation in section 6.2, and enforcement procedures in Chapter 7. There are general comments in section 3.2, and problems arising from lack of welfare entitlements are discussed in paragraph 182. The Commission considers that PNCs, despite their irregular status, are entitled to recognition and protection of their basic human rights. This section identifies some of the legislation and administrative practices affecting PNCs which infringe these rights.

196. Recent amendments to the Act signify a hardening attitude towards PNCs. The then Minister, in introducing the 1979 Migration Amendment Bill, said:

the relatively low volume of admission for settlement in more recent years inevitably prompts attempts to circumvent immigration policies and procedures either by malpractice or by entering for allegedly temporary purposes but then staying on without authority. It is estimated that there are approximately 57 000 prohibited immigrants in the country at this time. The Government is determined to stem the flow and reduce the numbers already here competing with citizens for employment and other benefits.'

197. The effect of the Migration Amendment Act 1979 was to tighten entry control. The Government considered that the numbers of PNCs had grown as a result of the introduction of an easy visa system in 1973. The 1979 amendments placed the visa system on a statutory basis with the insertion of section I 1A. It also introduced offences for temporary entrants and PNCs who engaged in employment in Australia without authority and required PNCs to pay detention and deportation costs. Deported PNCs were also barred from re-entering Australia for five years.

198. The Migration Amendment Act 1980 implemented the Government's intention to curtail the numbers of people who entered Australia as visitors, remained illegally, and subsequently sought resident status. The introduction of section 6A(1) prohibited the grant of permanent residence to a person subsequent to his or her arrival except in specific, limited circumstances. The second reading speech on the Amendment Act also signalled the last amnesty for PNCs, and foreshadowed a strengthening of control measures.

199. In 1983 an important amendment to the Migration Amendment Bill 1983 repealed section 7(4) of the Act which prevented the deportation of PNCs who had avoided detection for five years after the expiry of their entry permit. The effect of the amendment has been to make visitors to Australia who overstay the period set down in their entry visa always liable to deportation under section 18. During the speech on the amendment, the Minister assured the Parliament that it would not result in massive and indiscriminate deportation of PNCs because the Minister would exercise his discretion in deciding each case on its merits. The Senate Standing Committee for the Scrutiny of Bills, in its Fifth Report, 7 September 1983, drew attention to this amendment, as it considered that 'it might be regarded as trespassing on personal rights and making such rights and liberties unduly dependent on non-reviewable administrative decisions.'

200. The Commission recognises that the control of PNCs presents special problems for DIEA. It emphasises the fact, however, that notwithstanding his or her irregular status, any person within Australia, a signatory to the United Nations International Bill of Rights, is entitled to the enjoyment of fundamental human rights. It draws attention in this respect to the document 'The Rights and Obligations of Migrants in Receiving Countries

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57. Australia, House of Representatives. *Debates*, 10 May 1979, p. 2097.

— preservation of the fundamental human rights of undocumented migrants" and the recommendations contained therein. Although this document was prepared with the rights of migrant or guest workers in mind, the Commission considers its principles apply to all non-citizens in Australia. It considers that present legislation and administrative practices in respect of PNCs lead to infringements of human rights in that persons can become effectively absorbed in the community by being here for many years, yet continue to be subject to deportation. With this in mind, the Commission *recommends* that either the power to give amnesties be restored or guidelines for exercise of the power to allow change of status of PNCs under section 6A be included that would be consistent with the relevant human rights, e.g. in relation to the family (ICCPR Article 23) and to cruel or inhuman treatment (ICCPR Article 7). In paragraph 236 the Commission recommends that deportation orders remain valid for only three years.

201. The Commission has evidence that the present system of detection of PNCs and the racial representation of PNC detainees discriminates against certain ethnic minorities in Australia and as such contravenes section 9 of the Racial Discrimination Act and Articles 2(1) and 26 of the ICCPR. Statistics provided by DIEA indicate that for the period September 1983 to June 1983 the PNCs most highly represented in detention centres were from racial groupings which make them most visible and thus more readily detectable. These included Fijians — 124, Chinese — 98, Indonesians — 131, Malaysians — 143, Samoans — 31 and Tongans — 70. The number of detainees from the United Kingdom (91) was 7.7% of PNCs detained for the period, although it is estimated that they constitute about 27% of all PNCs in Australia." The number of detainees from Asia represented 47% of those detained although it is estimated that they constitute about 34% of all PNCs in Australia. The number of Pacific Island detainees represented 16.6% of those detained while the number of PNC Pacific Islanders is estimated to be about 8%.

202. The Commission understands that the disproportionate representation of racially visible PNCs in detention arises from detection practices which include responses to 'tip-offs' from community members, sometimes of the same ethnic background, and 'raids' on factories and restaurants where it is considered likely that numbers of PNC unskilled and semi-skilled workers will be. The Commission understands that publicised raids on racially visible groups in the community may not necessarily lead to the apprehension of any PNCs' and have had the effect of contributing to adverse perceptions of certain ethnic minorities in the community. The Commission, with due consideration for the difficulty of apprehending PNCs, draws attention to the finding of the Auditor-General noted above in paragraph 137, that DIEA has not been able to provide an accurate and up-to-date record of overstayers. It *recommends* that control practices for the detection and apprehension of PNCs be based on accurate and up-to-date information which will ensure that detections and deportations occur approximately in proportion to the racial representation of PNCs in Australia.

203. In response to this recommendation DIEA commented that the Commission may be more concerned with potential discrimination than with establishing the existence of actual discrimination; that its statistics are based on nationality, not racial background; it objected to the use of the word 'raids'; and took the view that it must ensure enforcement of the law as best it can, when it has information, and not refrain simply because some group or another is more or less the subject of enforcement action. To each of these points

58. Sixth Seminar on Adaptation and Integration of Immigrants. Geneva, 11-15 April 1983. (1983) XXI *Quarterly Review* of the Intergovernmental Committee for Migration and the Research Group for European Migration Problems 2. A section from the report is quoted in paragraph 50.

59. From broad estimates of distribution by nationality of PNCs based on those accepted under ROSP, as set out in D1EA Submission, Part C. p. 148.

60. See Submission No. 43.

the Commission believes there is a counter. In relation to discrimination, it argues that the law must be enforced without regard for race, colour or national or ethnic origin (ICCPR Article 26). But when, in a situation of incomplete enforcement, persons of some particular national origins (or nationalities) are more heavily penalised than others, then in the view of the Commission there is racial discrimination and an infringement of the right to equal administration of the law contained in Article 26 of the ICCPR. While the Commission does not consider 'quotas' of deportees to be necessary, it would expect efforts to be made by DIEA to ensure that some reasonable proportionality of detentions and deportations be achieved. In relation to the use of the word 'raids', the Commission understands DIEA's objections, but it is so commonly used in sections of the community associated with ethnic communities and involved in the affairs of PNCs that the Commission uses the term, albeit in quotation marks.

204. The Commission considers that searches for PNCs under section 37 of the Act may, in some cases, infringe Article 17 of the ICCPR, which defines the right to privacy. Under section 37, an officer may be issued with a search warrant for up to three months empowering him to search any building, premises, vehicle or place at any time of the day or night, provided he has reasonable cause to believe a PNC, or related documents, may be there. The Commission *recommends* that due consideration be given to the right not to be subjected to arbitrary interference with privacy and family when searches are carried out, especially where the premises is one in which it might reasonably be expected that families will be sleeping or that residents not under suspicion may be present. The Commission notes that DIEA has instructions which are intended to recognise privacy rights, and limit visits between 9.00 p.m. and 6.00 a.m., but considers these should be tightened and made more explicit.

205. The Commission has evidence which indicates that PNCs may, in some cases, have been arrested in a manner which contravenes Article 9 of the ICCPR, which provides for liberty and security of person. A suspected PNC may be arrested without warrant under section 38 of the Act. Detailed comments and recommendations on arrest without warrant are made below at chapter 7 (see especially paragraph 267). The Commission wishes to emphasise here that the rights of PNCs can best be protected where arrest is made by time, place and person-specific warrant. In this, it is only insisting on safeguards similar to those that apply to police. While noting that there are on occasions difficulties in this, it would expect the liberty of individuals to be respected rather than that persons be apprehended without due process. It notes also that where persons are illegally on premises, or are detected while engaged in illegal activity, there are greater powers of arrest available to police officers. This matter is further discussed at paragraph 267, where reference is made to the provisions of the Criminal Investigation Bill 1981 (which has not yet been enacted).

206. The Commission has received evidence that some suspected PNCs have been arrested on the street and taken into custody without the opportunity to inform their family of their whereabouts and that some people have not understood what is happening or the nature of the charges against them.<sup>61</sup> It *recommends* in this latter respect that, in order to recognise the right under Articles 9(2) and 25 of the ICCPR to be informed in the PNC's own language of the reasons for his or her arrest, interpreters should, wherever practicable, accompany arresting officers. DIEA advised that this, although desirable in principle, is impractical. The Commission notes the point, but considers it should draw attention to the matter through its recommendations and notes that the Criminal Investigation Bill 1981 provides safeguards for persons being arrested which it considers should be observed in action under the Act. The safeguards in the Bill ensure that, if an

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61. See Submission No. 40.

interpreter is not available at the moment of arrest, communication is made in a language the person understands before inquiries commence or charges are laid. The Commission regards this as only a second-best alternative and is of the view that processes under the Migration Act should embody maximum rather than minimum standards, having in mind the persons to whom it normally applies, i.e. non-citizens often from non-English speaking countries.

207. Practices during the custody of PNCs may also infringe Articles 9 and 10 of the ICCPR, as indicated below (attention is also drawn to the detailed comments and recommendations on detention made below at chapter 7). Article 9(4) of the ICCPR states that 'anyone who is deprived of this liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.' The Commission has evidence that in hearings held under section 38 of the Act, PNCs are generally not able to present their case through lack of legal representation or limited English language facility. The Commission was informed that magistrates frequently exercise an administrative rather than a judicial function under this section and accept, without question, DIEA requests for further detention. The Commission *recommends* that a PNC be afforded all facilities to present his or her case at section 38 detention hearings and that he or she be informed of this right as soon as detained in a language which he or she understands. Otherwise, apart from possibly infringing ICCPR Article 9, there may be an unlawful act under section 9 of the Racial Discrimination Act in that a person with inadequate understanding of English is not able to enjoy the right to legal process to the same extent as a PNC whose native language is English. It notes that the Criminal Investigation Bill 1981 (in clauses 18-20) defines procedures to be followed by police officers which cover cases where an interpreter is not present at the relevant time: these at least might be followed. It further notes DIEA's advice that PNCs in detention are informed of their rights to have the assistance of a solicitor, which may mean that the remedy is administrative and a matter of resources rather than requiring a change in policy.

208. Orders for detention for periods of more than seven days require the consent of the person involved, but the Commission was informed that this consent has in some cases been obtained through intimidation" or because the person did not understand what he or she was assenting to. It *recommends* that people detained as suspected PNCs be informed, as soon as they are detained and in a language they understand, of the right to be brought before a prescribed authority within forty-eight hours and every seven days thereafter. (The right to be brought before a magistrate arises from the obligation imposed on officers by section 38(2).)

209. Lack of legislative provision for conditional release (or bail) for PNCs contravenes the spirit if not the letter of Article 9(3) of the ICCPR which states that 'it shall not be the general rule that persons awaiting trial shall be detained in custody'. It is true that technically a criminal trial is not involved (though the Migration Act since 1979 has made it in effect an offence to be a PNC) and that habeas corpus may in the end be obtainable. But an offence is involved, and habeas corpus is a last rather than a first resort: the practices adopted in administration of the Act should facilitate release rather than encourage detention. The Commission draws attention to the detailed comments and

62. Submission No. 42 states: 'Chinese parents were placed in the Detention Centre after being rudely dealt with by Departmental Officials who shouted at them that they must consent to being in the Detention Centre for at least fourteen days. A Writ of Habeas Corpus was served upon the management of the Detention Centre and these people were eventually released'.

63. The UN Human Rights Committee appears to have adopted the view that the availability of habeas corpus constitutes compliance with Article 9(4). See the brief discussion in Sieghart, *The International Law of Human Rights*. op.cit. p. 158.

recommendations made below at chapter 7 (particularly at paragraph 262) and *recommends* that in order that a PNC be guaranteed the rights set out under Article 9(3) of the ICCPR, bail provisions for people detained either as suspected PNCs, or pending deportation, be included in the Act. This should be done even if, as DIEA states, some PNCs would not be able to raise any substantial sums of money, as the deposit of money is not necessarily a condition of bail, and even if detention is only for the purpose of deportation.

**210.** The Commission has evidence of cases in which the rights of PNCs under Article 10(2) (a) of the ICCPR have been infringed. Statistics provided by DIEA and other evidence submitted indicates that PNCs have been detained with, and apparently under the same conditions as, convicted criminals in gaols, sometimes for long periods.<sup>64</sup> The Commission notes in this respect that there is no legislative provision for the establishment and maintenance of detention centres under the Act and that in some States no centre exists for the detention of PNCs. It therefore *recommends* that the Act be amended to provide for the establishment and maintenance of detention centres and that the practice of detaining PNCs in gaols with convicted criminals cease forthwith. It recognises that the establishment of centres in all States may take time, but it regards their establishment under legislation as a more adequate means than the existing arrangement using executive powers. If practicable, the legislation should indicate that the centres are designed primarily to allow short-term detention in conditions which observe human rights.

**211.** The Commission draws attention to the detailed comments and recommendations on deportation at chapter 6 below and submits that practices relating to PNCs under section 18 of the Act may, in some cases, infringe rights under Articles 14, 23 or 24 of the ICCPR.

**212.** Section 18 empowers the Minister to order the deportation of PNCs under any provision of the Act. The Minister is obliged to consider the merits of the case when deciding whether to deport (see chapter 6, paragraphs 228-229 below) but the PNC is not entitled to put his or her case and the Minister's decision is not subject to review. The Commission *recommends*:

- (a) that a person whose deportation is being considered be entitled, and be afforded appropriate facilities, to argue his or her case; and
- (b) that the decision to deport under section 18 be subject to review by an independent body.

In relation to (a), the Commission records and accepts DIEA's advice that substantial opportunities for review are available and are exercised, but makes this recommendation in the context of (b), because in these critical cases an external and independent review is not available. In relation to (b), the Commission notes in support Canadian arrangements. The *Immigration Manual* of the Canadian Department of Employment and Immigration stipulates that:

. . . no person alleged to be in contravention of the Immigration Act shall be removed from Canada unless he has had the opportunity, in accordance with the principles of natural justice, to exercise his right to be heard at an inquiry before an independent adjudicator to establish why he should not be refused admission to or removal from Canada.'

Recommendations for review are contained in section 9.3.

**213.** The situation of the Australian citizen child of PNC parents causes special problems. The Commission received submissions suggesting that there are about one

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<sup>64</sup> In one case for six months. See Case Study IV at Appendix X below.

<sup>65</sup> Canada, Department of Employment and Immigration. *Immigration Manual*.

thousand children who were left in Australia when their families were deported.<sup>66</sup> Deported PNCs who choose to leave their Australian citizen children in Australia are not permitted to return to be reunited with their children for five years. The rights of the child in this situation are infringed under Principle 6 of the Declaration of the Rights of the Child. However, many deportees choose this option rather than the alternative of taking the child with them to a country where conditions would considerably reduce the child's opportunity for development. The Commission considers that the decision either to leave the Australian citizen child in Australia or to have it accompany the deported parents may, in some cases, contravene Principle 6 of the Declaration of the Rights of the Child and Articles 23 and 7 of the ICCPR. While it recognises that DIEA do take the interests of an Australian citizen child into consideration, it is of the view that insufficient priority is given to the rights of the family. It *recommends* therefore that, when considering the merits of a case for the deportation of a PNC under section 18, the rights of the Australian citizen child be a paramount consideration so that the parent/s of that child is/are deported only in exceptional circumstances.

**214.** The irregular and undefined status of PNCs in Australia has led, under the legislation and DIEA administration, to treatment which clearly infringes the basic human rights of these people. The Commission draws attention to some case studies attached at Appendix X of this report and notes that because of their irregular situation, PNCs have little opportunity for redress of these infringements. It considers that any person in Australia, a signatory to all the significant international human rights instruments, is entitled to maximum enjoyment of the rights established by the instruments although without affecting the irregular status necessarily associated with being a PNC. It *recommends* that any practice in relation to a PNC which infringes these rights be discontinued, noting as it does so that DIEA accepts that its practices should be consistent with the protection of basic human rights.

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66. Submission No. 81.

## 6. DEPORTATIONS

### PART II, DIVISION 2

215. Division 2 of Part II of the Act contains the operative provisions which authorise deportation of non-citizens in various circumstances. Section 12 deals with the deportation of non-citizens convicted of serious crimes; section 14 with deportation of subversive or violent non-citizens; sections 18 and 19 with the deportation of PNCs and their dependants; and sections 21 and 22 with the obligations of ship and air carriers.

216. The Commission accepts that in human rights terms there is a legitimate place for including in the Act a power to deport non-citizens. However, because of the gravity of the consequences, the circumstances of its exercise need to be carefully defined and there must be opportunity for review. Many of the submissions received by the Commission pointed to possible violations of human rights in the exercise of the power of deportation, particularly those relating to liberty of the person, double punishment and the family. It is these human rights in particular which are covered in this section of the report.

217. At the same time, the Commission notes that the 1983 amendments of the Migration Act and the 1984 amendment of the Citizenship Act (No. 129 of 1984) have in important respects mitigated the severity of the earlier law. Non-citizens convicted of serious offences may no longer be deported if the offence was committed after more than ten years as a permanent resident, and there is no power to deport citizens. The Citizenship Act, by virtue of amendments made in 1984 (Act No. 129 of 1984) does not allow a person whose citizenship was obtained by fraud or who commits a serious offence and is convicted after obtaining citizenship to have the grant of citizenship withdrawn where withdrawal would render the person stateless (section 23D). In such cases deportation would not be available under section 12 of the (Migration) Act. Further, the power to deport a non-citizen contained in section 14 has been restricted to non-citizens who, it appears to the Minister, are or may be a threat to security, and who have not spent ten years in Australia as permanent residents.

#### 6.1 Criminal Deportation

218. *Section 12.* Section 12 was extensively amended in 1983, and now replaces the former sections 12 and 13. It provides that non-citizens convicted of crimes involving sentences of death, life imprisonment or imprisonment for not less than one year may, either during or at the expiration of their term of imprisonment, be deported by order of the Minister, provided the person has not been a resident in Australia for more than 10 years.

219. In its Fourth Report — *Human Rights and the Deportation of Convicted Aliens and Immigrants* — which was prepared and submitted before the 1983 amendment of the Act, the Commission examined closely the exercise of the discretion contained in section 12 and discussed the broad question whether the interests of the community in freeing itself of people considered undesirable because of serious crimes should be allowed to outweigh the rights of a particular individual:

It has also been suggested to the Commission that the interests of the individual need to be balanced against the interests of the community — the public interest — and that the real question is what weighting human rights considerations should have. In the view of the Commission, a distinction between human rights and the public interest is in most cases a false dichotomy. When there is no liberty the people perish, and where the human rights of the individual are overridden in the interests of the community there is danger. It is the Commission's mandate to uphold the human rights of individuals as defined in its charter, and it must say firmly that it cannot agree to their being overridden. Many of the human rights are defined as being subject to

limitations, and the Commission accepts these. But whether the right contains an express limitation or does not, once the right has been defined it must be observed.'

The Commission stands by this statement of the importance of upholding the human rights of individuals.

220. The Commission received further evidence during the course of its review of the Act, all of which supported the views it had expressed in its Fourth Report which concerned the human rights of persons subject to deportation under section 12 because of conviction for serious criminal offences. Accordingly, it re-states those recommendations and urges the Government to continue to move towards their adoption.

Pursuant to sub-section 16(1) and paragraph 9(1) (a) of the Human Rights Commission Act 1981, the Commission makes the following recommendations as a result of its examination of the human rights which should be taken into account when consideration is being given to ordering the deportation of residents of Australia under sections 12 and 13 of the Migration Act 1958:

- (1) The Migration Act 1958 should be amended to incorporate a requirement that it is the duty of the Minister, when making deportation decisions, to ensure that they are invariably consistent with human rights as defined in the ICCPR, the Racial Discrimination Convention, and the three Declarations found in Schedules 2 to 4 of the Human Rights Commission Act 1981.
- (2) Deportation may in certain circumstances amount to an act that is inconsistent with Article 7 of the ICCPR, which proscribes cruel, inhuman or degrading treatment or punishment, and the human rights not to be subjected to this treatment should be observed when deportation decisions are being taken.
- (3) When the Minister is considering making a decision on deportation in conflict with the recommendation of the Administrative Appeals Tribunal *without receiving fresh evidence*, procedures of the kind envisaged in Article 13 of the ICCPR ought to be applied, that is to say, the alien (non-citizen) should be allowed a further opportunity to submit reasons against his expulsion, the Minister should review the case again, and the alien should be permitted to be represented before him or his delegate.
- (4) When the Minister is considering making a decision on deportation in conflict with the recommendations of the Administrative Appeals Tribunal *wholly or partly on the basis of fresh evidence* or fresh factors not considered by the Administrative Appeals Tribunal, he should remit the matter for hearing by the Tribunal which should consider, amongst other things, the admissibility and weight of the fresh evidence.
- (5) The provisions of Article 13 of the ICCPR for review of deportation decisions are such that the Administrative Appeals Tribunal should at least retain the power to make recommendations relating to individual deportation cases before it, and perhaps that it should have the ultimate power of decision on appeal.
- (6) In some cases deportation following a prison sentence could involve double punishment, and deportation should ordinarily be ordered only when there is fresh evidence available which makes it desirable to effect expulsion of the person, and then only after natural justice processes have been pursued, except where compelling reasons for national security otherwise require.
- (7) Where the penalties in Australian law are considered inadequate, that law should be amended rather than resorting to deportation, which is a form of treatment inevitably discriminatory in its application.
- (8) In view of the importance placed on the protection of the family, family units should not be broken up except in extreme circumstances, e.g. where considerations of national security prevail.
- (9) Attention must continue to be paid to the requirement of section 9 of the Racial Discrimination Act, when deportation decisions are made, in order to ensure that there is

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I. Human Rights Commission Report No. 4 op.cit., para. 43.

no infringement of the Racial Discrimination Act and the human rights defined in the Racial Discrimination Convention, the ICCPR and the Declaration of the Rights of the Child.

(10) The definition of 'alien' in sub-section 5(1) of the Migration Act 1958 should be repealed or reworded to remove discrimination between non-citizens on grounds of national origin (see Human Rights Commission Report: The Australian Citizenship Act 1948, paragraph 38[11]).<sup>2</sup>

(11) Guidelines should be developed to ensure that those involved invariably observe human rights in making decisions about deportation in respect of persons resident in Australia.'

221. *Section 13.* The Commission is pleased to note the repeal of section 13. This removes a number of provisions which it regarded as inconsistent with human rights.

## 6.2 Deportation of Non-citizens

222. *Section 14.* Sub-sections (1) and (2) of section 14 were revised by the Migration Amendment Act 1983. Sub-section (1) authorises the Minister to deport a person who has not been in Australia as a resident for 10 years for conduct that appears to constitute a threat to the security of the Commonwealth, a State or a Territory. While this represents a welcome tightening of section 14(2) (a), which referred only to conduct which the Minister considered warranted his/her deportation, it is still a very wide provision and confers large powers on the Minister.

223. The determination of what is a threat to security is a complex matter. Although the Minister would no doubt rely in most cases on an assessment by Australia's security authorities, the Commission believes that such advice should be required from ASIO, which would thereby invoke the jurisdiction of the Security Appeals Tribunal. Accordingly, the Commission *recommends*, in the interests of protecting the right of the individual from arbitrary arrest and deportation (Article 9 of the ICCPR) that the Minister be able to deport under section 14(1) only if he has received advice from ASIO as to the threat to security, and that advice would justify deportation.

224. Section 14(2), which replaces paragraph (b) of section 14(2) of the 1958 Act, is again a marked improvement on the earlier provision. The Minister's power to deport comes into operation only when a non-citizen has been convicted under the sections of the Crimes Act which create such offences against the State as treason, sabotage and sedition. Previously these offences were not defined by reference to particular offences under the Crimes Act.

225. **The new** style of section 14(2) guarantees due process in the determination of whether the non-citizen has actually committed the offence. The earlier provision was the subject of a number of submissions to the Commission, all pointing in the direction the law has now taken.

226. However, the Commission considers the decision to deport should be subject to the same overriding human rights considerations as were identified in relation to sections 12 and 13 in paragraph 48 of its Fourth Report, which is set out in paragraph 220 above.

227. *Section 18.* Section 18 authorises the Minister to order the deportation of a PNC under any provisions of the Act. It seems that the largest number of deportations is actually made for breach of conditions attaching to TEPs e.g. that the person has not left Australia by the nominated date and has not obtained a further permit. DIEA provided the

2. The Commission notes with pleasure that this amendment was given effect to in 1983 (Migration Amendment Act of 1983, No. 112).

3. Human Rights Commission, *Report No. 4* op.cit.. para. 48.

Commission with the following table of deportations by legal grounds,' noting as it did so that statistics on deportations are inaccurate.

**Grounds of Deportation**

<i>Financial Year</i>	<i>Illegal Entrance</i>	<i>Health</i>	<i>Breach Conditions</i>	<i>Criminal</i>	<i>Total</i>
	(1)	(2)	(3)	(4)	
1978-79	294	1	720	97	1 102
1979-80	188	2	467	95	752
1980-81	105	3	179	70	357
1981-82	243	—	305	62	610
1982-83	150	2	621	56	829

preliminary and subject to revision

(1) Illegal Entrance — sections 6, 8, 16(1) (a), 16(1) (b), 16(1) (b), (a), 16(1) (c) (v) and (vi)

(2) Health — sections 13(c) and 16(1) (c) (i)

(3) Breach of conditions of entry for temporary stay — section 7

(4) Criminal — sections 12, 13(a), 13(b), (there is now no section 13), 14, 16(1) (c) (ii) (iii) and (iv).

228. The width of the power under section 18 was criticised by a number of those making submissions to the Commission.' It was put to the Commission that the power under section 18 should not be unconditional. Note was made of the decisions of the Federal Court in *Ates v. Minister of Immigration and Ethnic Affairs* (unreported judgment of 3 March 1983) and *Tagle v. Minister of Immigration and Ethnic Affairs*. (1982-83) 48 ALR 566. The Court indicated in both cases that the Minister or his delegate must take into consideration the circumstances of the particular case before deciding to issue a deportation order. However, *Gaillard' s Case* (1983) 49 ALR 277 indicates that, as a matter of law, the Minister is not obliged to comply with the principles of natural justice where an alien has no legitimate expectation of being allowed to remain in Australia.<sup>o</sup> The matter is further discussed, and the Commission's view expressed of the obligations relating to the manner of exercise of the discretion placed on the Minister by the Human Rights Commission Act, at paragraph 140 (see also paragraph 175).

229. The Commission agrees with the views put to it as to the width of the power under section 18 and *recommends* that the grounds for exercise of the general power of deportation contained in section 18 be specified as being subject to at least the following considerations relating to human rights:

- (a) the situation of the family
- (b) the degree of absorption including the period resident in Australia
- (c) the rights of children involved
- (d) any evidence of cruel, inhuman or degrading treatment'
- (e) the right to interpreters, particularly in any legal processes
- (0 the right to legal assistance
- (g) the right to protection during interrogation.

Particularly in relation to points (e), (0 and (g) the Commission records its appreciation to the Chairman of the South Australian Ethnic Affairs Commission, who listed these and

4. DIEA Submission, Part C, para. 224.

5. See especially Submission No. 57 from the Macquarie Legal Centre. pp. 18-29.

6. However, contrast the comment of Stephen J., dissenting, in *Salmi v. Minister for Immigration and Ethnic Affairs* 137 CLR 396:

Since natural justice is 'but fairness writ large and juridically', what has been called 'fair play in action' . . . , the Minister must make such disclosure to the plaintiff as will enable him properly to present his case.

7. This point was made specifically by Murphy J. in *Pochi v. Minister of Immigration and Ethnic Affairs* (1982) 43 ALR 270-71.

other matters in his submission.' It notes that DIEA says the matters listed form part of the consideration. Its point is that there should be some legislative definition, and accordingly a check as to legality in disputed cases. In respect of the DIEA comment that not all persons in the community have ready access to interpreters, legal aid etc., the Commission is well aware of the situation but considers the matters should be brought to attention and be made the subject of action with an emphasis on need if resources are inadequate.

230. The issues were well summarised in a submission from P.N. Waye and Associates, which commented that:

Deportation should not be a legal point scoring exercise but should be decided on full humanitarian grounds and (that) the Act should be amended to give full protection of residence to a person who is assimilated in the community, has been gainfully employed, has not committed a major offence, has earned a good reputation and has a family in Australia. The Act should also give special consideration to the spouse of a person who commits an offence and to the children of that person who have been born in Australia and are Australian citizens.<sup>9</sup>

231. *Section 19.* Section 19 allows the Minister to order the deportation of a spouse or spouse and dependent children provided this has been requested by the spouse. The Commission understands this provision to be motivated by humanitarian considerations, and that it allows a family unit to be deported without cost to the family.

232. While the Commission accepts this as the purpose of the section, it notes that it is capable of misuse if the consent of the spouse is obtained under some form of duress. It also noted that an Australian citizen or permanent resident spouse will, in effect, be deported also where the spouse and/or dependent children do not wish to be separated from the deportee. Detailed discussion of the situation of spouses and dependent children of PNCs and deportees is presented above in chapters 3.3 and 5.8.

233. The Commission believes that a mechanism for review should be provided for the exercise of the powers under sections 18 and 19 and recommendations to this effect are made in section 5.8 above and chapter 8 below.

234. *Section 20.* Section 20 provides that when the Minister has made a deportation order, the person named is to be deported unless the order is revoked. The 1983 amendment of the Act added a new sub-section (2) which provides that the validity of a deportation order is not affected by any delay in its execution.

235. The Commission was advised by DIEA that a deportation order, once made, will remain operative indefinitely unless revoked. There seems to be no system for the review and cancellation of inoperative or stale orders. This means that deportation orders are outstanding for many thousands of individuals (the number is not known) and in many cases the individual will be unaware of the existence of an order made against him or her. One possibility would be for orders to lapse after one year, but the Commission accepts DIEA's view that this could both create a heavy burden on the Minister and senior officers, and encourage attempts at concealment. On the other hand, the ten year period which operates to remove the liability for deportation from permanent residents seems too long for an executive order. An intermediate period therefore would appear to be more appropriate, thus ensuring executive review of cases and clarification of a person's status. The minimum period might be two years — the time it takes for a permanent resident to qualify for citizenship, or it might be five years, a period earlier used in the Act and often associated with absorption. On the other hand, three years would give a reasonable time

8. Submission No. 56.

9. Submission No. 19.

for execution of the order, and an opportunity for the person subject to the order to show whether he or she can settle effectively. In the Commission's view, it would not be appropriate to review an order unless there were serious offences involved or unless the person was clearly not making successful efforts to become established in the community.

236. Accordingly, the Commission *recommends* that deportation orders in respect of *all* persons (whether permanent or temporary residents) remain valid for three years from the date of issue; that after three years they should automatically lapse; and that a fresh order be issued only after review of the circumstances by a person other than the person originally issuing the order, or by the Minister if the Minister issued the original order, and having in mind the factors mentioned in the previous paragraph. The Commission notes that in New Zealand there are two types of deportation order. One type of order, which is issued by the Minister where national security or serious criminal offences are involved, does not lapse. The other type of order, which is issued by a court, is made for breaches of the Immigration Act and lasts for two years only, unless renewed following further court proceedings. In paragraph 200 the Commission recommends either restoration of the amnesty provision or guidelines to allow change of status for PNCs.

237. *Sections 21, 21A and 22.* The Commission received no submissions relating to the arrangements for the transport of deported persons by ship or air, and a review of the provisions themselves does not suggest that significant human rights implications arise. However, the State Relief Committee of Victoria put to the Commission that the way in which sub-section (7) of section 21A is administered is contrary to human rights because of the short time normally given to families after the notification of deportation arrangements — only 24 to 48 hours. Decisions about whether to accompany the deportee or to remain in Australia made in such a short period cause considerable hardship.<sup>10</sup> Costs for detention and deportation recoverable under section 21A cause enormous financial burden for deportees and their families. It effectively precludes applications from former deportees to migrate to Australia because of the long periods involved in discharging the debt.

238. *Discrimination in Deportation.* It was suggested to the Commission that there is an element of racial discrimination in the identification of PNCs for deportation. The statistics provided by DIEA in its submission to the Commission indicate that approximately 60% of those detained prior to deportation are identifiable because of their skin colour, e.g. they come from the Pacific Islands or from countries on the mainland of Asia. Having in mind the number of persons in Australia who are not of Australian origin but who have non-European skin colour, and the suspected number of persons of British and European origin who are PNCs, it would seem that there is a *prima facie* element of discrimination. The Ethnic Communities' Councils of both new South Wales and Western Australia made the same point in their submissions." The Western Australia Council commented to the Commission:

We believe that there is inherent racial discrimination in the system of apprehension and deportation of illegal immigrants. It is also clear that the Department cannot find or deport all the illegal immigrants in Australia and those that do get caught are the 'unlucky' ones. For example, in 1981-82, 1 026 illegal immigrants were removed from Australia, a 'drop in the bucket' compared to the 50 000-60 000 the Department claims are currently in the country. If this is the case, then it is very important that all those who are apprehended are given the opportunity to put their case to remain in Australia to an independent authority.

239. The Commission took this matter up with the Secretary to DIEA during its Canberra hearing. He agreed that, in terms of racial origin, the result is not equitable, and

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10. Submission No. 35 from State Relief Committee, Chairman Dame Phyllis Frost, D.B.E.

II. See respectively Submission Nos. 84, p. 10, and 42, pp. 9-12.

pointed to the very practical difficulty of distinguishing an overstayed British or New Zealand person from other members of the community. He noted also that DIEA relies to a large degree on people phoning in.<sup>12</sup>

**240.** The Commission notes that as the number of people in the Australian community from the Asian and Pacific region grows, the potential for discrimination will reduce. Meanwhile, it believes the Government should take active and specific steps to reduce the apparent discrimination on grounds of race in the detection, detention and deportation of non-citizens. It deals with aspects of this in more detail above at chapter 5.8. There is a discussion at paragraphs 201-203, and a recommendation at paragraph 202.

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12. Transcript of Proceedings, Canberra, Monday 27 February 1984, pp. 488-90.

## **7. ENFORCEMENT**

### **PART II, DIVISIONS 4, 5 AND 7**

241. Divisions 4, 5 and 7 are concerned primarily with the creation of offences and the conferring of powers to ensure that the provisions of the Act, and the associated policy, are effectively implemented. Deportation is one of the primary powers available under the Act, but because of the special factors requiring consideration in relation to deportation, it has been the subject of a separate chapter (chapter 6). In this chapter, the concern is with the actual detection and detention of non-citizens, with the ancillary powers of search and seizure, and with the court proceedings related to offences under the Act, insofar as they are the subject of special provisions in the Act. It should be added that some of the provisions in Division 7, which is entitled 'General', do not relate to enforcement and as such are not dealt with here,, e.g. section 58 deals with the 'establishment of migrant centres.

242. The central problem presented by the enforcement provisions of the Act is that they confer upon officers of DIEA, and other authorised persons, powers which in the normal course are vested only in police officers. Accordingly, the Commission has reviewed the powers carefully to ensure that, in the absence of the normal and slowly built up protections available against the improper exercise by police officers of their powers, those given powers of search, arrest and seizure are not left free of the restraints appropriate to ensure the protection of the civil and political rights contained in the charter of the Commission.

243. *Section 27.* Section 27 provides that non-citizens entering or remaining in Australia in circumstances amounting to a contravention of provisions of the Act are guilty of an offence against the Act which is punishable by either a fine not exceeding \$1000 or imprisonment for a period not exceeding six months. (As well, the non-citizen is liable to deportation.) Thus the central enforcement provisions of the Act have criminal sanctions and accordingly attract all the protections of the ICCPR, including the rights to fair trial (Article 14); to liberty and to compensation in the event of unlawful arrest or detention (Article 9); to treatment with humanity and respect for the inherent dignity of the human person, and to segregation from convicted persons if only subject to charge (Article 10); and to enjoyment of all the rights without discrimination on such grounds as race, colour, sex, language or religion (Article 2). Although the Commission received no submissions relating specifically to section 27, the circumstances in which a person becomes a PNC dealt with under this section form the basis of submissions relating to later sections of these Divisions of the Act.

244. *Section 30.* Section 30 is designed to prevent persons bringing non-citizens secretly into Australia, harbouring such persons while in Australia or aiding or inciting a person to remain in Australia illegally. The Commission received evidence from social workers, particularly in Sydney, to the effect that they fear that in the course of providing services to PNCs they may offend against section 30, sub-sections (1) and (2). For example, by not revealing their knowledge of certain persons, they may offend against the provisions of section 30(1) (c), even if the concealment is only temporary and as part of their duties as a social worker. Again, they felt that it might be possible that they could be charged under sub-section (2) (aa), which makes it an offence to aid or incite a person who is a PNC to remain in Australia. Here, they felt that assisting a person to maintain himself or herself and his or her family in circumstances of personal difficulty would be a central part of their professional role, but it could at the same time bring them within the provisions of the section. It was suggested to the Commission that a special provision should be included to allow social workers, in the proper course of their duty, exemption

from the penalty provisions of section 30. To this, the Department replied that sub-section (3) would be sufficient to protect people such as social workers and lawyers when assisting PNCs.

245. The Commission notes that while sub-section (3) of section 30 provides that a person is not to be taken to have aided a PNC by reason only of supporting the grant of an entry permit or a further entry permit, it is expressed in negative terms. Thus giving advice about or assistance with housing, medical services etc. could constitute an offence. Furthermore, because of the narrowly defined eligibility categories for change of status to permanent residency under section 6A(1), many PNCs are not eligible to apply for an entry permit. The sub-section seems to the Commission to be rather too tightly drawn to meet the proper professional needs of those dealing with individuals and families in distress. The Commission *recommends* that section 30(3) be amended to provide that a person is not taken to have aided a PNC by virtue of giving aid or advice in the course of duty, provided that such advice is not in relation to the avoidance of detention.

246. *Section 31B.* Section 31B provides for offences where the holder of a temporary entry permit infringes the conditions for temporary permits set out in section 6 or where the person is a PNC and works in Australia without permission. The impact of section 31B is dealt with in sections 3.2 (especially paragraphs 49-52) and 5.8 above.

247. *Sections 35, 36 and 36A.* These sections empower an officer to prevent a person from entering Australia where the person would become a PNC; and to take a person from a ship or aircraft into custody if the officer reasonably believes the person would become a PNC if he or she entered Australia. In some cases, a person arriving on a ship or aircraft may be detained on the vessel and therefore be prevented from entering Australia. In other cases, the person is taken off the ship or aircraft and then is detained.

248. The main use of the sections, so far as human rights are concerned, relates to the entry of refugees or persons claiming refugee status, and stowaways. Human rights aspects of the problems raised by the would-be entry of such persons are discussed in chapter 5.8 above.

249. It was put to the Commission by the Ethnic Affairs Commission of New South Wales' that there is also a danger that sections 36 and 36A infringe Article 9 of the ICCPR by depriving a person of liberty without formal process of law. A similar point can be made in relation to section 35. The problem is that a person arriving by ship or aircraft without proper authorisation is deemed by these sections not to have entered Australia. Accordingly, it was suggested that the normal legal processes are not available. The Commission recognises, on the other hand, that it may be necessary in some circumstances to detain a person who has arrived unannounced and unauthorised from overseas while credentials are being assessed. It also records DIEA's comment that persons who are refused entry are able to avail themselves of normal legal processes.

**250. The** Commission notes that the problems associated with the arrival of unauthorised persons, who necessarily have to be dealt with by administrative processes at the point of arrival, are met in the United Kingdom by the availability of special tribunals. These are able to review the assessment made of the potential status of the person arriving. The Commission notes that in a recent amendment of the Taxation Administration Act 1953 (by Act No. 123 of 1984) provision is made for review of an order by the Commissioner of Taxation by either a court or the Administrative Appeals Tribunal. It assumes these provisions are designed to facilitate speedy testing and resolution of relevant issues. The Commission *recommends that* review arrangements be established

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I. Submission No. 65.

that can be brought into operation quickly where unauthorised persons are being held in custody. Where the person is not immediately placed on board a ship or aircraft for removal from Australia (this aspect of the matter is dealt with at paragraphs 154-6), the Commission *recommends* that a minimum period of detention be enforced, and that after a short period, e.g. one week, there be a process by which the continued detention is reviewed by a court and if possible a form of conditional release provided. The Commission records with pleasure DIEA's advice that it has recently undertaken a review of persons placed in custody. As a result, DIEA has issued instructions which indicate that detention is to be used as a last resort, list matters to be taken into account when deciding about detention, and establish internal review arrangements for custody cases.

251. *Section 37.* Section 37 gives an officer authority to go on board and search vessel for a stowaway or person who would, on entry, be a PNC. It authorises an officer with a search warrant to search any building, premises, vehicles or place in which there is reasonable cause to believe that a PNC, or a person with an entry permit with prohibitive conditions as to working, may be found. Further, section 37 authorises the seizure under warrant of any document, including a passport or a document of identity, for such time as the officer concerned thinks necessary. He may use such reasonable force as is necessary for the exercise of those powers.

252. It appears both from submissions made to the Commission, and from the submission by DIEA itself, that practice in relation to the issue of search warrants varies in the different regional offices of DIEA. It seems that in many cases warrants are issued for the maximum period of three months allowed by sub-section (4). In the Commission's view, this procedure is unacceptable. While it recognises the need on some occasions to search extensively for suspected PNCs and holders of conditional temporary entry permits with work conditions, it cannot accept that DIEA officers or others operating under the Act should have powers to search and seize less limited to time and place than those normally available to the police (it is noted that 'officer' includes a member of the police force). Warrants which authorise search, entry and seizure as well as the use of reasonable force should, in the view of the Commission, only be issued for particular occasions and in relation to particular persons. Otherwise, the rights of persons to their privacy (Article 17) and to liberty of person (Article 9) are in grave jeopardy.

253. The provisions of section 37, which allow an authorised officer under the Act — an authorised officer is any person authorised by the Minister to exercise a particular power — to issue a search warrant to another officer, appear to the Commission to be wider than warranted by the evil to which the section is addressed. Many submissions to the Commission suggested that the power should be reduced.<sup>2</sup> As a first step, the Commission considers that the period during which a search warrant should be allowed to remain valid should normally be only a few days; the period to be measured by estimating how long it should take to apprehend a particular person and not by how long it was taken to locate someone not specifically identified; and the number of search warrants issued should be greatly reduced. The DIEA advised<sup>3</sup> that tight security is maintained over the storage of warrants. In the view of the Commission, that is not sufficient. What is required is that warrants should be issued, as for the police in the ordinary run of criminal matters, in a time and place and person-specific manner and by a magistrate, as is generally the case with warrants issued by police. The Commission strongly *recommends* amendments

2. See for example Submission No. 60 from the Australian Institute for Multicultural Affairs pp. 18-21. See also the submission from the Queensland Council for Civil Liberties — Submission No. 71. Note also a view put by a Sydney solicitor, Mr P.W. Tebbutt, in Submission No. 10 and at page 218 of the Transcript of Proceedings, Sydney, 21 November 1983, that search warrants of the kind provided for in the Migration Act are beyond the proper exercise of legislative power, and are certainly inappropriate having in mind common law relating to the issue of search warrants.

3. DIEA submission, para 5.1.5.

to section 37 to achieve this. The Commission further *recommends* that use of force not normally be authorised to DIEA officers operating under the Act. Where force is necessary, it is of the view that the police should be involved. Indeed, the Commission notes that the Residence Control Manual states that 'an officer would not be expected to undertake such action himself in the normal course but rather to call upon police assistance' (6.2.4).

254. The Commission notes that DIEA handbooks state that in view of the intrusive nature of the search powers, officers should be instructed not to enter premises between 9 p.m. and 6 a.m. if there are reasonable grounds for believing that the search can be done successfully at another time and that they are also instructed to identify themselves to the occupants of the premises being searched and explain the purpose of the search in a language the occupants understand. The Commission received evidence that these instructions are not always complied with and *recommends* strict adherence to these instructions. For further recommendations relating to the use of interpreters, see paragraphs 164 and 206.

255. The Macquarie Legal Centre, in a lengthy and thoughtful submission, pointed to the possible evils which could arise in connection with section 37 and the associated instructions and manuals.<sup>4</sup> The Commission endorses the view of the Centre, and *recommends* that before a search is made arrangements should, in other than exceptional circumstances, be made to have an interpreter present, or some way of communicating with persons who may not be able to understand English, e.g. through a card system as used on occasions by police forces. Otherwise, it is possible that grave injustice may be done, particularly where a house or other place where more than one person may congregate is to be the subject of the search process. The Commission received submissions indicating the use of threats and intimidation as well as cases of people not understanding what is happening because of lack of language facility.<sup>5</sup>

256. *Sections 38 and 39.* Sections 38 to 43 provide the central provisions for arrest, holding and questioning persons on the basis that they are suspected to be PNCs or are deportees. The Commission has had more comment on the operation of sections 38 and 39 than on any of the other sections in the Act, largely because these confer powers of arrest without warrant and form the basis on which persons are detained in custody, including at the Immigration Detention Centre at Villawood and Maribyrnong, which were the subject of an earlier inquiry by the Commission.<sup>6</sup>

257. Sections 38 and 39 are being dealt with together because they form such legal authority as exists for the construction, maintenance and operation of the Immigration Detention Centres. The Commission *recommends* that there be specific provision in the Act authorising the Minister to maintain and operate Immigration Detention Centres, assuming these are to continue. It seems inappropriate that there be no formal authority for this, although section 58 authorises the establishment and maintenance of Migration Centres. The Centres would represent compliance with Article 10 of the ICCPR, which requires segregation of accused persons from convicted persons. It would be appropriate to include an indication in the legislation that the Centres are intended primarily as short-term holding places, and that the relevant human rights should be observed. A discussion of these is contained in the Commission's Sixth Report, *The Observance of Human Rights at the Villawood Detention Centre*. A note on a recent visit to the Centre is

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4. Submission No. 57A, pp. 7-10.

5. See Submission No. 50.

6. See Human Rights Commission Report No. 6 *The Observance of Human Rights at the Villawood Immigration Detention Centre*, AGPS, Canberra, 1983.

contained in Appendix XI to this Report, and an associated recommendation at paragraph 210.

258. PNCs brought to Immigration Detention Centres are usually one of four types, according to DIEA:

- (a) they have avoided detection following illegal entry
- (b) after authorised entry and contact with DIEA, usually about the extension of entry permit, they have discontinued that contact and are or are likely to become PNCs
- (c) they have not responded to an adverse decision as to continued stay in Australia and a direction to leave the country
- (d) they are PNCs who come to the notice of police authorities as a result of criminal activities in Australia or overseas.

DIEA advised that persons who have shown previous disregard for Departmental and Ministerial concessions, decisions and directions to depart are likely to be detained on the ground that otherwise they may evade the proper operation of the legal consequences of being a PNC or deportee.

259. The Commission notes that the Residence Control Manual states that because a person is a PNC or deportee, it does not necessarily follow that he must be placed in custody. The manual observes that use of custody depends on individual circumstances such as whether the person has a spouse and/or young children to support or the officer is satisfied that the person will not abscond. However, evidence to the Commission indicated that usually all those arrested have been taken into custody, particularly in New South Wales, although the Commission understands that this practice is presently being reviewed in New South Wales.

260. The Commission has also received evidence that PNCs have been detained with convicted criminals in prisons — sometimes for long periods. The Commission requested statistics from DIEA on the number of PNCs (without criminal charges laid against them or convictions) who were detained in institutions other than detention centres by institution, state, nationality and sex. DIEA was unable to provide statistics other than for Tasmania and the Northern Territory. Further information on this practice and recommendations are given above in chapter 5.8.

261. DIEA advised<sup>7</sup> that subsequent to placing a person in custody, release can be made in certain circumstances. It is of the view that the number of detentions is not attributable to the ease with which warrants can be obtained and advises, and the Commission has confirmed, that the issue of warrants has been tightened up and that instructions on detention have been reviewed and amended. The Commission *recommends* that the provisions in the resident Control Manual referred to in paragraph 257 above be given full force and effect. It seems that there has been a tendency for custody to be the first step, followed by release in situations mentioned in the DIEA submission, e.g. that an application for stay in Australia or for refugee status has merit, or that DIEA processing is likely to be protracted. There should be more careful examination of the situation of persons before they are arrested and greater consideration given to other forms of contact or control which would be more appropriate, having in mind the rights of persons to privacy and freedom of movement. Accordingly, the Commission *recommends* that continuing detention not be resorted to where the case of the person has merit or where the process for ascertaining future status is likely to be lengthy. The Commission has been advised that following a review of arrangements at the Villawood Centre, the period of detention has been considerably reduced, as has also the number of detainees.

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<sup>7</sup> D1EA submission, para. 5.3.18.

262. The Commission received evidence from a number of sources about practices which in effect infringe the human rights to liberty of person (Article 9) and to a fair trial (Article 14). Those brought to its notice' were:

- cases of people who were intimidated into consenting to detention for a period of more than seven days (sub-section (3A) of section 38 allows detention longer than seven days if the person consents)
- cases of people not understanding, or not being helped to understand, about their option not to consent to detention for more than seven days
- the frequent absence of adequate interpreting services and of legal representation at hearings under section 38 and in the course of administrative action taken pursuant to section 38
- failure of DIEA to give substantive as distinct from formal reasons to the magistrate conducting a section 38 hearing for detaining persons beyond seven days
- the apparent treatment by some courts of the discretion under section 38 to authorise detention as an administrative rather than a judicial function.

263. The Commission recognises the difficulty of determining when persons should be kept in custody and when they can be kept under notice by some form of reporting condition. It notes, however, that a PNC may not necessarily be charged with an offence and that such persons are entitled to a proper observance of their rights in all respects. This aspect is further considered in section 5.8 above.

264. Both in oral evidence and in written submissions' it was put to the Commission that some system of conditional release (or bail) be developed. The Commission also received evidence to this effect during its inquiry into conditions at the Villawood and Maribyrnong Immigration Detention Centres.<sup>8</sup> The Commission can see no reason why persons should be detained for lengthy periods at the Detention Centres. Indeed, it notes that the Secretary to DIEA, in evidence to the Commission in Canberra, said that he felt 'about two days' should be regarded as a reasonable period for detention." The Commission endorses this view and draws attention to the fact that sub-sections (2) and (3A) of section 38 together provide that a person taken into custody is to be brought before a prescribed authority within 48 hours after arrest and that the prescribed authority may authorise detention for only seven days unless the detained person consents to a longer period. From the evidence available to the Commission, it seems that the provisions have not been used as they ought and that periods of detention have in many instances been considerably longer than the two to seven days which are effectively envisaged by section 38. The Commission records DIEA advice that the longer term of custody often arises from exercise of rights of appeal or review, and that it has instituted an accountable internal review system for custody cases. It also noted DIEA's comment that some individuals do not respect the undertakings they give, and are not in an analogous situation to criminals, because deportees have an incentive to establish closer ties with the community. The Commission does not accept this view in regard to PNCs, nor the validity of the comparison with criminals, which it regards as demeaning to both.

265. Accordingly, the Commission *recommends* that a system of conditional release of detainees be developed immediately and be given the support of law. (For a further discussion of the need for a bail-type system to allow conditional release, see paragraphs 208-210.) The legal status of persons so released should also be clarified. At present, they tend to be treated as having no rights, and the Commission was actually provided with

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8. See Submission Nos. 42, 57A and 65.

9. See Submission No. 57A at pp. 45 ff.

10. See Human Rights Commission Report No. 6, op.cit.

11. Transcript of Proceedings, Canberra, Monday 27 February 1984, p. 493.

evidence of a conditional release which required the person released not to pursue his case in courts or through Members of the Parliament.' The Commission regards conditions of this kind as totally unacceptable. It considers the reporting conditions should be fair, and not require, for example, long journeys to a capital city office two or three times a week. It *recommends* further that conditions of release be reviewable by the courts and that they be only such as are reasonable having regard to all the circumstances of the case.

266. Similar considerations apply to persons who are the subject of a deportation order and have been taken into custody under section 39. The Commission notes that there is no provision in the legislation for continued authorisation of detention in section 39." It *recommends* that similar safeguards and conditional release provisions be built into that section, as it does seem that with the appeal rights now available, and the difficulty in some cases of determining the destination to which a deportee is to be sent, more than a few days may be required. It is clearly contrary to proper procedure, and to the provisions of Article 9 of the ICCPR, for a person to be held unnecessarily and without some right of recourse to a court.'

267. The Commission notes also that sections 38 and 39 authorise an officer to arrest without a warrant a person 'whom he reasonably supposes' to be a PNC or a deportee. The Commission recommends that reports be made to the Parliament in the Annual Report of DIEA of all cases in which arrest was made without warrant. It regards arrest without warrant as potentially inconsistent with the requirements of Article 9 of the ICCPR and considers, as indicated earlier, that the whole process of exercise by DIEA officers of the compulsory powers contained in the Act should be tightened up. While DIEA commented that publication may be an invasion of privacy, the Commission considers there would be ways of reporting that would not infringe that right, while giving the public generally an opportunity to observe trends. Warrants should, except in circumstances analogous to those available under the common law to ordinary citizens,<sup>5</sup> or to the police, always be obtained before persons are deprived of their liberty by arrest under sections 38 and 39.<sup>6</sup> In this connection the Commission notes the provisions in clause 10 of the Criminal Investigation Bill 1981, and considers the circumstances there envisaged for arrest without warrant provide the maximum allowable power, which would desirably be exercised only by a police officer.

268. It was suggested to the Commission that in some cases people have been arrested on the streets and have been removed without any chance to inform their spouses or children of their whereabouts.<sup>7</sup> In the view of the Commission this is inhumane treatment, when coupled with restrictions on the use of telephones at detention centres. The Commission *recommends* that either the person arrested be given the opportunity to immediately inform family or friends of his or her whereabouts, or that DIEA assume the responsibility. No less is required of police by the Criminal Investigation Bill 1981, where in many instances the circumstances will be less extenuating. It also appears that in such circumstances there may be no interpreting assistance available' and the Commission

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12. See Submission No. 72 from Mr Aqbal.

13. The Commission notes that in the DIEA procedures manual detention beyond 30 days must be authorised by a First Assistant Secretary. Powers of this order should not be vested in officials.

14. See Submission No. 65 from the Ethnic Affairs Commission of New South Wales, pp. 12-14, Submission No. 60 from the Australian Institute of Multicultural Affairs, pp. 23-24 and Submission No. 50, pp. 20-23, and also the evidence of Dr G. Flick, Transcript of Proceedings, Sydney, Monday 21 November 1983, p. 202.

15. See, for an analysis of the common law provisions, Submission No. 17 from Australian Institute of Multicultural Affairs (ALMA), p. 22.

16. Points similar to these were put to the Commission by the Macquarie Legal Centre — see Submission No. 57A at page 10. The Centre considers that all arrests should be made under warrant or summons. While the Commission can see, as indicated, some occasions where arrest without warrant may be required, these should be very strictly limited.

17. Submission No. 50.

18. Submission Nos. 50 and 100.

*recommends* that interpreters be made available at the time of arrest and immediately thereafter so that people arrested and detained can be informed of their rights and can notify their families.

269. It was also brought to the notice of the Commission that in some cases people who have been apprehended have had difficulty obtaining the services of a lawyer,<sup>19</sup> especially where the person is taken into custody during the night or immediately before a weekend. The Commission *recommends* that arrangements be made to ensure the availability of legal assistance at any time of the day or night as soon as a person is taken into custody. While the Commission acknowledges the practical difficulties involved in this recommendation, and the efforts DIEA makes to ensure interpreter and other services are available, it considers this recommendation accords with the relevant human rights and should be achievable, particularly if practices associated with arrests are reasonable as to time.

270. Finally, the Commission considers that all the points made in its *Report No. 6* on the Villawood Detention Centre should be implemented. The evidence obtained during the course of the review of the Act has strengthened rather than weakened the evidence in support of the recommendations it made as a result of the Villawood inquiry. The Commission conducted a further inspection of arrangements at Maribyrnong on 26 September 1984 and Villawood on 5 October 1984 in order to see the extent to which its recommendations had been implemented. Important steps have been taken by DIEA and a report on the visit is attached at Appendix XI. The Commission recommends that the reforms and improvements now under way, and the action recommended in the Sixth Report, should be continued to completion as quickly as possible and that inadequacy of resources should not be used as an excuse to prevent solution of some of the outstanding problems such as adequate training of protective custody staff and provision of adequate services by a welfare officer. DIEA reports that every effort is being made to improve conditions at its Detention Centres and that close liaison has been established with the Department of Local Government and Administrative Services on the provision of trained staff at the Centres.

271. *Section 41.* Section 41 is on the face of it a valuable provision because it provides that a person in custody under the Act is to be given all reasonable facilities for obtaining legal advice. However the section is only operative if the person in custody requests assistance.

272. The Commission draws attention to its *Report No. 6, The Observance of Human Rights at Villawood Immigration Detention Centre* where it recorded that it was informed that in some cases detained persons were not told that they had the right to obtain legal advice. It reaffirms its *recommendation* that section 41 of the Act be amended so that it is mandatory for persons in custody to be told of their legal rights in a language they understand.

273. *Section 42.* Section 42 makes it an offence not to answer questions put to a person suspected of being a PNC or a deportee. Sub-section (3) provides that a person is not excused from answering a question on the ground that the answer might tend to incriminate, but also stipulates that an answer is not to be used in any proceedings except in relation to determining that person's status as a PNC or deportee.

274. A number of submissions were put to the Commission to the effect that the words 'an officer may put to that person such questions as he considers necessary and may move that person from place to place' represent a denial of fundamental human rights. While it

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19. Submission Nos. 50, 53 and 57A.

is true that the questions may only relate to determining whether the person is a PNC or deportee, the questions should be objectively rather than subjectively appropriate. It was put, particularly, that there is a denial of the right to privacy in that any questions the officer considers necessary may be put. The Commission *recommends* that section 42(1) of the Act be amended to provide authority for an officer to put such questions as are reasonably necessary rather than as he considers necessary. The Commission had evidence of incriminating information being obtained from other sources, e.g. from neighbours and children,<sup>20</sup> and the Australian Institute of Multicultural Affairs drew attention to the risk associated with powers to question people. It said that if the section must be retained, consideration should be given to whether a failure to provide the information sought should justify imprisonment as well as a fine.'

275. The Commission *recommends* further that the power to question be limited to objectively necessary questions, and that these in turn be limited to determining the name, place of residence and origin of the person; and the date and place of entry of the person into Australia. They should not be as wide as to allow determination of the fact of being a PNC or a deportee."

276. The Commission also sees potential for infringement of human rights in the power to move a person from place to place, except on grounds which are clearly stated. Otherwise, the movement could well constitute arbitrary arrest and therefore be inconsistent with the requirements of Article 9 of the ICCPR which states that no-one is to be subjected to arbitrary arrest or detention.

277. The Macquarie Legal Centre' pointed out that the power to move a detained person means that a close friend or relative may not be able to discover the whereabouts of the detainee and may make the provision of legal aid difficult.

278. *Section 43.* Section 43 authorises an officer to have a person in custody photographed or measured in order to facilitate present or future identification. This power could allow a person who is only a suspect, and not necessarily either a PNC or a deportee, to be subjected to treatment of a kind that would grossly invade the rights to privacy and liberty of person. The Commission *recommends* that there be strict guidelines for this section which must be adhered to in order to avoid misuse of the provisions for photographing and measuring suspected PNC and deportees. It records with pleasure DIEA's advice that finger-printing and photographing of detainees at detention centres has ceased as a general practice. The processes are only used where identity details are required. The Commission further *recommends* that section 43 be amended to provide for the destruction of records where positive identification is not made. It notes DIEA's advice that this is current practice.

279. *Section 54.* Section 54 empowers an authorised officer to take security for compliance with the provisions of the Act or Regulations. The security may be in the form of cash or negotiable instruments, or in a form approved by the Minister.

280. The Commission raises the question of whether this provision may be used to grant conditional release to a person who is or is suspected to be a PNC or a deportee. The conditions might, for example, require a person to report to a particular office at stated times. It understands, however, that when DIEA sought advice regarding a proposed

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20. See, for instance, Case Study II, para. 4, Appendix X.

21. Submission No. 60, pp. 25-26.

22. See also Submission No. 71 from the Queensland Council for Civil Liberties, Submission No. 76 from the Premier of Victoria and evidence given by the Secretary to DIEA. Transcript of Proceedings, Canberra, Monday 27 February 1984, pp. 493-501.

23. Submission No. 57A, p. 16.

bail/bond/reporting agreement for a particular person it was told that there was no power to use the section in this way.

281. More broadly, the Commission takes the view that this section gives inappropriate powers to officers. It is its view that taking deposits or securities in other forms is a function which should be performed only under the supervision of a court. Sub-section (4) envisages that a court may be approached if a person who has provided a security has not complied with the conditions. In the view of the Commission, the role of the court is introduced too late in the process. The Commission *recommends* that a court set the original conditions if the rights to liberty and security of a person are to be adequately observed. It notes that a court is already required to authorise detention of a person suspected of being a PNC or a deportee and that where issues as large as deportation or custody are involved the processes should be under the supervision of a court. The Commission has already — see paragraph 206 — recommended that a system analogous to bail be introduced for those taken into custody under the enforcement provisions in the Act.

282. *Section 55.* Section 55 provides that, in any proceedings in a court involving the validity of a deportation order, the production of an order or of a document certified under the hand of the Minister is, in the absence of proof to the contrary, deemed to be proof of certain matters. These include that the person was not born in Australia, is a non-citizen, is the holder of an expired TEP or evaded an officer for the purpose of entering Australia. Sub-section (2) provides that proof to the contrary is to be by the personal evidence of the person concerned, with or without other evidence.

283. It was put to the Commission that the reversal of the onus of proof in section 55 infringes Article 14 of the ICCPR which provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty. It was argued that, as deportation may occur without the commission of a criminal offence, it was an infringement of human rights to reverse the onus of proof. This matter was also the subject of evidence by the Secretary to DIEA, who indicated that it is often very difficult to obtain information except from the suspected person, and that in particular it is difficult to know where the person should be sent. The Commission notes also that the powers of section 56 with relation to section 55 were rarely used.

**284.** It is evident that the proceedings in which a question as to the validity of a deportation order could arise may be either civil, e.g for injunction to prevent deportation, or criminal, e.g. a prosecution for an offence under section 27(1) (aa) or (2); or under section 21(4).

285. The Commission considered the question of statutory provisions that in effect reserve the onus of proof in its report on the review of the Crimes Act 1914 and other crimes legislation of the Commonwealth.' In that report (paragraph 35), the Commission concluded that, to the extent that certain provisions reverse the persuasive burden of proof and place it upon the defendant, they are inconsistent with the presumption of innocence principally contained in Article 14.2 of the ICCPR and are contrary to the concept of a fair trial in the Australian system of justice and are therefore inconsistent with the 'fair hearing' requirement of Article 14.1 of the ICCPR."

286. In the Commission's view, section 55 places only an evidential burden of proof upon defendants and, to that extent, is not inconsistent with Article 14.2. On this view,

24. Human Rights Commission *Report No. 5 Review of Crimes Act 1914 and Other Crimes Legislation of the Commonwealth*, AGPS, Canberra, 1983. (paras 30-35). See also Senate Standing Committee on Constitutional and Legal Affairs, *The Burden of Proof in Criminal Proceedings*, 1982, especially paras 4.9, 4.10, 5.9, 5.17 and 7.12.

25. *ibid*, at paras 30-36.

even if it were accepted that deportation is akin to a penalty for a criminal offence (and there is some force to this proposition), section 55 is unexceptionable, in terms of Article 14.2, in its application to civil proceedings which may result in deportation being effected. However, the Commission notes the conclusion of the Senate Standing Committee on Constitutional and Legal Affairs that 'statutory provisions sometimes unjustifiably place an evidential burden on the accused' and endorses again the Committee's recommendation that there be a 'review of Commonwealth legislation to ensure that such burdens do not rest on the defendant unless there are sound practical or policy considerations for their use'." Such a review, in relation to section 55, would no doubt take into account the evidence of the Secretary to DIEA mentioned above. However, on the question of determining the destination to which a deportee should be sent, the Commission observes that this issue will almost certainly have to be resolved through such means as overseas diplomatic or immigration posts."

287. *Section 56.* Section 56 provides that in a prosecution of a PNC for an offence under section 27 (relating to entry into or remaining within Australia) an averment of a matter by the prosecutor is to be deemed proved in the absence of proof to the contrary by the personal evidence of the defendant.

288. The Commission also in its fifth report reviewing the Crimes Act dealt with the question of averment provisions in Commonwealth legislation. It noted that the Senate Standing Committee on Constitutional and Legal Affairs had suggested that there was potential for misuse of averment provisions by prosecutors' and concluded that, if that proposition were accepted, there is equal potential for infringement of the fair trial requirement in Article 14.1 of the ICCPR. The Commission confirms its earlier approach to averment provisions and its *recommendation* that the Senate Standing Committee's proposal, that averment provisions be kept to a minimum and legislation enacted controlling their use by prosecutors, be implemented.

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26. *ibid.* paras 1.4 and 6.13.

27. See Submission No. 71 from the Queensland Council for Civil Liberties and evidence at p. 499.

28. Senate Standing Committee on Constitutional and Legal Affairs, *op.cit.*, para. 5.15.

**PART IV OF THE ACT  
MISCELLANEOUS**

## 8. DISCRETION, DELEGATION AND REVIEW

### 8.1 The Discretions Listed

289. The Commission has drawn attention throughout this report to the wide and extremely numerous discretionary powers exercisable under the Act. As indicated in chapter 2, the essentially 'machinery' legislation of the Act embodies a statutory framework for the implementation of any current immigration policy but contains no criteria for the exercise of the discretions it confers. Policy is developed and changed by the Government of the day in accordance with the current political, economic and social situation, but without constraint by the Act. Guidelines for the implementation and administration of current policy are contained in DIEA handbooks and instructions.

290. The Act confers powers on persons holding four groups of office — the Minister, 'authorised officers', 'officers' and 'prescribed authorities'. 'Authorised officers' are defined under section 5(1) as persons authorised by the Minister to exercise a power. 'Officers' defined under the same section are officers of DIEA, persons who are officers for purposes of the Customs Act, a member of the Australian Federal Police or a State or Territory Police Force and any other persons authorised by the Minister to exercise a power. A 'prescribed authority' for the purposes of sections 38 and 39 of the Act is a person appointed by the Minister who is or has been a judge of a superior court or a barrister or solicitor of not less than five years standing. The appointment of a prescribed authority is made under section 40.

291. In the table below, the powers which the Act vests in one of the four groups of officers mentioned in the previous paragraph are set out. The table shows that the powers of the Minister are largely related to arrangements for the entry and deportation of people from Australia. Authorised officers have powers relating to the issue of visas (which normally takes place at overseas posts), to the control of vessels and to the detention or release of detainees. The powers of officers relate largely to the enforcement area — to search and arrest and to prevention of illegal entry. Prescribed authorities authorise detention and provide a form of periodic review where a person is in custody.

### Discretions under the Migration Act

		Person empowered			
Section	Description of power	Minister	Authorised Officer	Officer	Prescribed Authority
ENTRY PERMITS					
6(2)	Issue entry permits				
6A(1)(a)	Grant Territorial asylum				
6A(1)(c)	Determine refugee status				
6A(2)	Grant entry permit to person granted territorial asylum				
6(3)	Issue entry permit to persons under s.6A(1)				
6(4)(b)(ii)	Determine if a child between 18 and 21 years is an integral part of a family				
7(1)	Cancel temporary entry permit				

Section	Description of power	Person empowered			Prescribed Authority
		Minister	Authorised Officer	Officer	
8(1)(e)(i)	Exempt person from entry permit requirement				
8(2)	Declare if an exempt person may not enter or remain in Australia				
8(3)(e)	Declare persons under s.8(1)(e) no longer exempt				
<i>VISAS AND RETURN ENDORSEMENTS</i>					
11A(a)	Grant visa				
11A(I)(b)	Grant return endorsement				
11B	Cancel temporary entry permit				
<i>DEPORTATION</i>					
12	Order deportation of non-citizen convicted of crimes				
14(1)	Determine whether non-citizen constitutes a security threat and order deportation				
14(2)	Order deportation of non-citizen who committed an offence relating to security				
18	Order deportation of a PNC				
19	Order deportation of spouse and children of PNC on request				
20	Revoke a deportation order				
21(1)	Require master etc of a vessel to remove a deportee				
21(3)	Require master etc of a vessel to take deportee without charge back to place of embarkation				
21(6)	Exempt master from 21(3) obligation				
21 A(4)	Determine whether ticket held by deportee be used for deportation costs				
23 & 24	Require production of crews' identity documents by master etc. of vessel				
26(1)	Exempt vessel from Division II provision				
26(2)	Exempt master of vessel from s. 23				
27(4)	Approve sureties for s.27				
31A	Require a PNC to leave Australia within a specified time				

Person empowered				
Section	Description of power	Minister	Author- ised Officer	Pres- cribed Authority
ENFORCEMENT				
33(2)(a)	Require that the master of a ship bring it to for boarding			
33(2)(b)	Permit ship to be moved			
33(4)(c)	Permit aircraft to be moved from boarding station			
33(6)	Board a vessel			
34	Exempt from s.33			
35(1)(a)	Prevent a person entering Australia where he/she would become a PNC (using force as necessary)			
35(1)(b)	Prevent a deportee leaving a vessel (using force as necessary)			
36(1)	Direct that a stow-away or prospective PNC be taken ashore and placed in custody by an officer			
36(1A)	Direct that a person refused an entry permit be taken ashore and placed in custody by an officer			
36A(1) & 36A(2)	Direct that a stowaway or prospective PNC on an aircraft or at an airport be taken into custody by an officer			
36A(3)	Direct that a person refused an entry permit be taken into custody at an airport by an officer			
36A(4)	Require a person in custody under 36A(1)—(3) be removed without charge by master, etc of vessel			
SEARCH				
37(1)	Board and search any vessel any time where there are suspected stowaways or prospective PNCs			
37(3)	Issue a search warrant			
37(5)	Enter and search premises any time and seize documents where there are suspected PNCs			
37(6)	Stop any vessel under s.37(5)			



Section	Description of power	Person empowered			Pres- scribed Authority
		Minister	Author ised Officer	Officer	
ARREST AND DETENTION					
38(1)	Arrest without warrant suspected PNC				
38(3)	Order detection				
38(4)	Extend custody				
38(7)	Order release of person in custody				
39(1)	Arrest without warrant suspected deportee				
39(4)	Determine if there are reasonable grounds for supposing a person is a deportee				
39(6)	Direct custody arrangements				
39(7)	Release detainee				
42(1)	Put any questions considered necessary and move a detainee from place to place				
43	Take measure for identification of detainee				
44(1)	Order the detention of a vessel to search for stowaways or prospective PNCs				
45(1)	Direct the detention of a vessel by officer pending recovery of penalty				
45(2)(a)	Detain vessel by officer in that place or another				
45(3)	Obtain assistance to seize vessels or goods				
45(5)	Seize vessel in default of penalty				
MIGRATION AGENTS					
48(1)	Direct that person may not act as a migration agent				
51(1)	Direct that migration agents furnish particulars				
GENERAL					
54(1)	Require and take security for compliance with the Act				
58(1)	Establish and maintain migration centres				
66D	Delegate all Ministerial powers except powers of delegation				
67(1)(c)	Require maintenance guarantees				

292. While the Act itself provides a reasonably clear distribution of powers and functions between Ministers, authorised officers and others, practice is much less clear. This is because the Minister is authorised under s.66D 'either generally or as otherwise provided by the instrument of delegation, by writing signed by him, (to) delegate to an officer any of his powers under this Act other than the power of delegation'. Furthermore, under sections 5(1AA) and 5(1AB) inserted by the Migration Amendment Act 1983, any power exercised by an authorised officer or officers under the Act may also be exercised by the Minister.

293. Officers authorised by the Minister to discharge duties and functions under the Act are given at Appendix I of the Residence Control Manual. However, this list does not indicate which officers have responsibility for the specific areas of administration. Thus it is in practice almost impossible to identify what officer or officers are responsible for any particular decision.

## 8.2 Criteria for the Exercise of Discretions

294. As a general principle, four criteria should exist if there is to be due exercise of statutory powers:

- the person who exercised the power should be identifiable
- clearly stated guidelines for the exercise of powers should be available, preferably in the legislation
- reasons should be given when a power is exercised
- some form of external review should be available.

Unless these criteria are met, there is a likelihood that the decision will, or will be seen to, possess an element of arbitrariness that is contrary to the provision of Article 26 of the ICCPR and of many of the detailed provisions, e.g. Articles 9, 10 and 17.

295. The large number of decisions required under powers expressly attributed to the Minister means that much of this work must be delegated. People who may expect that decisions will be made on the merits by the Minister will find that often this is not the case. There appears to be no list indicating the officers authorised to exercise the various powers delegated by the Minister, and to the outside observer this can carry connotations of arbitrariness.

296. Decision-making powers authorised by the Act, therefore, will not, in reality, necessarily be performed by the person or persons designated in its provisions. Not surprisingly, DIEA clients are often confused about the decision-making process and are unable to ascertain which officer is or has been responsible for making a particular decision, again with possible overtones of arbitrariness. The Commission *recommends* either that lists be prepared that indicate which officers make particular decisions, or that a statement of practice, which explains the location of powers, be prepared. In either case, it should be possible for a person to identify who has been the decision-maker in his or her case. Although DIEA advised that instruments of authorisation and delegation exist, they are not readily accessible and the Commission considers accessibility to be highly desirable.

297. In relation to the second element of accountability mentioned above, the Commission notes that under the present system there are no statutory criteria for the exercise of discretions. Manuals and instructions are difficult and time-consuming to consult and the Act makes no reference to their existence or availability. Migration policy, which forms the basis for decisions, is not adequately publicised in a consolidated and updated form. Accordingly, as well as being unable to find out who made a particular decision, DIEA clients frequently experience difficulty in ascertaining how and on what

basis the decision was made. This difficulty, when coupled with an absence in most cases of the provision of reasons, contributes to a suspicion that the decisions can be made in an arbitrary way. The Commission notes that section 25D of the Acts Interpretation Act provides that where legislation requires a person to give written reasons for a decision, the instrument giving the reasons should also set out findings as to material facts and refer to the evidence on which the findings were based. The difficulty is that virtually none of the powers conferred by the Act are expressed to require the provision of reasons, and that most of them are not reviewable by the Administrative Appeals Tribunal. Although the Administrative Decisions (Judicial Review) Act is available, its procedures are costly. Accordingly, the Commission *recommends* that the Act, when amended, include in the provisions conferring powers of decision on officers and others a requirement that reasons be given for the decision.

298. A further problem arises because the large number of decisions, and the large number of discretions, when exercised by different officers at regional offices and overseas posts as well as at central office, lead to a lack of consistency of policy administration. The Commission has evidence, for instance, that the policy for issuing search warrants has varied considerably between States.<sup>1</sup> It also had brought to its attention cases where conflicting advice was given at different branches regarding applications for change of status.<sup>2</sup> Again, the subjective judgments involved in assessing settlement suitability for migration and in determining whether the applicant's appearance, personal hygiene, speech and behaviour is of the standard prevailing in Australia will also make consistency difficult to achieve. The subjective elements involved in such decisions, together with the possibility that decisions made in branches and posts may be overturned at central office, lead to perceptions of arbitrariness and allegations of discrimination in decision-making.

299. In relation to the provision of reasons for decisions, the Commission considers that under the present system, where many officers exercise wide discretionary powers, the provision of an accurate and comprehensive statement, particularly where adverse decisions are involved, is essential for ensuring that DIEA is, and is seen to be, administering a consistent and non-discriminatory migration policy. In its submission, DIEA claimed that 'the Department endeavours to provide an explanation of decisions to its clients without placing an undue strain on limited staff resources'.<sup>3</sup> However, the Commission has received evidence that some people are dissatisfied with the statement of reasons given by DIEA of adverse decisions and it has received complaints in which the statement appeared inadequate.<sup>4</sup> This both contributes to perceptions of arbitrariness and makes preparation of a case, or consideration of whether a case has merit for review, extremely difficult. DIEA submitted in relation to statements of reasons that '... there is considerable scope for the Department to provide its clients with a much more comprehensive explanation of the applicable policy and a fully individualised explanation of the reasons their initial explanation has not been successful'.<sup>5</sup> The Commission agrees, while noting DIEA's comment that this would require additional resources. It also notes the comment of Stephen J. in *Salemi v. Minister for Immigration and Ethnic Affairs* (137 CLR, 396), and his quotation of Lord Denning:

While the prohibited immigrant must be placed in a position to know of and correct any

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1. DIEA submission para. 5.1.4. and Part C, pp. 267-271.

2. In some cases, spouses applying for change of status under s.6A(1) (b) have been advised, wrongly, to return home and to apply for permanent residence from overseas. Confusion exists over the application of legislation for sections 6A(1) (c) and (e). Some branches refuse to allow applications for change of status from people without current temporary entry permits while others will accept the application.

3. DIEA submission, para. 3.3.4.

4. Submission Nos. 2, 3 and 110.

5. DIEA submission, para. 7.3.13.

misapprehensions on the part of the Minister 'chapter and verse' need not be quoted to him by the Minister nor, in general, need the sources of the Minister's information be disclosed if to do so would be to prejudice security or otherwise be contrary to the national interest. But, as Lord Denning observed (20), the Minister

ought in every case to be able to give the applicant [here, the prohibited immigrant] sufficient indication of the objections raised against him such as to enable him to answer them. That is only fair. And the board [here, the Minister] must at all costs be fair. If they are not, these courts will not hesitate to interfere.

300. Specifically, in relation to the powers of decision contained in the Act, the Commission *recommends* that statements of reasons should be given for the purposes of section 25D of the Acts Interpretation Act at least in the following cases:

- (a) where the conditions laid down in sections 6A are not met, and a non-citizen is not allowed change of status
- (b) where the Minister, under section 7, in his absolute discretion, cancels a temporary entry permit
- (c) where issue of a visa is refused (section 11A) or an extant visa is cancelled under section 11B
- (d) where a person is deported under section 12, when he is not an Australian citizen, has less than ten years' residence in Australia and has been convicted of an offence involving imprisonment for over a year
- (e) where the general power to deport under section 18 is exercised (and see also paragraph 229)
- (f) where, under sections 36 and 36A, an officer having reason to believe that a person on board a vessel or an aircraft may become a prohibited non-citizen if allowed entry, takes the person away and keeps him in custody.

As it makes this recommendation, the Commission notes that clearer statements in the Act itself and in accompanying guidelines of the basis on which discretions are to be exercised should reduce the difficulty of giving adequate reasons for the decisions taken. It further notes, in relation to (c) above, that it has recommended (paragraph 141) that cancellation of visas be reviewable and that imposing an obligation to provide reasons for refusing to issue a visa would require amendment of the Administrative Decisions (Judicial Review) Act. It *recommends* such an amendment. By section 13 and Schedule 2 of that Act, decisions in connection with the issue or cancellation of visas are exempt from the requirement to give reasons. The issues relating to visas are further discussed at paragraph 138.

301. In various discussions the Commission has had with DIEA, it has taken the view that policy and practice under the jurisdiction of the Act should always observe human rights as defined for the Commission. The Commission has taken the view that it is not enough merely to take human rights factors into consideration along with many other criteria in making decisions. Rather, human rights should invariably be observed. On the other hand, in its submission, DIEA stated in defence of the present system, that 'it has been the traditional view and it remains a widespread view, that in order to take account of the vicissitudes of social and economic factors prevailing in Australia at any particular point in time a flexible mechanism to give effect to the Government's immigration policy is essential'.<sup>6</sup>

302. This traditional view must be modified now that the Parliament, in passing the Human Rights Commission Act 1981, has given a clear indication that human rights should be observed in decisions made in the exercise of discretionary powers under the Migration Act. Whilst it is necessary to consider a flexible range of criteria in migration

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6. DIEA submission, para. 4.1.7.

decisions, human rights should invariably be observed, whilst at the same time recognising that merely because human rights issues arise in a particular case it does not follow that their application will always require a decision in favour of the individual concerned. It also needs to be noted that the human rights as defined are in some cases subject to reservation, e.g. the right to privacy in Article 17 is limited by the need for the invasion to be 'arbitrary or unlawful'. In other cases, a balance may need to be found between two rights, e.g. the right of the family to the protection of the State (Article 23) and the right to deport a person after due process (Article 13). Within their sphere of application, however, the rights must in the view of the Commission be invariably observed.

303. Although a full Federal Court recently held in *Kioa and Others v. Minister for Immigration and Ethnic Affairs and Another*, unreported, Melbourne, 3 October 1984, that as a matter of domestic law, the Minister was not required to observe human rights in the exercise of the absolute discretion conferred by section 18 to make deportation decisions, this does not in the Commission's view mean that human rights can be ignored or set aside in deportation decisions, or any other decisions made under the Act.<sup>7</sup> Assuming that the reasoning in *Kioa's* case is upheld in the High Court, which recently reserved its decision in the appeal in this matter, the result would be only that the sanctions for not observing human rights in migration decisions lie outside the courts. The sanctions for the enforcement of human rights in Commonwealth decision-making are found in the Human Rights Commission Act 1981. They are conciliation and, if that fails, reporting to the Attorney-General and tabling in Parliament. The net result is that, on the *Kioa* reasoning, a particular decision may be unassailable in the courts yet nevertheless be inconsistent with or contrary to human rights and the subject of an adverse report by the Commission which is tabled in the Parliament. Given the clear intention of the Parliament in enacting the Human Rights Commission Act that human rights be invariably observed in Commonwealth decision making, the Commission *recommends* that DIEA give effect to human rights in all its actions.

304. The Commission draws attention to the detailed information and recommendations on the exercise of discretionary powers, under specific sections of the Act, in other chapters of this report. It *recommends* that criteria for the exercise of discretions under the Act, be either incorporated in the Act or embodied in other legislative instrument.

305. The Commission further *recommends* that a statement that all decisions made under the Act will be in accordance with the human rights instruments to which Australia is signatory be added to the nine principles of immigration policy and included in the Act.

### 8.3 Review

306. The Commission has drawn attention in other sections of this report to the current provisions for review which do not adequately protect the human rights of people affected by decisions made under the Act. The Commission *recommends* that, as well as providing statutory criteria for the exercise of discretion in decision-making, review on the merits of most<sup>8</sup> decisions be available, based on those criteria. This would ensure that policy was being applied in a fair, consistent and non-discriminatory manner. Apart from the general requirement in Article 26 of the ICCPR that all persons have a right to equal treatment under the law, and to equal protection by it, there is also the more specific requirement in Article 13. Article 13 provides that an alien lawfully in a country has a right to submit reasons against his proposed expulsion and 'to have his case reviewed by . . . the

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7. This issue is further discussed in Human Rights Commission Report No. 10, op cit., paras 24-25.

8. The Commission is aware that it would not be feasible to provide review for some decisions made under the Act -- e.g. with regard to applications for visitors visas.

competent authority or a person . . . designated by the competent authority'. The Commission has made it clear that in its opinion a review of decisions as important as those in migration matters should be external and independent, rather than internal. While it recognises that in its terms Article 13 applies only to aliens lawfully in Australia, it is of the opinion that the Article ought not, in such matters, to be construed so literally that the right of review should not apply to all persons in Australia, unless there are overriding and compelling reasons, for example relating to national security.

307. Under the existing system review, in the broad sense, may be made in certain cases by:

- (a) the Immigration Review Panels
- (b) the Administrative Appeals Tribunal
- (c) the Security Appeals Tribunal
- (d) the Committee on the Determination of Refugee Status
- (e) the High Court or the Federal Court
- (f) the Ombudsman and the Human Rights Commission
- (g) representations to the Minister or the Department.

308. The Immigration Review Panels (IRP) have been established to investigate twelve categories of decisions and to recommend to the Minister whether to vary or uphold the original DIEA decision. To be eligible to seek review, the decision must come within one of the following twelve review rights:

- 1. refusal to allow migrant entry to a sponsored relative
- 2. refusal to accept a sponsorship
- 3,4. refusal to grant permanent residence to people eligible under s.6A(1)
- 5. refusal to issue or cancellation of a return endorsement
- 6. grant of a TEP to someone who arrives with a migrant visa,
- 7,8,9. refusal to extend or cancellation of a TEP for certain categories of visitors and temporary residents
- 10. refusal to grant citizenship
- 11. PNCs liable for deportation who are eligible for consideration for permanent residence under s.6A(1)(b)
- 12. PNCs liable for deportation under s.16(1).

However, the 12 review categories are narrowly defined and there are significant areas of decision where review is not available, such as refusal to grant an entry permit, cancellation of a visa, the requirement to provide an assurance of support, deportation under section 18 and refusal to grant refugee status.

309. In 1983, 4 543 cases were submitted for review by the IRPs, and 1 964 were finalised. In 376 of these, IRPs recommended that the primary decision be changed. DIEA accepted 269 of these recommendations.

310. The Commission notes that the IRPs have made a useful contribution but considers the system inadequate because:

- (a) it has no statutory basis and availability of review is not referred to in the legislation
- (b) it can only review certain categories of decisions and may only make recommendations
- (c) it is not seen as independent from DIEA
- (d) applicants can rarely appear before the IRPs to make their case
- (e) applicants may not be given access to all the information required to make the best case, including reasons for the decision
- (f) review forms must be typed and in English.

311. Under section 66E of the Act, the Administrative Appeals Tribunal can review decisions, but only in relation to section 12 deportations and to refusal to allow a person to act as a migration agent under section 48. The AAT is an independent body which normally reviews on the merits, but its jurisdiction under section 66E is limited to two categories of decision and it has only recommendatory powers. Only Australian citizens and permanent residents are eligible to apply for review under section 12 of the Act.

312. The Security Appeals Tribunal (SAT) has power to review security assessments made by ASIO. Because only Australian citizens or permanent residents are eligible to seek review by the SAT, adverse security assessments leading to negative decisions in relation, among others, to change of status, refusal or cancellation of a visa, refusal of an entry permit and cancellation of a TEP, would not be reviewable. Decisions relating to deportation on security grounds under section 14 and the refusal or cancellation of a return endorsement under section 11A(1) (b) and 11B are reviewable by the SAT.

313. The Committee for the Determination of Refugee Status (DORS) considers claims for refugee status and makes recommendations to the Minister. Adverse decisions are referred back to the DORS Committee for review when an unsuccessful applicant seeks reconsideration of the case and may be referred back to it by the Minister or DIEA where further information becomes available or further advice is sought. The Commission has made a recommendation in paragraph 165 on the need for the DORS Committee to be given a measure of independence by the appointment of an independent and respected Chairman.

314. The passage of the Administrative Decisions (Judicial Review) Act, 1977 has considerably facilitated judicial review and has been used for the review of decisions made under the Act relating to deportation and the cancellation of a TEP. Judicial review, however, considers only the legality, not the merits of a decision and the costs of mounting a case for review through the Federal or High Court may prevent many people from applying. It was held by Davies J. in the Federal Court in *Mayer v. Minister for Immigration and Ethnic Affairs*, unreported, 10 October 1984, that a person in Australia who was refused recognition as a refugee was entitled to make a request under section 13 of the Administrative Decisions (Judicial Review) Act 1977 for the Minister's reasons in refusing him refugee status. The ultimate question in the case was whether a decision to refuse refugee status was covered by the Administrative Decisions (Judicial Review) Act and was a decision made 'under an enactment'. If it was, then the applicant was entitled to reasons for the Minister's decision. The difficulty in the case arose from the fact that a decision whether to grant or withhold refugee status is made under the 1951 Convention relating to the status of refugees and the 1967 Protocol thereto. These international instruments are not directly incorporated into Australian domestic law. However, Davies J. was able to say that the decision to refuse the applicant refugee status was in fact made under an enactment because the result of that decision was that the applicant became a PNC by virtue of section 6A(1) (c) of the Act, which provides, amongst other things, that an entry permit shall not be granted to a non-citizen after entry into Australia unless the Minister determines that he has the status of a refugee within the meaning of the Convention on the Status of Refugees. Lacking such an entry permit, the applicant became a PNC. There was thus a close link between a decision made under the Convention relating to the status of refugees and the provisions of the Act relating to entry permits and PNCs. The result was that the applicant was entitled to reasons for the Minister's decision.

315. The Ombudsman's role in relation to migration questions is primarily to review migration decisions in relation to cases where maladministration is alleged, i.e. the review is as to procedures rather than policy. A person may make a complaint to the Human

Rights Commission in cases where it is considered that an action by DIEA infringed that person's human rights.

However, the Commission's jurisdiction extends only to investigating the case and attempting to effect a settlement and, where settlement is not possible, making recommendations to the Attorney-General. (Nevertheless, if there has been an unlawful act of racial discrimination or sex discrimination the complaint, if not resolved by conciliation under the auspices of the Commission, may ultimately reach the courts for a civil remedy.)

316. An informal, and continually popular form of review of an adverse decision is through representations to the Minister or to DIEA. This system has several serious deficiencies. It would be difficult for people without knowledge, contacts and influence to have effective access to these avenues. The lack of formal guidelines and the fact that access is unequal tends to make the system inconsistent. Considerable DIEA and Ministerial resources are required to handle representations, and sometimes the resources of more than one Member of Parliament are involved.

317. The serious major deficiencies in the present system of migration legislation and administration which infringe the rights of persons under Article 26 of the ICCPR to equal protection of the law are the lack of statutory criteria in the Act defining the exercise of discretion in decision making (discussed in the previous section of this chapter) and an external system for the review of decisions made under the Act.

318. The Commission understands that the Administrative Review Council is inquiring into and making recommendations on the review provisions of the Act. Accordingly, it refrains from making recommendations in relation to specific review machinery. It *recommends* however that, in order to protect human rights under Article 26 of the ICCPR, any proposed amended review provisions take into account the considerations that:

- (a) a statement of reasons be required for all adverse decisions (including where a review is not available) — the statement to be full in cases where there is a right of appeal
- (b) legislative provisions require the notification of appeal rights and a statement of sections under which review can be applied for
- (c) the review system be determinative rather than recommendatory
- (d) there be ready access to interpreting and legal services
- (e) multilingual application forms be available
- (f) migrant community organisations be briefed and funded to provide assistance to applicants
- (g) a person whose case is being reviewed be given an opportunity of being heard
- (h) cases be dealt with expeditiously.

## 9. RECOMMENDATIONS

The Commission recommends that:

1. (Para 52) the status and rights of prohibited non-citizens be defined.
2. (Para 54) a review be undertaken by DIEA to ensure that, as far as possible, legal and interpreter assistance is available at critical points in the process of administering the Act.
3. (Para 55) as a result of the administration of the Act, persons within Australia are not put into a situation where they are, in effect, subject to inhuman or degrading treatment by virtue of their status as PNCs or their equivocal position while seeking change of status.
4. (Para 57) to the grounds of compassion and humanitarianism be added the grounds of human rights relating to the family and to children, which are embodied in both the ICCPR and the Declaration of the Rights of the Child.
5. (Para 58) DIEA make clear the factors it takes into account when assessing whether a de facto marriage is genuine, and that it might, as a working rule, adopt a practice of recognising as de facto couples those who have lived together for not less than one year.
6. (Para 60) for the purposes of groupings closely analogous to that of a family, the implications arising from the importance of the family in the migration program, be taken into account. This applies not only to control procedures but also to providing opportunities for persons to join their companions in Australia, where genuine and enduring bonds of friendship or companionship can be established.
7. (Para 62) early action be taken to establish an independent and external system of review, such as is provided by the AAT in most of its jurisdiction, for the major discretions exercised under the Act.
8. (Para 64) references to persons with disabilities, both mental and physical and also to children, be included in the statement of the principle of non-discrimination for the administration of the Act.
9. (Para 73) consideration be given to ensuring freedom of movement within Australia, possibly by including an overriding provision implementing Article 12 of the ICCPR.
10. (Para 84) criteria for the exercise of discretion in making decisions regarding the issue of visas be legislated.
11. (Para 88) a detailed, consolidated statement of current immigration policy, which forms the basis for the issue of visas, be made publicly available and regularly brought up-to-date.
12. (Para 91) staffing levels at overseas posts be allocated according to volume of demand to ensure the implementation of a non-discriminatory policy.
13. (Para 93) in order to conform with the spirit and intention of the ICCPR, Article 23, and in order to give credibility to DIEA's humanitarian commitment to the family, efforts be made to reduce delays which keep families separated for long periods.
14. (Para 95) there be no impediment to the sponsorship for permanent residence of the spouse and/or dependent children of an Australian citizen or permanent resident.
15. (Para 99) the assurance of support system, including the arrangements for recovery of

Special Benefits, which appears to restrict the right to family reunion and which has potentially discriminatory aspects on grounds of race, be reviewed, and, if possible, discontinued but without affecting the family reunion policy.

16. (Para 105) diseases or conditions no longer be prescribed for the purposes of section 16(1) (c) (i) of the Act and that Regulation 26, accordingly, be repealed.
17. (Para 106) the revised entry manual now in preparation be critically examined with a view to separating out health and disability considerations.
18. (Para 109) a disabled person seeking to immigrate be assessed on the basis of the ordinary selection criteria applicable to every other applicant.
19. (Para 115) the basis of migrant entry, including the assessment of the capacity of a family or a person to cope with migration to Australia, should be reviewable by an independent body such as the AAT at the instance of a relative or sponsor resident in Australia.
20. (Para 116) DIEA's Legal Manual should draw specific attention to the requirements of the Racial Discrimination Act and the Sex Discrimination Act.
21. (Para 249) the definition of refugee, for the purposes of determinations of refugee status, be included in the Act.
22. (Para 124) consideration be given to making decisions on determination of refugee status subject to review at the request of relatives in Australia by the new review machinery proposed by the Commission.
23. (Para 129) as for overall migration policy, there be a review of practice to ensure that refugee policy be administered in a non-discriminatory manner.
24. (Para 131) refugees with disabilities be assessed on the selection criteria applicable to other refugee applicants and that there should be no additional requirement for 'outstanding qualities' or 'compassionate' grounds, etc.
25. (Para 137) profiles for assessing visitor bona fides be based on a reliable and accurate record of overstayers and that any practice relating to the assessment of the bona fides of applicants for visitors' visas be administered in a non-discriminatory manner.
26. (Para 139) decisions made by DIEA, with regard to the spouse and/or dependent children of overseas students be consistent with Article 23 of the ICCPR which would, for example, give students a right to have members of their family come with them provided adequate arrangements for support were made.
27. (Para 141) criteria for the exercise of discretion, in making decisions regarding the cancellation of visas, be legislated and that the cancellation of a visa be subject to review by an independent body such as the AAT.
28. (Para 147) a non-citizen, whose period of permanent residence has reached a nominated period, say 3 or 5 years, has satisfied any assessments regarding his or her true country of residence and that this not be a consideration in situations where return endorsements may be cancelled or the issue of a replacement return endorsement refused.
29. (Para 149) a permanent resident be entitled to return to Australia with his or her Australian citizen spouse regardless of time spent outside Australia, in cases where the marriage remains intact, or in the event of the death of the Australian citizen spouse.

30. (Para 153) comprehensive statistics be kept by DIEA to assist in planning, implementing and administering its immigration program effectively and to ensure that no discrimination is involved.
31. (Para 156) consistent with Australia's obligations under the ICCPR, DIEA take continuing care to ensure that the small minority of arrivers in Australia who remain in the position of being deemed not to have entered Australia are accorded the right to equal treatment with others under the law (ICCPR Article 26), the right to security of person (ICCPR Article 9) and the right to freedom from degrading treatment (ICCPR Article 7).
32. (Para 161) the Act be amended to enable any person who reasonably seeks the status of refugee upon arrival to be given a TEP until his or her claim is considered in Australia and that if it is determined that the person has the status of a refugee he or she be eligible to apply for permanent residence in Australia under section 6A(1) (c).
33. (Para 164) procedures in relation to the assessment of persons arriving in Australia without visas who claim, or might reasonably claim, refugee status, be along the following lines:
  - (a) every practicable effort be made to identify persons who might reasonably claim refugee status, and they and those claiming the status be informed of the meaning of the term status of refugee and of the procedures associated with applying for it
  - (b) it be mandatory for relevant DIEA officers to advise people who might reasonably seek, or who seek, refugee status of their rights including-
    - (i) the right to a confidential interpreter
    - (ii) the right of access to assistance by a relevant community agency
    - (iii) the right to advice on refugee procedures in Australia
    - (iv) the right to legal representation
  - (c) it be mandatory for relevant DIEA officers to advise the DORS Committee of interviews with all potential refugees
  - (d) all people seeking refugee status be allowed to put their case to the DORS Committee for consideration and, where there is doubt, the matter should be referred to the Committee
  - (e) appropriate interpreting services be provided
  - (f) the standard questions currently asked by Control Officers (Immigration Inspectors) be reviewed and particular attention paid to questions which might ascertain whether or not the interviewee might be eligible for refugee status and thus further interview
  - (g) access to the UNHCR representative in Australia, or where appropriate to relevant community agencies such as Amnesty International, be provided to all applicants for refugee status by their being advised of its availability as a matter of normal procedure.
34. (Para 165) to enhance its standing, at least the Chairperson of the DORS Committee be an independent person of some stature, and an appeal permitted from decisions of the Minister to whatever appeals structure is determined.
35. (Para 169) the reporting and inspecting procedures associated with Regulation 5 be limited to cases involving a possible risk to public health.
36. (Para 169) persons with disabilities not automatically become PNCs.
37. (Para 169) an entry permit in respect of a disabled person not be withheld unless the individual concerned has a condition likely to pose a threat to public health.

38. (Para 171) refusal to issue an entry permit to a person arriving with a valid visa be the subject of review by an independent body such as the AAT.
39. (Para 173) a genuine change in marital status of persons granted visas for permanent residence not be taken into account when granting an entry permit.
40. (Para 174) refusal of entry to a person who claims to be an Australian citizen be reviewable by an independent body such as the AAT.
41. (Para 175) criteria for the exercise of the discretion to cancel a TEP be included in the Act, and that the decision be made subject to review by an independent body such as the AAT.
42. (Para 181) paragraphs (c), (d) and (e) of section 6A(1) be amended to allow people without TEPs to apply for change of status.
43. (Para 181) TEPs be issued to those whose applications for change of status have been accepted for consideration and who do not possess a valid TEP at the time of application, except those the subject of a valid Deportation Order.
44. (Para 181) the TEP of a person whose application for change of status is being considered not expire until the application has been duly processed (including the time taken to complete review processes) and the decision communicated to the applicant.
45. (Para 183) where the application has been refused the TEP not expire until a reasonable period after the decision to enable the applicant to make arrangements for voluntary departure from Australia.
46. (Para 184) unconditional TEPs be issued to all applicants for change of status.
47. (Para 186) decisions made under section 6A be reviewable before an external tribunal such as the AAT.
48. (Para 187) applications for change of status on the grounds of a de facto relationship with an Australian resident or citizen be considered under section 6A(1) (b) of the Act.
49. (Para 188) assessments of genuineness of marriages or de facto relationships be conducted in a manner consistent with Articles 17 and 23 of the ICCPR.
50. (Para 201) either the power to grant amnesties should be restored or guidelines for the exercise of the power to allow change of status of PNCs under section 6A be included that would be consistent with the relevant human rights, e.g. in relation to the family (ICCPR Article 23) and to cruel or inhuman treatment (ICCPR Article 7).
51. (Para 202) control practices for the detection and apprehension of PNCs be based on accurate and up-to-date information to ensure that detections and deportations occur approximately in proportion to the racial representation of PNCs in Australia.
52. (Para 204) due consideration be given to the right not to be subjected to arbitrary interference with privacy and family when searches are carried out, especially where the premise is one in which it might reasonably be expected that families will be sleeping or that residents not under suspicion may be present.
53. (Para 206) in order to recognise the right under Articles 9(2) and 25 of the ICCPR to be informed, in the PNC's own language, of the reasons for his or her arrest, interpreters, as a matter of course, accompany arresting officers.
54. (Para 207) a PNC be afforded all facilities to present his or her case at section 38

detention hearings and that he or she be informed of this right as soon as detained and in a language which he or she understands.

55. (Para 208) people detained as suspected PNCs be informed, as soon as they are detained and in a language they understand, of the right to be brought before a prescribed authority within forty-eight hours and every seven days thereafter.
56. (Para 209) in order that a PNC be guaranteed the rights set out under Article 9(3) of the ICCPR, bail provisions for people detained, either as suspected PNCs or pending deportation, be included in the Act.
57. (Para 210) the Act be amended to provide for the establishment and maintenance of detention centres and the practice of detaining PNCs in gaols with criminals cease forthwith.
58. (Para 212) a person whose deportation is being considered be entitled to, or be afforded, appropriate facilities to argue his or her case.
59. (Para 212) the decision to deport under section 18 be subject to review by an independent body.
60. (Para 213) when considering the merits of a case for the deportation of a PNC under section 18, the rights of the Australian citizen child be a paramount consideration so the parent/s of that child is/are deported only in exceptional circumstances.
61. (Para 214) any practice in relation to a PNC which infringes the rights established by the international human rights instruments be discontinued.
62. (Para 223) in the interests of protecting the rights of the individual from arbitrary arrest and deportation (Article 9 of the ICCPR) the Minister be able to deport under section 14(1) only if he has received advice from ASIO, as to the threat to security, and that advice would justify deportation.
63. (Para 229) the grounds for the exercise of the general power of deportation contained in section 18 of the Act be specified as being subject to, at least, the following considerations relating to human rights:
  - (a) the situation of the family
  - (b) the degree of absorption including the period resident in Australia
  - (c) the rights of children involved
  - (d) the evidence of cruel, inhuman or degrading treatment
  - (e) the right to interpreters, particularly in any legal processes
  - (f) the right to legal assistance
  - (g) the right to protection during interrogation.
64. (Para 236) deportation orders in respect of all persons (whether permanent residents or temporary residents) remain valid for only three years from the date of issue, and that after that date they should automatically lapse.
65. (Para 236) any decision to issue a fresh deportation order be taken only after review of the circumstances by a person other than the person originally issuing the order, or by the Minister if the Minister issued the original order.
66. (Para 245) section 30(3) be amended to provide that a person is not taken to have aided a PNC by virtue of giving aid or advice in the course of duty, provided that such advice is not in relation to the avoidance of detention.
67. (Para 250) review arrangements be established that can be brought into operation quickly where persons deemed not to have entered Australia are being held in custody.

68. (Para 250) a minimum period of detention be enforced, and after a short period, e.g. one week, there be a process by which the continued detention of a person deemed not to have entered Australia is reviewed by a court and if possible a conditional form of release provided.
69. (Para 253) section 34 be amended to require that search warrants be issued in a time, place and person-specific manner and by a magistrate.
70. (Para 253) use of force not normally be authorised to DIEA officers operating under the Act, but be the responsibility of police officers.
71. (Para 254) DIEA officers maintain strict adherence to the instructions not to enter the premises between 9 p.m. and 6 a.m. if there are reasonable grounds for believing that the search can be done successfully at another time and identify themselves to occupants of the premises and explain the purpose of the search in a language the occupants understand.
72. (Para 253) before a search arrangement be made, in other than exceptional circumstances, to have an interpreter present or some way of communicating with persons who may not be able to understand English, e.g. through a card system as used on occasions by police forces.
73. (Para 257) there be specific provision in the Act authorising the Minister to maintain and operate Immigration Detention Centres.
74. (Para 261) provisions in the Resident Control Manual for determining that a person arrested under section 38(1) of the Act need not be detained in custody, be given full force and effect.
75. (Para 261) continuing detention not be resorted to where the case of the person arrested under section 38(1) of the Act has merit or where the processing for ascertaining future status is likely to be lengthy.
76. (Para 265) a system of conditional release of detainees arrested under section 38(1) of the Act be developed immediately and given the support of the law.
77. (Para 265) conditions of release for persons arrested under section 38(1) of the Act be reviewable by the courts and be only such as are reasonable having regard to all the circumstances of the case.
78. (Para 266) safeguards and conditional release provisions similar to those in recommendations 73-77 be provided for persons arrested under section 39(1) of the Act.
79. (Para 267) reports be made to the Parliament in the Annual Report of DIEA of all cases in which arrest was made without warrant.
80. (Para 268) either the person arrested be given the opportunity to immediately inform family or friends of his or her whereabouts, or DIEA assume the responsibility.
81. (Para 268) interpreters be made available at the time of arrest and immediately thereafter so that people arrested and detained can be informed of the reasons for their arrest and their rights and can notify their families.
82. (Para 269) arrangements be made to ensure the availability of legal assistance at any time of the day or night as soon as a person is taken into custody.
83. (Para 270) the reforms and improvements now under way at the Villawood and Maribyrnong Detention Centres, and the action recommended in its Sixth Report on

the Villawood Centre, be continued to completion as quickly as possible and that inadequacy of resources should not be used as an excuse to prevent solution of some of the outstanding problems such as adequate training of protective custody staff and provision of adequate services by a welfare officer.

84. (Para 272) section 41 of the Act be amended so that it is mandatory for persons in custody to be told of their legal rights in a language they understand.
85. (Para 274) section 42 of the Act be amended to provide for an officer to put such questions as are reasonably necessary rather than as he considers necessary.
86. (Para 275) the power to question be limited to objectively necessary questions and that these be limited to determining the name, place of residence and origin of the person; and the date and place of entry of the person into Australia.
87. (Para 278) there be strict guidelines under section 43 which must be adhered to in order to avoid misuses of the provisions for photographing and measuring suspected PNCs or deportees.
88. (Para 278) section 43 be amended to provide for the destruction of records where positive identification is not made.
89. (Para 281) a court set the original conditions for the taking of deposits or securities in other forms under section 54 of the Act.
90. (Para 288) the proposal of the Senate Standing Committee on Constitutional Affairs in its report *The Burden of Proof in Criminal Proceedings*, that averment provisions be kept to a minimum and legislation be enacted controlling their use by prosecutors, be implemented for the purposes of section 56 of the Act.
91. (Para 294) either lists be prepared that indicate which officers make particular decisions, or, a statement or practice, which explains the location of powers, be prepared.
92. (Para 297) the Act, when amended, include in the provisions conferring powers of decision on officers and others a requirement that reasons be given for the decision.
93. (Para 300) statements of reasons for decisions be given for the purposes of Section 25D of the Acts Interpretation Act at least in the following cases—
  - (a) refusal to grant change of status under section 6A
  - (b) cancellation of a TEP under section 7
  - (c) refusal to issue, or cancellation of, a visa
  - (d) deportation of a non-citizen under section 12
  - (e) where the general power to deport under section 18 is exercised
  - (f) removal and custody of a person under sections 36 and 36A.
94. (Para 300) the second schedule to the Administrative Decisions (Judicial Review) Act be amended to remove the exclusion of decisions in connection with the issue and cancellation of visas.
95. (Para 302) DIEA give effect to human rights in all its actions.
96. (Para 304) statutory criteria for the exercise of discretions under the Act be either incorporated in the Act or embodied in other legislative instrument.
97. (Para 305) a statement that all decisions made under the Act will be in accordance with the human rights instruments to which Australia is signatory be added to the nine principles of immigration policy and included in the Act.

98. (Para 306) as well as providing statutory criteria for the exercise of discretion in decision making, review on the merits of most decisions be available, based on these criteria.
99. (Para 318) in order to protect human rights under Article 26 of the ICCPR, any proposed amended review provisions take into account the following considerations that—
- (a) a statement of reasons be required for all adverse decisions (including where a review is not available) — the statement to be full in cases where there is a right of appeal
  - (b) legislative provisions require the notification of appeal rights and a statement of sections under which review can be applied for
  - (c) the review system be determinative rather than recommendatory
  - (d) there be ready access to interpreting and legal services
  - (e) multilingual application forms be available
  - (f) migrant community organisations be briefed and funded to provide assistance to applicants
  - (g) a person whose case is being reviewed be given an opportunity of being heard
  - (h) cases be dealt with expeditiously.

## **APPENDIX I**

### **The Migration Act 1958 and Subsequent Amendments**

The Migration Act 1958 (1981 reprint) together with:

- Statute Law (Miscellaneous Provisions) Act (No. 1) 1984 (para 67(1))
- Torres Strait Treaty (Miscellaneous Amendments) Act 1984 (Part VII — Amendments to the Migration Act 1958)
- Migration Amendment Act 1983
- Migration (Miscellaneous Amendments) Act 1983 (Parts I and II)
- Migration Amendment (Emigration of Certain Children) Act 1983
- Off-shore Installations (Miscellaneous Amendments) Act 1982 (Part VI — Amendments to the Migration Act 1958)



# MIGRATION ACT 1958

*Reprinted as at 30 June 1981*

## TABLE OF PROVISIONS

### PART I—PRELIMINARY

Section	Short title
1.	Commencement
3.	(Repealed)
4.	Repeal and savings
5.	Interpretation
5A.	Act to extend to Territory of Christmas Island

### PART II—IMMIGRATION AND DEPORTATION

#### *Division 1—Entry Permits*

- 6. Immigrant not to enter Australia without entry permit
- 6A. Conditions on which entry permits may be granted to immigrants after entry into Australia
- 7. Cancellation, expiration and renewal of entry permits
- 8. Exemptions
- 9. Entry permit to lapse upon departure from Australia
- 10. Person to cease to be prohibited immigrant if granted entry permit
- 11. Visa, &c., not to entitle persons to enter Australia

#### *Division 1A—Visas and Return Endorsements*

- 11A. Visas and return endorsements
- 11B. Cancellation, expiration and renewal of visas and return endorsements
- 11C. Carriage of persons to Australia without documentation

#### *Division 2—Deportation*

- 12. Aliens convicted of crimes
- 13. Deportation of immigrants in respect of matters occurring within five years after entry
- 14. Certain persons may be deported after report by Commissioner
- 15. Re-entry not to be entry in certain cases
- 16. Persons entering Australia in certain circumstances to be prohibited immigrants
- 17. (Repealed)
- 18. Deportation of prohibited immigrants
- 19. Dependents of deportee

TABLE OF PROVISIONS-continued

- 20. Deportation order to be executed
- 21. Duty of master, &c., of vessel which brought deportee to Australia to provide passage
- 21A. Deportation and maintenance costs
- 22. Deportees to be received on board vessels

*Division 3-Duties of Masters in relation to Crews*

- 23. Production of identity documents and mustering of crew
- 24. Master to report absences
- 25. (Repealed)
- 26. Exemptions

*Division 4-Offences in relation to entry into, and remaining in, Australia*

- 27. Offences in relation to entering or remaining in Australia
- 28. Penalty on master, owner, agent and charterer of vessel
- 29. Stowaways
- 30. Persons concerned in bringing immigrants secretly into Commonwealth or harbouring prohibited immigrants
- 31. False papers, &c.
- 31A. Minister or authorized officer may require prohibited immigrant to leave Australia
- 31B. Offences in relation to work

*Division 5-Examination, Search and Detention*

- 32. Appointment of boarding stations
- 33. Vessels to enter ports and be brought to boarding stations
- 34. Exemption
- 35. Prohibited immigrants, &c., may be prevented from landing
- 36. Custody of prohibited immigrant during stay of vessel in port
- 36A. Custody of prohibited immigrant during stay of aircraft in Australia
- 37. Powers of entry and search
- 38. Arrest of prohibited immigrant
- 39. Arrest of deportee
- 40. Prescribed authorities
- 41. Persons in custody to have access to legal advice
- 42. Persons may be required to answer questions
- 43. Identification of persons in custody
- 44. Detention of vessel for purpose of search
- 45. Detention of vessel pending recovery of penalty

*Division 6-Immigration Agents*

- 46. Interpretation
- 47. Persons proposing to act as immigration agents to give notice to Department
- 48. Minister may direct persons not to act as immigration agents
- 49. Persons not to describe themselves as registered or approved immigration agents
- 50. Maximum charges
- 51. Immigration agents liable to furnish particulars of fees, & c.
- 52. Undertaking to provide passage to be carried out within a reasonable time
- 53. Provisions relating to offences

*Division 7-General*

- 54. Securities
- 55. Proof of certain matters recited in deportation orders
- 56. A ver m e n t s    56A. Reports of absences of crews of vessels
- 57. Proof of certain matters
- 58. Immigrant centres

*Migration Act 1958*

TABLE OF PROVISIONS—continued

PART III—EMIGRATION OF CERTAIN CHILDREN

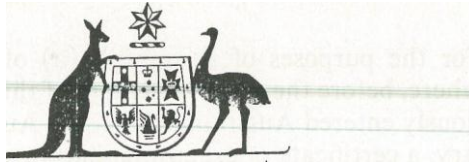
- 59. Interpretation
- 60. (Repealed)
- 61. Preservation of State laws
- 62. Taking of certain children out of Australia prohibited
- 63. Obligations of owners, &c., of vessels
- 64. (Repealed)

PART IV—MISCELLANEOUS

- 65. Obstructing or deceiving Minister or officers
- 65A Identification card to be deemed to continue to be in a form approved by the Minister
- 66. Institution of prosecutions
  - 66A Offences in relation to escaping from custody
  - 66B Commencement of prosecutions
  - 66C Jurisdiction of courts
  - 66D Delegation
  - 66E Review of decisions
- 67. Regulations

THE SCHEDULE

Acts Relating To Immigration And Deportation Repealed



-4..s AUSTRALIA

4;

## MIGRATION ACT 1958

An Act relating to Immigration, Deportation and Emigration

### PART I—PRELIMINARY

1. This Act may be cited as the *Migration Act 1958* Short title
2. The several Parts of this Act shall come into operation on such Commence-  
dates as are respectively fixed by Proclamation.' ment

Section 3  
repealed by  
No. 216, 1973, s.  
3

4. ( 1 ) The Acts specified in the Schedule to this Act are repealed. Repeal and
- (2) Section nine of the *War Precautions Act Repeal Act 1920-1955* savings  
and the heading to that section, and the Schedule to that Act, are  
repealed.
- (3) The *War Precautions Act Repeal Act 1920-1955*, as amended by  
this section, may be cited as the *War Precautions Act Repeal Act*  
1920-1958.

- (4) Notwithstanding the repeals effected by this section—  
(a) a certificate of exemption in force under the *Immigration Act*  
1901-1949 immediately before the date of commencement of this  
Part shall, for all purposes of this Act, be deemed to be a tempor-  
ary entry permit granted under this Act to the person specified in  
the certificate and authorizing that person to remain in Australia  
for a period ending on the date on which the certificate would  
have expired if this Act had not been passed.

Amended by  
No. 216, 1973,  
s. 3

s. 4

(5) For the purposes of paragraph (a) of the last preceding subsection, where, before the commencement of this Part, an immigrant who had previously entered Australia re-entered Australia and, upon or after the re-entry, a certificate of exemption purported to be issued to him, the certificate shall be deemed to have been as validly issued as if he had not previously entered Australia.

Interpretation

Sub-section (1) amended by No. 10, 1966, s. 3; No. 216, 1973, s. 3; No. 91, 1976, s. 3; No. 117, 1979, s. 3; No. 118, 1979, s. 3; No. 89, 1980, s. 3; No. 175, 1980, s. 3

**5. (1)** In this Act, unless the contrary intention appears—

"alien" means a person who is not—

- (a) a British subject;
- (b) an Irish citizen; or
- (c) a protected person;

"authorized officer", in relation to the exercise of any power or the discharge of any duty or function under this Act, means a person authorized by the Minister to exercise that power or discharge that duty or function;

"crime" includes any offence;

"deportation" means deportation from Australia;

"deportation order" means an order for the deportation of a person made under, or continued in force by, this Act;

"deportee" means a person in respect of whom a deportation order is in force;

"enter" includes re-enter;

"entered" includes re-entered;

"entry" includes re-entry;

"entry permit" means a permit issued under section six of this Act;

"identity document", in relation to a member of the crew of a vessel, means—

- (a) an identification card, in accordance with a form approved by the Minister, in respect of the member signed by the master of the vessel; or
- (b) a document, of a kind approved by the Minister as an identity document for the purposes of this Act, in respect of the member;

"immigrant" includes a person intending to enter, or who has entered, Australia for a temporary stay only, where he would be an immigrant if he intended to enter, or had entered, Australia for the purpose of staying permanently;

"master", in relation to a vessel, means the person in charge or command of the vessel;

"member of the crew" means—

- (a) in relation to a vessel other than an aircraft—the master of the vessel, or a person whose name is on the articles of the vessel as a member of the crew; or

- (b) in relation to an aircraft—the master of the aircraft, or a person employed by the operator of the aircraft and whose name is included in a list of members of the crew of the aircraft furnished by the master as prescribed;

"officer", in relation to the exercise of any power or the discharge of any duty or function under this Act, means—

- (a) an officer of the Department of Immigration and Ethnic Affairs;
- (b) a person who is an officer for the purposes of the *Customs Act 1901*;
- (c) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or
- (d) any other person who is, or who is included in a class of persons who are, authorized by the Minister to exercise that power or to discharge that duty or function;

"passport" includes a document of identity issued from official sources, whether in or outside Australia, and having the characteristics of a passport;

"port" means a proclaimed port or a proclaimed airport; "proclaimed airport" means—

- (a) an airport appointed under section 15 of the *Customs Act 1901*; or
- (b) an airport appointed by the Minister under sub-section (1A);

"proclaimed port" means—

- (a) a port appointed under section 15 of the *Customs Act 1901*; or
- (b) a port appointed by the Minister under sub-section (1A);

"protected person" has the same meaning as in the *Nationality and Citizenship Act 1948-1958*;<sup>2</sup>

"return endorsement" means a return endorsement in force under section 11A;

"stowaway" means a person who is or was on board a vessel at the time of the arrival of the vessel from a place outside Australia at a port or place in Australia and is not or was not—

- (a) a *bona fide* passenger on the vessel; or
- (b) a member of the crew of the vessel;

"temporary entry permit" means an entry permit referred to in sub-section (6) of section six of this Act;

"Territory" means—

- (a) an internal Territory; or
- (b) the Territory of Christmas Island;

s. 5

"the holder", in relation to an entry permit, means the person to whom the entry permit was granted or a person who is deemed to be included in the entry permit;

"ticket" includes a travel document in respect of the conveyance of a person from one place to another place;

"vessel" includes an aircraft;

"visa" means a visa in force under section 11A.

Inserted by  
No. 75, 1980,  
s. 3

(1A) The Minister may, by notice published in the *Gazette*—

(a) appoint ports in the Territory of Christmas Island as proclaimed ports for the purposes of this Act and fix the limits of those ports; and

(b) appoint airports in the Territory of Christmas Island as proclaimed airports for the purposes of this Act and fix the limits of those airports.

(2) For the purposes of this Act, a person shall be deemed to enter Australia—

(a) in the case of a person arriving in Australia by a vessel other than an aircraft—when he disembarks from the vessel in Australia; or

(b) in the case of a person arriving in Australia by an aircraft—when he disembarks from the aircraft in Australia or, if he so disembarks at a proclaimed airport, when he leaves the airport,

whether or not he intends to return to the vessel or aircraft.

(3) For the purposes of this Act, a person shall be deemed to have left Australia if he has gone outside the territorial limits of Australia.

Amended by  
No. 216, 1973,  
s. 3: No. 175,  
1980, s. 3

(4) For the purposes of this Act, a person shall not be deemed to have entered or re-entered Australia, or to enter or re-enter Australia, where, having left Australia—

(a) he returned or returns to Australia, within the prescribed time after the date on which he left Australia, in the vessel in which he left Australia after having remained, at all times during his absence from Australia, a passenger in, or a member of the crew of, that vessel; or

(b) he returned or returns to Australia without having entered any country other than an external Territory other than the Territory of Christmas Island,

unless he was, at the time when he left Australia, a person whose deportation had been ordered.

(5) In the last preceding sub-section, "the prescribed time", in relation to a person, means—

(a) thirty days; or

(b) where, at the time when that person left Australia, there was in force an instrument under the hand of an authorized officer

approving a longer time as the prescribed time in the case of that person or a class of persons in which that person was included—that longer time.

(6) For the purposes of this Act, a reference to the holder of a visa or return endorsement shall be read as a reference to the person to whom a visa or return endorsement was granted and as including a reference to any other person whose name is included in that visa or return endorsement.

Added by  
No. 117,1979,  
s. 3

5A. (1) This Act extends to the Territory of Christmas Island.

(2) Subject to this Act, the Territory of Christmas Island—

- (a) shall be deemed to be part of Australia for the purposes of this Act; and
- (b) shall be deemed not to be a place outside Australia.

Act to extend  
to Territory  
of Christmas  
Island

Inserted by  
No. 175,1980,  
s.4

## PART II—IMMIGRATION AND DEPORTATION'

### *Division I—Entry Permits*

6.<sup>4</sup> (1) An immigrant who, not being the holder of an entry permit that is in force, enters Australia thereupon becomes a prohibited immigrant.

Immigrant  
not to enter  
Australia  
without  
entry permit

(2) An officer may, in accordance with this section and at the request or with the consent of an immigrant, grant to the immigrant an entry permit.

(2A) The Minister may, in accordance with this section and at the request or with the consent of an immigrant who has entered Australia, grant to the immigrant an entry permit other than a temporary entry permit.

Inserted by  
No. 175,1980,  
s.5

(3) An entry permit shall be in a form approved by the Minister and shall be expressed to permit the person to whom it is granted to enter Australia or to remain in Australia or both.

(4) For the purposes of the last preceding sub-section, where a notation in a form approved by the Minister as a form of entry permit is made by an officer in a passport or other document of identity held by a person and the notation does not specify the name of any person as the person to whom it relates, the notation has effect as if it were expressed to relate to the person holding the passport or other document.

(5) An entry permit may be granted to an immigrant either upon his arrival in Australia or, subject to section 6A, after he has entered Australia (whether or not that entry took place before, or takes place after, the commencement of this Part).

Substituted by  
No. 117,1979,  
s. 4; amended by  
No. 175,1980,  
s.5

s. 6

(6) An entry permit that is intended to operate as a temporary entry permit shall be expressed to authorize the person to whom it relates to remain in Australia for a specified period only, and such a permit may be granted subject to conditions.

Inserted by  
No. 17, 1979,  
s. 4

(6A) Without limiting the conditions subject to which an entry permit referred to in sub-section (6) may be granted, such a permit may be granted subject to a condition imposing restrictions with respect to the work that may be performed by the holder in Australia, including restrictions on performing any work, or work other than specified work or work of a specified kind, without the permission, in writing, of an authorized officer.

(7) A woman who enters Australia in the company of, and whose name is included in the passport of, or any other document of identity of, her husband shall be deemed to be included in any entry permit granted to her husband before his entry and written on that passport or other document of identity, unless the contrary is stated in the entry permit.

(8) A child under the age of sixteen years who enters Australia in the company of, and whose name is included in the passport of, or any other document of identity of, a parent of the child shall be deemed to be included in any entry permit granted to that parent before the entry of that parent and written on that passport or other document of identity, unless the contrary is stated in the entry permit.

Conditions  
on which  
entry permits  
may be  
granted to  
immigrants  
after entry  
into  
Australia

Inserted by  
No. 175, 1980,  
s. 6

6A. (1) An entry permit shall not be granted to an immigrant after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say—

- (a) he has been granted, by instrument under the hand of a Minister, territorial asylum in Australia;
- (b) he is the spouse, child or aged parent of an Australian citizen or of the holder of an entry permit;
- (c) he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or of the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967;
- (d) he is the holder of a temporary entry permit which is in force, is authorized to work in Australia and is not a prescribed immigrant; or
- (e) he is the holder of a temporary entry permit which is in force and there are strong compassionate or humanitarian grounds for the grant of an entry permit to him.

(2) An entry permit shall not be granted to an immigrant in respect of whom the condition specified in paragraph (1) (a) is fulfilled (whether

or not any other condition specified in sub-section (1) is also fulfilled in respect of him) otherwise than by the Minister.

(3) Subject to sub-section (2), an entry permit shall not be granted to an immigrant after his entry into Australia otherwise than by—

- (a) the Minister; or
- (b) an officer authorized by the Minister, by instrument in writing, to be an authorized officer for the purposes of this section.

(4) In sub-section (1)—

- (a) a reference to an aged parent shall be read as a reference to a parent who has attained the age upon the attainment of which an age pension might be granted to him under the *Social Services Act 1947*;
- (b) a reference to a child of a person shall be read as a reference to a child of the person who is not married and-
  - (i) has not attained the age of 18 years; or
  - (ii) has attained the age of 18 years but has not attained the age of 21 years and has been determined by the Minister to be an integral part of the family of that person; and
- (c) a reference to a prescribed immigrant shall be read as a reference to-
  - (i) the holder of a temporary entry permit who, in connection with his application, or last application, for a visa in respect of his travel to Australia acknowledged, in writing, that he understood and accepted that he would leave Australia on the completion of his studies or training in Australia;
  - (ii) the holder of a temporary entry permit who is the spouse or a child of a person referred to in sub-paragraph (i) and was granted a temporary entry permit permitting him to enter Australia only by reason that he was the spouse or child of that person; or
  - (iii) the holder of a temporary entry permit who, immediately before the grant of that temporary entry permit, was a person referred to in paragraph 8 (1) (b) or the spouse or dependent relative of such a person.

(5) For the purposes of sub-section (4), the reference to a visa in sub-paragraph (c) (i) shall be read as including a reference to any visa or similar notation, or form of provisional authority to enter Australia, that was issued before 1 November 1979.

(6) For the purposes of sub-section (1), but without limiting the manner in which a person may have been, or may be, authorized to work in Australia, the holder of a temporary entry permit granted before 29 October 1979 shall be taken to be authorized to work in Australia if, in

the application or last application to visit Australia made by him or on his behalf—

- (a) in a case where the application was made by the holder—he did not declare that he would not engage in employment in Australia;
- (b) in a case where the application was made on behalf of the holder—the person making the application did not declare that the holder would not engage in employment in Australia.

(7) For the purposes of sub-section (1), a person who is the holder of a temporary entry permit granted after 28 October 1979 shall be taken to be authorized to work in Australia—

- (a) if that temporary entry permit was not granted subject to any condition imposing restrictions with respect to the work that may be performed by him in Australia;
- (b) if that temporary entry permit was granted subject to a condition imposing restrictions on his performing work other than specified work or work of a specified kind in Australia; or
- (c) if that temporary entry permit was granted subject to a condition imposing restrictions on his performing any work without the permission, in writing, of an authorized officer, and such a permission in writing has been given and has not been revoked.

(8) In this section, a reference to an entry permit shall be read as a reference to an entry permit other than a temporary entry permit.

Cancellation,  
expiration  
and renewal  
of entry  
permits

7. (1) The Minister may, in his absolute discretion, cancel a temporary entry permit at any time by writing under his hand.

(2) At any time while a temporary entry permit is in force or after the expiration or cancellation of a temporary entry permit, a further entry permit may, at the request of the holder, be granted to the holder and, where such a further entry permit is granted while a temporary entry permit is in force, the further entry permit shall come into force only upon the expiration or cancellation of the existing entry permit.

(3) Upon the expiration or cancellation of a temporary entry permit, the person who was the holder of the permit becomes a prohibited immigrant unless a further entry permit applicable to him comes into force upon that expiration or cancellation.

(4) Notwithstanding section ten of this Act, a person who has become a prohibited immigrant by virtue of the last preceding sub-section ceases to be a prohibited immigrant at the expiration of a period of five years from the time at which he became a prohibited immigrant unless, at the expiration of that period, a deportation order in relation to him is in force.

Sub-section (5)  
omitted by  
No. 117, 1979.  
S. 5

8. (1) Nothing in this Division applies in relation to the entry into Australia of an immigrant being—

- (a) a member of the armed forces of the Crown entering Australia in the course of his duty, not being a person in respect of whom a declaration is in force under sub-section (2);
- (b) a diplomatic or consular representative of a country other than Australia, a member of the staff of such a representative or the spouse or dependent relative of such a representative, not being a person in respect of whom a declaration is in force under sub-section (2);
- (c) a person included in the complement of a vessel of the regular armed forces of a government recognized by the Commonwealth entering Australia with leave from that vessel during the vessel's stay in a port, not being a person in respect of whom a declaration is in force under the next succeeding sub-section;
- (d) a member of the crew of any other vessel entering Australia with leave from that vessel during the vessel's stay in a port, where the master of the vessel has duly complied with the provisions of Division 3 of this Part that are applicable upon arrival of the vessel at that port, not being a person in respect of whom a declaration is in force under the next succeeding sub-section; or
- (e) a person who-
  - (i) is for the time being exempted, by instrument under the hand of the Minister, from the requirements of this Division relating to entry permits; or
  - (ii) is included in a class of persons who are for the time being so exempted,
 not being a person in respect of whom a declaration is in force under the next succeeding sub-section.

Exemptions  
Sub-section (1)  
amended by  
No. 87, 1964, s. 3;  
No. 10, 1966, s. 4;  
No. 117, 1979,  
s. 6; No. 61, 1981,  
S. 115

(2) The Minister or an authorized officer may, by writing under his hand, declare, in relation to a person referred to in paragraph (a), (b), (c) (d), or a person included in a class of persons exempted under para-

Amended by  
No 87, 1964, s. 3;  
No 117, 1979, or

s  
.  
6

graph (e), of the last preceding sub-section, that it is undesirable that he be permitted to enter Australia or to remain in Australia.

Amended by  
No. 87, 1964, S. 3

(3) Where a person to whom sub-section (1) of this section applies has entered Australia and an entry permit has not been granted to that person since that entry, that person becomes a prohibited immigrant—

- (a) in the case of a person referred to in paragraph (a) of that sub-section, not being a member of the Australian armed forces—if he becomes absent without leave or ceases to be a member of the armed forces of the Crown;
- (b) in the case of a person referred to in paragraph (b) of that sub-section—if he ceases to be such a person;

s. 8

(c) in the case of a person referred to in paragraph (c) or (d) of that sub-section-

- (i) if he remains in Australia after the vessel has left the port at which he entered, or last entered, Australia; or
- (ii) if, before the vessel has so left, he becomes absent without leave or a declaration in relation to him is made under the last preceding sub-section; or

(d) in the case of a person referred to in paragraph (e) of that sub-section—if he ceases to be such a person, whether by his own act, by act of the Minister or otherwise.

Omitted by  
No. 10, 1966, s. 4;  
added by  
No. 117, 1979,  
s. 6

(4) A reference in paragraph (b) of sub-section (1) to a diplomatic or consular representative of a country other than Australia shall be read as a reference to a person who has been appointed to, or is the holder of, a post or position in a diplomatic or consular mission of that country in Australia other than a person who was ordinarily resident in Australia when he was appointed to be a member of the mission.

Entry permit  
to lapse upon  
departure  
from  
Australia

9. (1) Where an immigrant who is the holder of an entry permit leaves Australia, the entry permit has no force or effect in relation to him upon or after his re-entry into Australia.

Sub-section (2)  
omitted by  
No. 137, 1979,  
s. 7

Person to  
cease to be  
prohibited  
immigrant if  
granted entry  
permit

10. A person who has become a prohibited immigrant ceases to be a prohibited immigrant if and when an entry permit or further entry permit is granted to him, and not otherwise.

Visa, &c.,  
not to entitle  
persons to  
enter  
Australia

Substituted by  
No. 117, 1979,  
s. 8

**11. (1)** A document or notation to which this section applies issued to a person on behalf of the Commonwealth 'shall not be deemed to be an entry permit and does not entitle that person to enter Australia or to be granted an entry permit.

(2) A document or notation to which this section applies is—

- (a) a visa or return endorsement granted under this Act; or
- (b) a visa or similar notation, or a form of provisional authority to enter Australia, issued, before the commencement of this section, on behalf of the Commonwealth.

*Division 1A Visas and Return Endorsements*

Division 1A  
inserted by  
No. 117, 1979,  
s.9

11A. (1) An authorized officer may, in accordance with this section—

- endorse-  
by  
No. 117,1979,  
S. 9
- (a) grant to a person, upon request by that person, a visa with respect to travel to Australia by that person and any person whose name is included in the visa—
    - (i) on a single occasion;
    - (ii) on occasions aggregating not more than a specified number of occasions; or
    - (iii) on any number of occasions, while the visa remains in force; or
  - (b) upon request by a person who is residing in Australia, or has resided in Australia and wishes to return to Australia, grant to that person a return endorsement with respect to travel to Australia by that person and any other person whose name is included in the return endorsement on any number of occasions while it remains in force.

(2) A visa or return endorsement—

- (a) shall be in a form approved by the Minister;
- (b) shall come into force on the day on which it is granted;
- (c) shall be expressed to continue in force until the expiration of a date specified in it, or of a period specified or otherwise described in it; and
- (d) shall, notwithstanding that it is so expressed to continue in force cease to be in force upon cancellation under section 11B.

(3) For the purpose of sub-section (2) and subject to sub-section (4), where a notation in a form approved by the Minister as a form of visa or return endorsement is made by an officer in a passport or other document of identity held by a person and the notation does not specify the name of any person as the person to whom it relates, the notation has effect as if it were expressed to relate to the person holding the passport or other document.

(4) Where the spouse or child of a person, being a spouse or child whose name is included in the passport or document of identity of that person, accompanies that person to Australia, a visa or return endorsement granted by an authorized officer to that person and written on that passport or document of identity shall extend to that spouse or child if, but only if, the name of that spouse or child is included in the visa or return endorsement.

(5) An authorized officer shall not grant a return endorsement to a person who is the holder of a temporary entry permit.

s. 11B

Cancellation,  
expiration and  
renewal of visas  
and return  
endorsements

Inserted by  
No. 117, 1979, s.  
9

Carriage of  
persons to  
Australia  
without  
documen-  
tation

Inserted by  
No. 117, 1979, s.  
9

11B The Minister or an authorized officer may, in his absolute discretion, cancel a visa or return endorsement at any time by writing under his hand.

11C (1) The master, owner, agent and charterer of a vessel on which a person (not being an Australian citizen) is brought into Australia on or after the commencement of this section are each guilty of an offence against this section if the person, on his arrival in Australia—

- (a) is not in possession of a visa or return endorsement applicable to his travel to Australia on that occasion; and
- (b) is not exempted, by instrument under the hand of the Minister, from the requirements of this Division or included in a class of persons who are so exempted.

(2) A person who is guilty of an offence against this section is liable, upon conviction, to a fine not exceeding \$2,000.

(3) Notice of the making of an instrument of the kind referred to in paragraph (b) of sub-section (1) may be published in the *Gazette*.

(4) In any proceedings against the master, owner, agent or charterer of a vessel for an offence against sub-section (1), evidence that a person who arrived in Australia on board that vessel failed, on his arrival, to produce to an officer, upon demand by that officer, a visa or return endorsement applicable to that person's travel to Australia on that occasion is *prima facie* evidence that the person was not, on his arrival, in possession of such a visa or return endorsement.

(5) Where the master, owner, agent or charterer of a vessel on which a person is brought into Australia is prosecuted for an offence against sub-section (1) in relation to the bringing of that person into Australia, it is a defence if the master, owner, agent or charterer satisfies the court—

- (a) that the person was, when he boarded or last boarded the vessel\* for travel to Australia, in possession of a visa or return endorsement applicable to his travel to Australia on that occasion, being a visa or return endorsement that did not appear to have been cancelled and was expressed to continue in force until, or at least until, the date of his expected arrival in Australia;
- (b) that the master of the vessel had reasonable grounds for believing a person to be, when he boarded or last boarded the vessel for travel to Australia, a person exempted, by instrument under the hand of the Minister, from the requirements of this Division or included in a class of persons so exempted; or
- (c) that the vessel on which the person was brought into Australia entered Australia from overseas by reason only of the illness of a

Amended by  
No. 89, 1980.  
S.4

person on board the vessel, stress of weather or other circumstances beyond the control of the master.

(6) Where—

- (a) two or more persons who are the holders of the same visa or return endorsement travel to Australia on board the same vessel; and
- (b) on the arrival of those persons in Australia, one of them is in possession of that visa or return endorsement,

for the purposes of this Act, each of them shall be deemed, upon arrival in Australia, to be in possession of that visa or return endorsement.

*Division 2—Deportation*

12. Where (whether before or after the commencement of this Part) an alien has been convicted in Australia of a crime of violence against the person or of extorting any money or thing by force or threat, or of an attempt to commit such a crime, or has been convicted in Australia of any other offence for which he has been sentenced to imprisonment for one year or longer, the Minister may, upon the expiration of, or during, any term of imprisonment served or being served by that alien in respect of the crime, order the deportation of that alien.

Aliens convicted of crimes

13. Subject to section fifteen of this Act, where (whether before or after the commencement of this Part) an immigrant—

- (a) has been convicted in Australia of an offence punishable by death or by imprisonment for one year or longer, being an offence committed within five years after any entry by him into Australia;
- (b) has been convicted in Australia of an offence by reason of being a prostitute or of having lived on, or received any part of, the earnings of prostitution or of having procured persons for the purposes of prostitution, being an offence committed within five years after any entry by the immigrant into Australia; or
- (c) is, within five years after any entry by him into Australia, an inmate of a mental hospital or public charitable institution, the Minister may order the deportation of the immigrant from Australia.

Deportation of immigrants in respect of matters occurring within five years after entry

14. (1) If it appears to the Minister that the conduct of an alien (whether in Australia or elsewhere) has been such that he should not be allowed to remain in Australia, the Minister may, subject to this section, order the deportation of that alien.

Certain persons may be deported after report by Commissioner

(2) Subject to the next succeeding section, if it appears to the Minister that, in the case of an immigrant who entered Australia (whether before or after the commencement of this Part) not more than

f i v e            y e a r s            p r e v i o u s l y —  
1 1 5

**s. 14**

- (a) his conduct (whether in Australia or elsewhere) has been such that he should not be allowed to remain in Australia; or
- (b) he is a person who advocates the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilized country or of all forms of law, or advocates the abolition of organized government or the assassination of public officials, or advocates or teaches the unlawful destruction of property, or is a member of an organization which entertains and teaches any of the doctrines and practices specified in this paragraph,

the Minister may, subject to this section, order the deportation of that immigrant.

(3) The Minister shall not order the deportation of a person under this section unless he has first served on that person a notice informing that person that he proposes to order the deportation of that person, on the ground specified in the notice, unless that person requests, by notice in writing to the Minister, within thirty days after receipt by him of the Minister's notice, that his case be considered by a Commissioner appointed for the purposes of this section.

(4) If a person on whom a notice is served by the Minister under the last preceding sub-section duly requests, in accordance with the notice, that his case be considered by a Commissioner appointed for the purposes of this section, the Minister may, by notice in writing, summon that person to appear before a Commissioner specified in the notice at the time and place specified in the notice.

(5) A Commissioner for the purposes of this section shall be appointed by the Governor-General and shall be a person who is or has been a Judge of a Federal Court or of the Supreme Court of a State or Territory, or a barrister or solicitor of the High Court or of the Supreme Court of a State or Territory of not less than five years' standing.

(6) The Commissioner shall, after investigation in accordance with the next succeeding sub-section, report to the Minister whether he considers that the ground specified in the notice under sub-section (3) of this section has been established.

(7) The Commissioner shall make a thorough investigation of the matter with respect to which he is required to report, without regard to legal forms, and shall not be bound by any rules of evidence but may inform himself on any relevant matter in such manner as he thinks fit.

(8) Where a notice has been served on a person under sub-section (3) of this section, the Minister shall not order the deportation of that person under this section unless—

- (a) that person does not request, in accordance with the notice, that his case be considered by a Commissioner;

- (b) that person, having been summoned under this section to appear before a Commissioner, fails so to appear at the time and place specified in the summons; or
- (c) a Commissioner reports under this section in relation to that person that he considers that the ground specified in the notice has been established.

**15.** For the purposes of the last two preceding sections, where an immigrant who has lived in Australia continuously for a period of two years or more has thereafter left Australia, a re-entry of that immigrant into Australia (whether before or after the commencement of this Part) after he has so left Australia shall not be deemed to be or to have been an entry of that immigrant into Australia unless—

Re-entry not to be entry in certain cases

- (a) he had, at the time of the re-entry, been absent from Australia for a period exceeding five years; or
- (b) he was, at the time of leaving Australia—
  - (i) the holder of a temporary entry permit;
  - (ii) a person in respect of whom there was in force a certificate of exemption issued under the *Immigration Restriction Act 1901* or that Act as amended at any time;
  - (iii) a prohibited immigrant by virtue of this Act or any of the Acts repealed by this Act; or
  - (iv) a person whose deportation had been ordered.

**16.** (1) Where, after the commencement of this Part or before the commencement of this Part but after the commencement of the *Immigration Restriction Act 1901*,<sup>5</sup> a person who enters or entered Australia as an immigrant—

Persons entering Australia in certain circumstances to be prohibited immigrants  
Sub-section (1) amended by No. 117, 1979, s. 10; No. 175, 1980, s. 7

- (a) evades or evaded an officer for the purpose of entering Australia;
- (b) for the purpose of securing entry into Australia produces or produced to an officer—
  - (i) a permit, certificate, passport, visa, return endorsement, identification card or other document that was not issued to him or is or was forged or was obtained by false representation; or
  - (ii) a passenger card that contains information that is false or misleading in a material particular;
- (ba) for the purpose of securing a visa or a return endorsement, or an entry permit permitting a person to remain in Australia, produces or produced to the Minister or to an officer a document of a kind referred to in sub-paragraph (i) of paragraph (b); or
- (c) at the time of entry is or was a person of any of the following descriptions, namely:
  - (i) a person suffering from a prescribed disease or a prescribed physical or mental condition;

s. 16

- (ii) a person who has been convicted of a crime and sentenced to death, to imprisonment for life or to imprisonment for a period of not less than 1 year;
- (iii) a person who has been convicted of 2 or more crimes and sentenced to imprisonment for periods aggregating not less than 1 year;
- (iv) a person who has 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 he was of unsound mind;
- (v) a person who has been deported from Australia or another country; or
- (vi) a person who has been excluded from another country in prescribed circumstances,

that person shall, notwithstanding section ten of this Act, be deemed to be a prohibited immigrant unless he is the holder of an entry permit endorsed with a statement that the person granting that permit recognizes him to be a person referred to in this sub-section.

Inserted by  
No. 117, 1979,  
S. 10

(1A) Where a person has been convicted of a crime and ordered to be confined in a corrective institution other than a prison, sub-section (1) applies to and in relation to him as if he had been convicted of that crime and sentenced to imprisonment for the period during which he was so confined.

Inserted by  
No. 17, 1979,  
S. 10

(1B) In sub-section (1), a reference to a crime shall be read as a reference to an offence punishable by death, by imprisonment for life or by imprisonment for a period of not less than 6 months.

Inserted by  
No. 61, 1981,  
s. 59

(1C) In sub-section (1)—

- (a) references to a visa shall be read as including references to a visa or similar notation, or a form of provisional authority to enter Australia, that was issued on behalf of the Commonwealth before 1 November 1979; and
- (b) references to a return endorsement shall be read as including references to a document or notation that was issued on behalf of the Commonwealth before 1 November 1979 in respect of the return of a person to Australia.

Amended by  
No. 117, 1979,  
S. 10

(2) For the purpose of the making of a deportation order against a person on the ground that he is a prohibited immigrant by virtue of this section, the reference in this section to a prescribed disease shall be read as a reference to a disease, or a physical or mental condition, that is prescribed for the purposes of this section by the regulations as in force at the time when the deportation order is made.

(3) In this section, "officer" includes a person who was an officer for the purposes of the *Immigration Restriction Act* 1901, or that Act as amended at any time.

(4) For the purposes of this section—

(a) a person who

(i) while he was a member of the crew of, or a person included in the complement of, a vessel, entered Australia before the commencement of this Part; and

(ii) at the time of entering Australia, or at any time thereafter, deserted or deserts the vessel or became or becomes absent without leave; or

(b) a person who enters or has entered Australia (whether before or after the commencement of this Part) at a place where no officer (other than a member of a Police Force) is or was stationed,

shall be deemed to have evaded or to evade an officer for the purpose of entering Australia.

(5) Where a person is deemed, by virtue of the operation of sub-section 12(1) of the *Migration Amendment Act* (No. 2) 1980, to have entered Australia as an immigrant, this section does not apply to or in relation to that entry.

Omitted by  
No. 10, 1966,  
s. 5; added by  
No. 75, 1980,  
s. 7

(6) Where a person who is the holder of a re-entry permit within the meaning of section 12 of the *Migration Amendment Act* (No. 2) 1980, makes, at any time while he is in Australia and before the expiration of that re-entry permit or upon his arrival in Australia at any time before the expiration of that re-entry permit, a request for the grant of an entry permit to him, sub-section (1) applies to and in relation to him as if there was substituted for paragraph (c) of that section the following paragraph:

Added by  
No. 175, 1980,  
s. 7

"(c) at the time he makes a request for the grant of an entry permit is a person referred to in paragraph 12 (7) (c), (d), (e), (f) or (g) of the *Migration Amendment Act* (No. 2) 1980,".

\* \* \* \* \*

Section 17  
repealed by  
No. 216, 1973,  
s. 3

18. The Minister may order the deportation of a person who is a prohibited immigrant under any provision of this Act.

Deportation  
of prohibited  
immigrants

19. Where the Minister makes or has made an order for the deportation of a person, the Minister may, in his discretion, at the request of the spouse of that person, order the deportation of the spouse, or of the spouse and a dependent child or children, of that person.

Dependants  
of deportee  
Amended by  
No. 117, 1979,  
s. 11

20. Where the Minister has made an order for the deportation of a person, that person shall, unless the Minister revokes the order, be deported accordingly.

Deportation  
order to be  
executed

s. 21

Duty of  
master, &c.,  
of vessel  
which  
brought  
deportee to  
Australia to  
provide  
passage

**21. ( 1)** Where the Minister has ordered the deportation of a person by virtue of, or by reference to, sub-section (1) of section six, paragraph (c) of sub-section (3) of section eight, or paragraph (a) of sub-section (1) of section sixteen, of this Act, an authorized officer may, by notice in writing, require the master, owner, agent or charterer of the vessel in which the deportee arrived in Australia to remove him from Australia without charge to the Commonwealth.

(2) An authorized officer may make a requirement under the last preceding sub-section in respect of a deportee notwithstanding that such a requirement has previously been made by that authorized officer or another authorized officer in respect of that deportee, if the time for compliance with the previous requirement has expired and the deportee is still in Australia.

Amended by  
No. 216, 1973,  
s.3

(3) Subject to sub-section (6) of this section, where the Minister has ordered the deportation of a person by virtue of, or by reference to, section thirteen or paragraph (b) or (c) of sub-section (1) of section sixteen, of this Act, an authorized officer may, by notice in writing, require the master, owner, agent or charterer of the vessel in which the deportee arrived in Australia to provide, without charge to the Commonwealth, a passage for the deportee to the place at which he boarded the vessel when he came to Australia.

Amended by  
No. 10, 1966,  
s. II; No. 216,  
1973,s.3;  
No. 117, 1979,  
s.29

(4) A person on whom a requirement has been made under sub-section (1) or (3) of this section shall comply with the requirement within thirty days after receipt of the requirement or within such further time as the Minister allows, whether or not the deportee is able or willing to pay, or agrees to pay, a charge in respect of his passage.

Penalty: \$2,000.

(5) It is a defence to a prosecution in respect of a failure to comply with a requirement under sub-section (1) of this section if the defendant proves that, after the date of the requirement, he gave reasonable notice to an authorized officer of his willingness to receive the deportee on board a specified vessel at a specified port on a specified date for removal from Australia and the deportee was not made available at that port on that date in the custody of an officer for placing on board that vessel.

(6) Where sub-section (3) of this section applies in relation to a deportee but the Minister is satisfied that the deportee will not or may not be permitted to re-enter the place referred to in that sub-section, the Minister shall exempt the persons on whom a requirement under that subsection has been or could be made from liability under the preceding provisions of this section in respect of the deportee if arrangements to the satisfaction of the Minister are made by all or any of those persons for payment to the Commonwealth of such sum as the Minister thinks reasonable in the circumstances in respect of the cost, or part of the cost, of a passage for the deportee to some other place outside Australia.

(7) Where a deportee in respect of whom a requirement has been made under this section is being maintained at the expense of the Commonwealth or of a State, the person on whom the requirement has been made is liable to pay to the Commonwealth a fair sum in respect of the cost of maintaining the deportee from the date on which the requirement was made until the deportee is placed on board the vessel or until an exemption is granted to that person under the last preceding sub-section and, where any such sum is received by the Commonwealth in respect of the maintenance of a deportee at the expense of a State, the Commonwealth shall pay an amount equal to that sum to the State.

(8) The master, owner, agent or charterer of a vessel shall not be required, under this section, to remove a deportee from Australia or to provide a passage for a deportee if—

- (a) the passage money paid in respect of the conveyance of the deportee to Australia was paid, in whole or in part, by or on behalf of the Commonwealth;
- (b) the deportee, when he came to Australia, was the holder of a passport endorsed by a person acting under the authority of the Commonwealth with a migrant's visa;
- (c) the deportee, being a woman, was, when she came to Australia, the wife of, and in the company of, the holder of a passport so endorsed in which she was named as the wife of the holder; or
- (d) the deportee, when he came to Australia, was under the age of twenty-one years and was in the company of the holder of a passport so endorsed in which he was named as a child of the holder.

(9) In this section, a reference to the owner or charterer of the vessel in which a deportee arrived in Australia shall be read as a reference to the person who was the owner or charterer of the vessel at the time when that deportee arrived in Australia (whether or not he continues to be the owner or charterer of the vessel), and a reference to the agent of such a vessel shall be read as a reference to the present agent of the person who, in accordance with the foregoing provisions of this sub-section, is referred to as the owner or charterer of the vessel.

(10) In this section, a reference to the master of the vessel in which a deportee arrived in Australia shall, in relation to the making of a requirement on the master under this section, be read as a reference to the person who is the master of the vessel at the time when the requirement is made, but no such requirement shall be made on the master unless, at that time, the vessel is still owned or chartered by the person who was the owner or charterer of the vessel at the time when the deportee arrived in Australia.

Deportation  
and  
maintenance  
costs  
inserted by  
No. 117, 1979,  
s. 12

21A. (1) Where the Commonwealth makes arrangements for the conveyance of a deportee from a place in Australia to a place outside Australia, the deportee is liable to pay to the Commonwealth an amount equal to the passage money and other charges payable in respect of the conveyance.

(2) The arrangements to which sub-section (1) apply include arrangements made under section 22 but do not include arrangements made under section 21.

(3) Without limiting the manner in which the obligation of a deportee under sub-section (1) may be fulfilled, that obligation may be fulfilled, in whole or in part, as provided in sub-section (4).

(4) Where the Commonwealth makes arrangements of the kind referred to in sub-section (1) for the conveyance of a deportee to a place outside Australia and the deportee is the holder of a ticket for his conveyance from a place within Australia to a place outside Australia, an authorized officer may, on behalf of the deportee and either with or without the consent of the deportee, arrange for the ticket to be applied for or towards the conveyance of the deportee to that first-mentioned place.

(5) Arrangements for the application of a ticket made by the authorized officer in pursuance of sub-section (4) are as valid and effectual as they would be if they had been made by the deportee himself.

(6) Where an authorized officer arranges for a ticket held by a deportee to be applied for or towards the conveyance of that deportee to a place in pursuance of sub-section (4)—

- (a) if the application of the ticket meets the passage money and other charges for the conveyance of the deportee to that place in full—the deportee shall be deemed to have fulfilled his obligation under sub-section (1); and
- (b) in any other case—the deportee shall be deemed to have fulfilled his obligation under sub-section (1) to the extent of the amount credited, by reason of the application of a ticket, to the amount of his passage money and other charges for conveyance to that place.

(7) Where a person in respect of whom a deportation order has been made is kept in custody in a State or Territory under this Act pending his deportation from Australia, the person is liable to pay to the Commonwealth, in respect of the cost to the Commonwealth of keeping and maintaining him while he is so kept in custody, for each complete day in the period during which he is so kept in custody, an amount equal to the amount determined by the Minister, by notice published in the *Gazette*, to be the daily maintenance amount in respect of that State or Territory.

(8) A person referred to in sub-section (7) is not liable, under that sub-section, to pay to the Commonwealth any amount in relation to a day

in respect of which another person, being a person on whom a requirement is made under section 21, is liable under that section to pay an amount to the Commonwealth in respect of the cost of maintaining that first-mentioned person.

(9) In making a determination under sub-section (7) in respect of a State or Territory, the Minister shall have regard to the cost to the Commonwealth of persons kept in custody in that State or Territory on behalf of the Commonwealth.

(10) The reference in sub-section (7) to a complete day shall be read as a reference to a period of 24 hours ending at midnight.

(11) An amount payable by a deportee to the Commonwealth under sub-section ( 1 ) or (7) may be recovered by the Commonwealth, as a debt due to the Commonwealth, in a court of competent jurisdiction.

22. ( 1 ) The master, owner, agent or charterer of a vessel shall, on being required in writing by an authorized officer so to do, receive a deportee on board for conveyance to a place specified in the requirement, being a place to which the vessel is bound, and also receive on board, for such time as is required by the authorized officer, a person charged with the custody of the deportee.

Penalty: \$1,000.

(2) For services rendered in pursuance of a requirement under sub-section (1) in connection with the conveyance of a deportee to a place outside Australia, the Commonwealth is liable to pay—

- (a) in the case of services rendered in respect of the deportee—the reasonable passage money and other charges for those services, less any amount paid by the deportee towards, or credited by reason of the application of a ticket towards, that passage money and those charges; and
- (b) in the case of services rendered in respect of the person charged with the custody of the deportee—reasonable passage money (if any) and other charges for those services.

(3) An officer shall not make a requirement under sub-section (1) of this section unless he is satisfied on reasonable grounds that the deportee will be permitted to land at the place specified in the requirement, and it is a defence to a prosecution for a contravention of that sub-section if the defendant proves that, if the requirement had been complied with, the deportee would not have been permitted to land at the place specified in the requirement.

Deportees to  
be received  
on board  
vessels

Sub-section (1)  
amended by  
No. 10,1966,  
s. II; No. 117,  
1979,s. 29

Substituted by  
No. 117,1979,  
s. 13

s. 23

*Division 3—Duties of Masters in relation to Crews*

Production of identity documents and mustering of crew

Amended No. 10, 1966, ss. 6 and II; No. 117, 1979, s. 29

23. The master of a vessel, other than a vessel of the regular armed forces of a government recognized by the Commonwealth, which has entered Australia from overseas—

- (a) shall, upon the arrival of the vessel at a port, have in his possession an identity document in respect of each member of the crew who is on board the vessel;
- (b) shall, upon the arrival of the vessel at a port, if so required by an officer, produce to the officer the identity documents referred to in the last preceding paragraph;
- (c) shall, before the departure of the vessel from a port, if so required by an officer, muster the crew in the presence of the officer and produce to the officer the identity documents referred to in paragraph (a) of this section; and
- (d) shall not, where a requirement has been made on him in accordance with the last preceding paragraph, depart with the vessel from the port unless the requirement has been complied with.

Penalty: \$500.

Master to report absences

Substituted by No. 10, 1966, s. 7; amended by No. 117, 1979, s. 29

24. Where a member of the crew of a vessel, other than a vessel of the regular armed forces of a government recognized by the Commonwealth, that has entered Australia from overseas was on board the vessel at the time of its arrival at a port and is absent from the vessel at the time of its departure from the port, the master of the vessel shall, at that departure—

- (a) deliver to an officer a report in writing specifying the name of the member, stating that the member was a member of the crew of the vessel on board the vessel at the time of its arrival at that port and is absent from the vessel at the time of its departure from that port and further stating whether that member left the vessel at that port with leave or without leave; and
- (b) on demand by an officer, deliver to the officer the identity document in respect of that member.

Penalty: \$500.

Section 25 repealed by No. 216, 1973, s. 3

Exemptions

26. (1) Where the Minister is satisfied that it is no longer necessary for the purposes of this Act that a provision of this Division should continue to apply in relation to a vessel, he shall, by writing under his hand, exempt the master of that vessel from liability to comply with that provision.

(2) An authorized officer may, by writing under his hand, exempt the master of a vessel in whole or in part from liability to comply with any of the provisions of section twenty-three of this Act.

*Division 4—Offences in relation to entry into, and remaining in, Australia*

Heading substituted by No. 117, 1979, s. 14

27. (1) An immigrant who—

Offences in relation to entering or remaining in Australia

- (a) enters Australia in such circumstances that he becomes a prohibited immigrant by virtue of section six of this Act;
- (aa) enters Australia after having been deported from Australia and is not, when he enters Australia, the holder of any entry permit endorsed with a statement that the officer granting the permit recognizes him to be a person referred to in sub-section (1) of section 16;
- (ab) becomes a prohibited immigrant upon the expiration of a temporary entry permit that is applicable to him;
- (b) becomes a prohibited immigrant by reason of being a person to whom paragraph (a) or (c) of sub-section (3) of section eight of this Act applies; or
- (c) enters Australia after having produced to an officer, for the purpose of securing entry into Australia, a permit, certificate, passport, visa, return endorsement, identification card or other document which was not issued to him or was forged or was obtained by false representations,

Sub-section (1) amended by No. 117, 1979, s. 15

shall be deemed to be guilty of an offence against this Act punishable upon conviction by a fine not exceeding \$1,000 or imprisonment for a period not exceeding 6 months.

(2) A deportee who has been placed on board a vessel for deportation shall not leave the vessel in Australia otherwise than in custody under this Act.

Amended by No. 117, 1979, s. 15

Penalty: \$1,000 or imprisonment for 6 months.

(2A) It is a defence to a prosecution of an immigrant for an offence against paragraph (ab) of sub-section (1) if the immigrant satisfies the Court that, after he became a prohibited immigrant a further entry permit applicable to him had come into force or he had ceased to be a prohibited immigrant by virtue of sub-section (4) of section 7.

Inserted by No. 117, 1979, s. 15

(3) The conviction of a person under this section does not prevent the making of an order for the deportation of that person or the further execution of a deportation order, as the case may be, and any imprisonment in respect of such a conviction shall cease for the purpose of deportation.

s. 27

Amended by  
No. 10, 1966,  
s. 11; No. 117,  
1979, s. 15

(4) Where a person is convicted of an offence under this section and appeals against his conviction, he shall not be released on bail unless he finds two sureties, each in the sum of \$2,500 and each approved by an authorized officer, for his appearance at the hearing of the appeal.

Penalty on  
master,  
owner, agent  
and charterer  
of vessel  
  
Amended by  
No. 10, 1966,  
s. II

28: Where—

- (a) a person enters Australia from a vessel and, by reason of his not being the holder of an entry permit, that person becomes, upon entry, a prohibited immigrant;
- (b) a member of the crew of a vessel referred to in paragraph (d) of sub-section (1) of section eight of this Act becomes a prohibited immigrant by reason of the operation of paragraph (c) of sub-section (3) of that section; or
- (c) a deportee who has been placed on board a vessel for deportation leaves the vessel in Australia otherwise than in custody under this Act,

the master, owner, agent and charterer of the vessel shall each be deemed to be guilty of an offence against this Act punishable by a fine not exceeding One thousand dollars.

Stowaways  
  
Sub-section (1)  
amended by  
No. 10, 1966,  
s. I I; No. 117,  
1979, s. 16

29. (1) If a vessel having on board one or more stowaways comes into a port or place in Australia, the master, owner, agent and charterer of the vessel shall each be deemed to be guilty of an offence against this Act punishable by a fine not exceeding \$2,000 for each stowaway.

Sub-section (2)  
omitted by  
No. 117, 1979,  
s. 16

(3) Sub-section (1) of this section does not apply in relation to a stowaway if the master of the vessel, forthwith after the arrival of the vessel at the port or place, gives notice to an officer that the stowaway is on board and prevents the stowaway from landing before an officer has had an opportunity of interrogating him.

Persons  
concerned in  
bringing  
immigrants  
secretly into  
Common-  
wealth or  
harbouring  
prohibited  
immigrants

30. ( 1 ) A person shall not take any part in—

- (a) the bringing or coming to Australia of an immigrant under circumstances from which it might reasonably have been inferred that the immigrant intended to enter Australia secretly or without the knowledge of an officer;
- (b) the concealing of an immigrant with intent to enable him to enter Australia secretly or without the knowledge of an officer; or
- (c) the concealing of a prohibited immigrant or a deportee with intent to prevent his discovery by an officer.

Amended by  
No. 10, 1966,  
s. I I; No. 117,  
1979, s. 17

(2) A person shall not—

- (a) aid or incite a person to enter or remain in Australia in circumstances in which he would become a prohibited immigrant;

(aa) aid or incite a person who is a prohibited immigrant to remain in Australia; or

(b) knowingly harbour a prohibited immigrant or a deportee.

Penalty: \$1,000 or imprisonment for 6 months.

(3) For the purpose of sub-section (2), a person shall not be taken to have aided a prohibited immigrant to remain in Australia by reason only of that he does an act or thing by way of making a request, supporting a request or assisting another person to make a request for the grant of an entry permit, or a further entry permit, permitting the prohibited immigrant to remain in Australia.

Added by  
No. 117, 1979,  
s. 17

31. (1) A person shall not, in connexion with the entry, or proposed entry, of an immigrant (including that person himself) into Australia or with an application for an entry permit or a further entry permit permitting an immigrant (including that person himself) to remain in Australia—

False papers,  
&C.

Sub-section (1)  
amended by  
No. 117, 1979,  
s. 18; No. 175,  
1980, s. 8

- (a) present to the Minister or to an officer a document which is forged or false;
- (b) falsely represent to the Minister or to an officer that he or another person is the person named in a document;
- (c) produce a document to the Minister or to an officer with intent to deceive or mislead him; or
- (d) deliver to the Minister or to an officer, or otherwise furnish for official purposes of the Commonwealth, a document containing a statement or information that is false or misleading in a material particular.

(1A) In sub-section (1), a reference to an officer shall be read as including a reference to a person authorized by the Minister to exercise a power or to discharge a duty or function under this Act.

Inserted by  
No. 118, 1979,  
s. 4

(2) A person shall not transfer or part with possession of a document with intent that the document be used to assist a person, being a person not entitled to use it, to gain entry to, or to remain in, Australia or where he has reason to suspect that the document may be so used.

Amended by  
No. 10, 1966,  
S. II

Penalty: \$1,000 or imprisonment for 6 months.

Penalty amended  
by No. 117, 1979,  
s. 18

31A. The Minister or an authorized officer may require a person who is a prohibited immigrant to leave Australia within the time specified by the Minister or by that authorized officer, as the case may be, and the person shall comply with that requirement.

Minister or  
authorized  
officer may  
require  
prohibited  
immigrant to  
leave  
Australia

Penalty: \$1,000 or imprisonment for 6 months.

Inserted by  
No. 117, 1979,  
s. 19

s. 31a

Offences in  
relation to  
work  
Inserted by  
No. 117, 1979,  
s. 19

31B. (1) Where a person who is the holder of a temporary entry permit that is in force and is subject to a condition of the kind referred to in sub-section (6A) of section 6 contravenes or fails to comply with that condition, the person commits an offence against this sub-section.

(2) Where a person who is a prohibited immigrant performs any work in Australia without the permission, in writing, of an authorized officer, the person commits an offence against this sub-section.

(3) Where a person makes, in, or in connection with or in support of, an application to an authorized officer for permission to work in Australia, a statement that is false in a material particular, that person commits an offence against this sub-section.

(4) The penalty for an offence against sub-section (1), (2) or (3) is a fine not exceeding \$1,000.

(5) In proceedings in a court for an offence against sub-section (1) or (2), a certificate of the Secretary to the Department of Immigration and Ethnic Affairs, or of an officer of that Department authorized by the Secretary to that Department to give certificates under this sub-section-

- (a) certifying that the person charged with the offence has not been given any permission by an authorized officer to perform work in Australia; or
- (b) certifying that the person charged with the offence has not been given permission by an authorized officer to perform work in Australia other than the permission a copy of which is attached to the certificate,

is admissible in evidence in the proceedings and is *prima facie* evidence of the matters stated in the certificate.

(6) For the purposes of this section, a document purporting to be a certificate referred to in sub-section (5) shall, unless the contrary is proved, be deemed to be such a certificate and to have been duly given.

(7) For the purposes of this section, a reference in a temporary entry permit, and the reference in sub-section (2), to the performance of any work in Australia by a person, shall each be read as not including a reference to the performance by the person of any work of a prescribed kind or of work in prescribed circumstances.

#### Division 5—Examination, Search and Detention

Appointment  
of boarding  
stations

32. (1) The Governor-General may, by Proclamation, appoint a place in a port to be the boarding station for that port for the purposes of this Act.

(2) Where a boarding station for a port is for the time being appointed or continued under the *Customs Act* 1901-1957, that boarding

station shall be deemed to be appointed under this section as the boarding station for that port for the purposes of this Act.

33. (1) The master of a vessel which has entered Australia from overseas shall not suffer his vessel to enter any place other than a port unless from stress of weather or other reasonable cause.

Penalty: \$2,000.

Vessels to enter ports and be brought to boarding stations  
Sub-section (1) amended by No. 10, 1966, S. 11; No. 117, 1979, s. 29

(2) The master of a ship from overseas bound to or calling at a port—  
(a) shall, if so required by an authorized officer, bring his ship to for

Amended by No. 10, 1966, s. 11; No. 117, 1979, s. 29

boarding under this Act at the boarding station appointed for that port; and

(b) shall not move his ship from that boarding station, except for the purpose of leaving that port, until permitted to do so by an authorized officer.

Penalty: \$2,000.

(3) The master of an aircraft from overseas arriving in Australia shall not suffer the aircraft to land at any other proclaimed airport until the aircraft has first landed—

Amended by No. 10, 1966, S. 11; No. 117, 1979, s. 29

(a) at such proclaimed airport for which a boarding station is appointed as is nearest to the place at which the aircraft entered Australia; or

(b) at such other airport for which a boarding station is appointed as has been approved by an authorized officer, in writing, as an airport at which that aircraft, or a class of aircraft in which that aircraft is included, may land on arriving in Australia from overseas.

Penalty: \$2,000.

(4) The master of an aircraft which is engaged on an air service or flight from a place overseas to a place in Australia—

Amended by No. 10, 1966, s. 11; No. 117, 1979, s. 29

(a) shall not suffer the aircraft to land at a proclaimed airport for which a boarding station is not appointed;

(b) shall, as soon as practicable after the aircraft lands at a proclaimed airport, bring the aircraft for boarding to the boarding station appointed for that airport; and

(c) shall not move his aircraft from that boarding station until permitted to do so by an authorized officer.

Penalty: \$2,000.

(5) It is a defence to a prosecution for an offence against a provision of either of the last two preceding sub-sections if the person charged

s. 33

proves that he was prevented from complying with the provision by stress of weather or other reasonable cause.

(6) While a vessel is at a boarding station, an officer may go and remain on board the vessel for the purposes of this Act.

Amended by  
No. 10, 1966,  
s. 11; No. 117,  
1979, s. 29

(7) The master of a vessel shall do all things reasonably required by an officer to facilitate the boarding of the vessel under this section and the performance by the officer of duties for the purposes of this Act.

Penalty for any contravention of this sub-section: \$1,000.

Exemption

34. Where the Minister is satisfied that it is no longer necessary for the purposes of this Act that a provision of the last preceding section should continue to apply in relation to a vessel, he shall, by writing under his hand, exempt the master of that vessel from liability to comply with that provision.

Prohibited  
immigrants,  
&c., may be  
prevented  
from landing

35. (1) An officer may -

- (a) prevent a person from entering Australia where that person would, if he so entered, be a prohibited immigrant; or
- (b) prevent a deportee from leaving a vessel on which he has been placed,

and may take such action and use such force as are necessary for that purpose.

(2) The master of a vessel may, in relation to persons on board the vessel, do all things which an officer is, under the last preceding sub-section, authorized to do.

Custody of  
prohibited  
immigrant  
during stay of  
vessel in port

36. (1) A person who is on board a vessel at the time of the arrival of the vessel at a port, whether or not that port is the first port of call of the vessel in Australia, being a stowaway or a person whom an authorized officer reasonably believes to be seeking to enter Australia in circumstances in which he would become a prohibited immigrant (in this section referred to as "the prohibited immigrant"), may---

- (a) if an authorized officer so directs; or
- (b) if the master of the vessel so requests and an authorized officer approves,

be taken ashore by an officer and kept in such custody as an authorized officer directs until the departure of the vessel from its last port of call in Australia or until such earlier time as an authorized officer directs.

Inserted by  
No. 117, 1979,  
s. 20

(1A) Where a person, not being a person exempted, by instrument under the hand of the Minister, from the requirements of Division 1A, who has travelled to a port in Australia on board a vessel, whether or not that port is the first port of call of the vessel in Australia, has, after the arrival of the vessel at its first port of call in Australia, sought and been refused an entry permit, he may, if an authorized officer so directs, be

taken ashore by an officer and kept in such custody as an authorized officer directs until the departure of the vessel from its last port of call in Australia or until such earlier time as an authorized officer directs.

(2) A person in custody under sub-section (1) or (1A) may be returned to the vessel or, with the consent of the master of another vessel, placed on board that other vessel, at any time by an officer. Amended by No. 17, 1979, s.20<sup>1</sup>

(3) The master, owner, agent and charterer of the vessel are, jointly and severally, liable to pay to the Commonwealth a fair sum for the cost of keeping and maintaining the prohibited immigrant while he is kept in custody in pursuance of sub-section (1) or sub-section (1A) and the cost of transporting the prohibited immigrant, and a custodian of the prohibited immigrant, from the vessel to the place of custody and, if the prohibited immigrant is returned to the vessel or another vessel, from the place of custody to the vessel or that other vessel. Amended by No. 117, s. 20 1979,

(4) A person shall not, for the purposes of this Act, be deemed to have entered Australia by reason only of his having been taken ashore in pursuance of sub-section (1) or sub-section (1A). Amended by No. 117, 1979, s. 20

(5) In this section, "vessel" does not include aircraft. Added by No. 117, 1979, s. 20

36A. (1) A person who is on board an aircraft at the time of the arrival of the aircraft at a proclaimed airport, whether or not that airport is the first port of call of the aircraft in Australia, being a stowaway or a person whom an authorized officer reasonably believes to be seeking to enter Australia in circumstances in which he would become a prohibited immigrant, may— Custody of prohibited immigrant during stay of aircraft in Australia Inserted by No. 117, 1979, s.21

- (a) if an authorized officer so directs; or
- (b) if the master of the aircraft so requests and an authorized officer approves,

be taken off the aircraft by an officer and kept in such custody, either at the proclaimed airport or elsewhere, as an authorized officer directs until such time as he is removed from Australia in accordance with sub-section (4) or until such earlier time as an authorized officer directs.

(2) A person who disembarks from an aircraft at a proclaimed airport, whether or not that airport is the first port of call of the aircraft in Australia, being a stowaway or a person whom an authorized officer reasonably believes to be seeking to enter Australia in circumstances in which he would become a prohibited immigrant, may, at any time before he leaves the airport—

- (a) if an authorized officer so directs; or
- (b) if the master of the aircraft so requests and an authorized officer approves,

be taken into custody by an officer and kept in such custody, either at the proclaimed airport or elsewhere, as an authorized officer directs until

s. 36A

such time as he is removed from Australia in accordance with sub-section (4) or until such earlier time as an authorized officer directs.

(3) Where a person, not being a person exempted, by instrument under the hand of the Minister, from the requirements of Division IA, who travels by aircraft from a place outside Australia to a proclaimed airport has sought and been refused an entry permit at that airport or at any other airport in Australia at which he has called in the course of that travel, he may, if an authorized officer so directs, be taken into custody at that first-mentioned airport by an officer and kept in such custody, either at that first-mentioned airport or elsewhere, as an authorized officer directs until such time as he is removed from Australia in accordance with sub-section (4) or until such earlier time as an authorized officer directs.

(4) Where a person is taken into custody under sub-section (1), (2) or (3), an authorized officer may, at any time within 24 hours after the person is so taken into custody, by notice in writing served on the master, owner, agent or charterer of the aircraft on which he travelled to Australia, require the master, owner, agent or charterer to remove the person from Australia at no charge to the Commonwealth.

(5) A master, owner, agent or charterer on whom a requirement has been served under sub-section (4) shall comply with the requirement within the period of 72 hours commencing at the time when the requirement was served on him or within such further period as an authorized officer allows, whether or not the person to whom the requirement relates is able or willing to pay, or agrees to pay, a charge in respect of his removal from Australia.

Penalty: \$2,000.

(6) It is a defence to a prosecution in respect of a failure to comply with a requirement under sub-section (4) if the defendant proves that, after the requirement was served upon him, he gave reasonable notice to an authorized officer of his willingness to receive the person to whom the requirement related on board a specified vessel or aircraft at a specified port at a specified time for removal from Australia and the person concerned was not made available at that port at that time in the custody of an officer for placing on board that vessel or aircraft.

(7) The master, owner, agent and charterer of an aircraft are, jointly and severally, liable to pay the Commonwealth a fair sum for the cost of keeping and maintaining a person while he is kept in custody in pursuance of sub-section (1), (2) or (3) and, if the person has been kept in custody at a place other than the proclaimed airport, the cost of transporting the person, and a custodian of the person, from the airport to the place of custody and, if the person is required to be removed from Australia, from the place of custody to the vessel or aircraft upon which he is to be so removed.

(8) A person shall not, for the purposes of this Act, be deemed to have entered Australia by reason only of his having been taken from a proclaimed airport for the purpose of being kept in custody at a place outside a proclaimed airport in pursuance of sub-section (1), (2) or (3).  
which he has reason to suspect that there may be found a stowaway or a

37. (1) An officer may at any time go on board and search a vessel in entry and search Powers of

person seeking to enter Australia in circumstances in which he would become a prohibited immigrant.

(2) The master of a vessel shall do all things reasonably required by an officer to facilitate the boarding and searching of the vessel by the officer under the last preceding sub-section. Penalty: \$1,000.

Amended by  
No. 10, 1966,  
s. II, No. 117,  
1979.s. 22

(3) An authorized officer may issue to an officer a search warrant in accordance with the prescribed form.

(4) A search warrant shall be expressed to remain in force for a specified period not exceeding three months and ceases to be in force at the expiration of the specified period.

(5) An officer having With him a search warrant issued to him under this section and remaining in force may, at any time in the day or night with such assistance as he thinks necessary, enter and search any building, premises, vehicle or place in which he has reasonable cause to believe there may be found—

Amended by  
No. 17.1979,  
s. 22

- (a) a prohibited immigrant or a deportee;
- (b) a person to whom a temporary entry permit has been issued subject to a condition with respect to the work that is to be performed by that person;
- (c) any document, book or paper relating to the immigration or proposed immigration of a person in circumstances in which he would have become, or would become, a prohibited immigrant; or
- (d) any passport or document of identity of, or any ticket for the conveyance from a place within Australia to a place outside Australia of a prohibited immigrant or a deportee,

and may seize any such document, book, paper, passport, document of identity or ticket, as the case may be, and impound and detain it for such time as he thinks necessary.

(6) For the purposes of the exercise of his powers under this section an officer may stop any vessel or vehicle.

(7) An officer may use such reasonable force as is necessary for the exercise of his powers under this section.

Arrest of  
prohibited  
immigrant  
Sub-section (1)  
amended by  
No. 117, 1979,  
s. 23

38. (1) An officer may, without warrant, arrest a person whom he reasonably supposes to be a prohibited immigrant, and a person so arrested may, subject to this section, be kept in the custody of any officer or in such other custody as the Minister or an authorized officer directs.

(2) Where an officer arrests a person in pursuance of this section, the officer shall forthwith inform the person arrested of the reason for the arrest, and that officer or another officer having the custody of that person shall take him before a prescribed authority within forty-eight hours after the arrest or, if it is not practicable to bring him before a prescribed authority within that period, as soon as practicable after that period, and, if the arrested person is not so brought before a prescribed authority, he shall be released.

Amended by  
No. 117, 1979,  
s. 23

(3) Where a person is brought before a prescribed authority under this section, the prescribed authority shall inquire into the question whether there are reasonable grounds for supposing that that person is a prohibited immigrant and, if the prescribed authority is satisfied that there are such reasonable grounds, he may, by writing under his hand, authorize the detention of that person in custody for such period as the prescribed authority is satisfied is reasonably required in order to enable the Minister to consider whether that person is a prohibited immigrant and whether a deportation order should be made in respect of him, but otherwise the prescribed authority shall order that person to be released.

Inserted by  
No. 117, 1979,  
s. 23

(3A) The period for which the detention in custody of a person brought before a prescribed authority may be authorized under sub-section (3) by that prescribed authority shall not exceed 7 days from the date of the authorization or such longer period from the date of the authorization as the person consents to.

Amended by  
No. 117, 1979,  
s. 23

(4) A prescribed authority may, from time to time, extend the period of detention referred to in sub-section (3).

(5) Subject to the next succeeding sub-section, at the expiration of the period of detention of a person under this section, that person shall be released.

Amended by  
No. 117, 1979,  
s. 23

(6) If, while a person is in custody under this section, an officer informs that person (whether before or after he has been brought before a prescribed authority) that a deportation order is in force in relation to him, the preceding provisions of this section cease to apply in relation to that person and he shall be deemed to have been thereupon arrested under the next succeeding section by the officer having his custody or, if he is not in the custody of an officer, by the officer who so informs him.

(7) Notwithstanding anything contained in this section, an authorized officer may at any time order the release of a person who is in custody under this section.

(8) Nothing contained in, or done under, this section prevents the Supreme Court of a State or Territory or the High Court from ordering the release from custody of a person held in custody under this section where the court finds that he is not a prohibited immigrant.

39. ( 1 ) Where an order for the deportation of a person is in force, an officer may, without warrant, arrest a person whom he reasonably supposes to be that person, and a person so arrested may, subject to this section, be kept in custody as a deportee in accordance with sub-section (6) of this section. Arrest of deportee

(2) Where an officer arrests a person in accordance with this section, the officer shall forthwith inform the person arrested of the reason for the arrest and shall, if that person so requests, furnish to him, as soon as practicable, particulars of the deportation order.

(3) If a person under this section claims, within 48 hours of his arrest and while he is in custody, that he is not the person in respect of whom the deportation order is in force, the person to whom the claim is made shall— Substituted by  
No. 117,1979,  
s. 24

(a) if he is an officer—ask him; or

(b) in any other case—cause an officer to ask him,

to make a statutory declaration to that effect, and, if the person arrested makes such a declaration, the officer who asked him to make the declaration shall take him before a prescribed authority within 48 hours after the making of the declaration, or, if it is not practicable to take him before a prescribed authority within that time, as soon as practicable after the expiration of that period.

(3A) If an arrested person who is required under sub-section (3) to be brought before a prescribed authority within a particular period, is not so brought before a prescribed authority, he shall be released. Inserted by  
No. 117,1979,  
s.24

(4) Where a person is brought before a prescribed authority under this section, the prescribed authority shall inquire into the question whether there are reasonable grounds for supposing that that person is a deportee and, if the prescribed authority is satisfied that there are such reasonable grounds, he shall, by writing under his hand, declare accordingly.

(5) Where a prescribed authority makes a declaration in accordance with the last preceding sub-section, the arrested person may be held in custody as a deportee in accordance with the next succeeding sub-section, but otherwise the prescribed authority shall direct the release of that person and he shall be released accordingly.

(6) A deportee may be kept in such custody as the Minister or an officer directs—

s. 39

- (a) pending deportation, until he is placed on board a vessel for deportation;
- (b) at any port or place in Australia at which the vessel calls after he has been placed on board; or
- (c) on board the vessel until her departure from her last port or place of call in Australia.

(7) Notwithstanding anything contained in this section, an authorized officer may at any time order the release of a person who is in custody under this section.

(8) Nothing contained in, or done under, this section prevents the Supreme Court of a State or Territory or the High Court from ordering the release from custody of a person held in custody under this section where the Court finds that there is no valid deportation order in force in relation to that person.

Prescribed  
authorities

**40.** (1) The Minister may appoint as a prescribed authority for the purposes of the last two preceding sections a person who is or has been a Judge of a Federal Court or of the Supreme Court of a State or Territory or a barrister or solicitor of the High Court or of the Supreme Court of a State of not less than five years' standing.

(2) The Governor-General may arrange with the Governor-in-Council of a State for the performance by persons who hold office as Police, Stipendiary or Special Magistrates in that State of the functions of a prescribed authority under the last two preceding sections.

(3) Notice of an arrangement under the last preceding sub-section shall be published in the *Gazette*.

(4) Where an arrangement under sub-section (2) of this section is in force, a person who holds an office specified in the arrangement is a prescribed authority for the purposes of the last two preceding sections.

(5) A person who holds office as a Police, Stipendiary or Special Magistrate of a Territory is a prescribed authority for the purposes of the last two preceding sections.

(6) A prescribed authority shall make a thorough investigation of the matter which he is required to inquire into, without regard to legal forms, and shall not be bound by any rules of evidence but may inform himself on any relevant matter in such manner as he thinks fit.

Persons in  
custody to  
have access  
to legal  
advice

**41.** Where a person is in custody under this Act, the person having his custody shall, at the request of the person in custody, afford to him all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his custody.

**42. (1)** For the purpose of determining whether a person who has <sup>Persons may</sup> been arrested and is in custody under this Act is a prohibited immigrant <sup>be required to answer</sup> or a deportee, an officer may put to that person such questions as he <sup>con-</sup> questions <sup>siders necessary</sup> and may move that person from place to place.

(2) Where an officer puts a question to a person in accordance with <sup>Amended by</sup> the last preceding sub-section after having informed that person that he is <sup>N 10, 1966,</sup> required to answer the question, that person shall not— <sup>s.11; No. 117,</sup>

1979, s. 29

- (a) refuse or fail to answer the question; or
- (b) in answer to the question, make a statement which is false or misleading in a material particular.

Penalty: \$1,000 or imprisonment for 6 months.

(3) Where the last preceding sub-section is applicable in relation to a question put to a person, that person is not excused from answering the question on the ground that the answer might tend to incriminate him, but the answer to the question shall not be used as evidence against that person in any proceedings other than proceedings under that sub-section.

**43.** Where a person is in custody by virtue of this Act, an authorized <sup>Identification</sup> officer may do all such things as are reasonably necessary for photograph- <sup>of persons incustody</sup> ing or measuring that person or otherwise recording matters in order to facilitate his present or future identification.

**44. (1)** An authorized officer may, by notice in writing to the master <sup>Detention of</sup> of a vessel which has arrived in Australia not more than one month before <sup>vessel for</sup> of the date of the notice, order that the vessel remain at a port or place for a search reasonable time specified in the notice for the purpose of enabling a search of the vessel to be made in order to ascertain whether there are on the vessel any stowaways or any persons seeking to enter Australia in circumstances in which they would become prohibited immigrants.

(2) The master of a vessel in respect of which an order is in force <sup>Amended by</sup> under this section shall not, during the time specified in the order, move <sup>No. 10, 1966,</sup> the vessel without the consent of an authorized officer. <sup>s.11; No. 117,</sup>

1979s., 29

Penalty: \$2,000.

**45. (1)** An authorized officer may, by writing under his hand, direct <sup>Detention of</sup> an officer to detain a vessel where, in the opinion of the authorized officer, <sup>vessel</sup> the master, owner, agent or charterer of the vessel has been guilty of an <sup>pending</sup> offence against this Act. <sup>recovery of</sup> <sup>penalty</sup>

- (2) Where a direction is given under the last preceding sub-section-
  - (a) the officer specified in the direction may detain the vessel at the place where she is found or cause her to be brought to another place specified by the authorized officer and detain her at that place; and
  - (b) the authorized officer shall forthwith give notice of the detention to the owner, charterer or agent of the vessel.

(3) For the purposes of the detention and other lawful dealings with the vessel, the officer specified in the direction is entitled to obtain such writ of assistance or other aid as may be obtained under the law relating to the Customs with respect to the seizure of vessels or goods.

(4) The detention of a vessel under this section shall cease if a bond with two sufficient sureties to the satisfaction of an authorized officer is given by the master, owner, agent or charterer of the vessel for the payment of any penalties that may be imposed in respect of the alleged offence.

(5) If, while the vessel is detained under this section, default is made in payment of any penalties imposed in respect of an offence against this Act by the master, owner, agent or charterer of the vessel, an authorized officer may seize the vessel, and the like proceedings shall thereupon be taken for forfeiting and condemning the vessel as in the case of a vessel seized for breach of the law relating to the Customs, and the vessel shall be sold.

(6) The proceeds of the sale shall be applied firstly in payment of the penalties referred to in the last preceding sub-section and of all costs awarded in connexion with the proceedings in which the penalties were imposed or incurred in and about the sale and the proceedings leading to the sale, and the balance shall be payable to the owner and other persons having interests in the vessel before the condemnation and sale.

#### *Division 6—Immigration Agents*

Interpret-  
ation

**46.** For the purposes of this Division, a person shall be deemed to act as an immigration agent if he demands or receives a fee, commission or other reward for or in relation to services rendered or to be rendered by him in relation to—

- (a) an application or representation to a Minister, Department or authority of the Commonwealth with a view to the entry of a person into Australia as an immigrant; or
- (b) arranging or securing the passage of an intending immigrant to Australia.

Persons  
proposing to  
act as  
immigration  
agents to give  
notice to  
Department  
Sub-section (1)  
amended by  
No. 10, 1966,  
s. 11; No. 216,  
1973, s. 3; No. 91,  
1976, s. 3;  
No. 117, 1979,  
s. 29

**47.** (1) A person shall not act as an immigration agent unless he has—

- (a) delivered to the Secretary to the Department of Immigration and Ethnic Affairs a notice of his intention to do so in accordance with the prescribed form and containing such information as is prescribed; and
- (b) received an acknowledgment in writing of receipt of the notice.

Penalty: \$1,000 or imprisonment for 6 months.

(2) Upon receipt by the Secretary to the Department of Immigration and Ethnic Affairs from a person of a notice referred to in paragraph (a) No. 91, 1976, s. 3 of the last preceding sub-section, the Secretary shall send, or cause to be sent, by post to that person, at the address specified by that person in the notice, an acknowledgment in writing of receipt of the notice.

(3) A person shall not, in a notice under this section, furnish information that is false or misleading in a material particular.

Amended by  
No. 10, 1966,  
s. 11; No. 117,  
1979, s. 29

Penalty: \$1,000 or imprisonment for 6 months.

(4) Sub-section (1) of this section does not apply to a person who was a registered agent under the *Immigration Act* 1901-1949 immediately before the commencement of this Part.

**48.** (1) Where the Minister is satisfied that a person is not a fit and proper person to act as an immigration agent, the Minister may, by notice direct

in writing, direct that person not to act as an immigration agent.

persons not  
to act as  
immigration  
agents

(2) Where a direction under the last preceding sub-section is in force in relation to a person, that person shall not—

Amended by  
No. 0, 1966,  
s. 11; No. 117,  
1979, s. 29

- (a) act as an immigration agent;
- (b) describe himself as an immigration agent or by words which suggest that he is a person who acts, or is prepared to act, as an immigration agent; or
- (c) advertise that he renders or is prepared to render services of a kind referred to in section forty-six of this Act.

Penalty: \$1,000 or imprisonment for 6 months.

(3) A person in respect of whom a direction is in force under sub-section (1) of this section is not entitled to sue for or set-off any fee, commission or other reward for services of a kind referred to in section forty-six of this Act.

**49.** A person shall not describe himself by words which suggest that he is registered or approved as a person who may act as an immigration agent.

Persons not  
to describe  
themselves as  
registered or  
approved  
immigration  
agents  
Amended by  
No. 10, 1966,  
s. 11; No. 117,  
1979, s. 29

Penalty: \$1,000 or imprisonment for 6 months.

**50.** (1) The regulations may prescribe the maximum charges that may be made for any services of a kind referred to in section forty-six of

s. 50

this Act, and any regulation made by virtue of this sub-section is applicable to services rendered while the regulation is in force.

(2) Where a person proposes to render, or has, after the commencement of this Part, rendered, a service of a kind referred to in section forty-six of this Act and the maximum charge for that service is not prescribed, or was not prescribed at the time the service was rendered, as the case may be, the Minister may, by notice in writing to that person, fix the maximum charge that may be made for that service.

(3) The Minister shall not fix the maximum charge for a service later than one year after the service was rendered.

(4) Where the maximum charge for a service has been prescribed or fixed in pursuance of this section, then, notwithstanding the terms of any agreement, a person shall not demand or receive in respect of that service an amount which, together with any amount previously received in respect of that service, exceeds the maximum charge so prescribed or fixed.

Penalty: \$1,000 or imprisonment for 6 months.

(5) An amount received in respect of a service referred to in the last preceding sub-section, whether before or after the maximum charge was prescribed or fixed, is, to the extent that it exceeds that maximum, repayable and may be sued for and recovered in a court of competent jurisdiction.

Amended by  
No. 10,1966,  
s. II:No. 117,  
1979, s. 29

Immigration  
agents liable  
to furnish  
particulars of  
fees, &c.

**51. (1)** A person shall, if required so to do by an authorized officer by notice in writing, furnish in writing to the authorized officer particulars of any fee, commission or other reward charged or proposed to be charged by him, or of any agreement entered into or proposed to be entered into by him, in respect of any services of a kind referred to in section forty-six of this Act.

Amended by  
No. 10,1966,  
S. II

(2) A person shall not—

- (a) refuse or fail to furnish, within the time specified in the requirement, any particulars which he is required under this section to furnish; or
- (b) make a false statement in or in connexion with those particulars.

Penalty amended  
by No. 117,1979,  
s. 29

Penalty: \$1,000 or imprisonment for 6 months.

Undertaking  
to provide  
passage to be  
carried out  
within a  
reasonable  
time

Amended by  
No. 10,1966,  
S. 11; No. 117,  
1979,s. 29

**52.** Where a person has, whether before or after the commencement of this Part, been paid moneys in consideration of a promise to provide or arrange a passage to Australia for an intending immigrant, the Minister may, by notice in writing served on that person, determine a time within which it is reasonable that the passage should be provided or arranged, and where such a determination has been made, that person shall, notwithstanding the terms of any agreement, either-

- (a) provide or arrange the passage within the time determined by the Minister; or
- (b) within that time refund those moneys to the person by whom they were so paid.

Penalty: \$2,000 or imprisonment for 12 months.

53. (1) Where a person convicted of an offence against this Division is a body corporate, the penalty for the offence is—

- (a) where the prescribed penalty for an offence apart from this section is \$1,000 or imprisonment for 6 months—a fine not exceeding \$2,000; and
- (b) where the prescribed penalty for an offence apart from this section is \$2,000 or imprisonment for 1 year—a fine not exceeding \$4,000.

Provisions relating to offences

Sub-section (1) amended by No. 10, 1966, s.11; No. 117, 1979, s. 25

(2) Where a person is convicted by a court of an offence against this Division and another person has suffered loss by reason of that offence, the court may, in addition to any penalty imposed upon the offender, order the offender to make to the person who suffered the loss such reparation, by way of money payment or otherwise, as the court thinks fit.

(3) Where a court has made an order under this section for the making of reparation by way of money payment, a certificate under the hand of the clerk or other appropriate officer of the court, specifying the amount ordered to be paid and the persons by whom and to whom the amount is payable, may be filed in a court having civil jurisdiction to the extent of that amount and is thereupon enforceable in all respects as a final judgment of that court.

(4) For the purposes of this section, where a person is convicted of an offence against sub-section (4) of section fifty of this Act and the person from whom the amount in respect of the service was demanded or received has paid to the offender, in respect of the service, an amount exceeding the fixed maximum, that person shall be deemed to have suffered loss by reason of the offence to the extent of the amount of the excess.

#### *Division 7—General*

54. (1) An authorized officer may require and take security for compliance with the provisions of this Act or the regulations or with any condition imposed in pursuance of, or for the purposes of, this Act or the regulations—

- (a) by a deposit of cash, Treasury Bonds or negotiable instruments, together with a memorandum of deposit in a form approved by the Minister; or
- (b) in accordance with a form of security approved by the Minister.

s. 54

(2) A security given in accordance with a form approved by the Minister shall, without sealing, bind its subscribers as if it were sealed and, unless otherwise provided in the security, jointly and severally and for the full amount.

(3) Whenever a security under this Act is put in suit, the production of the security without further proof shall entitle the Commonwealth to judgment for their stated liabilities against the persons appearing to have executed the security unless the defendants prove compliance with the conditions of the security or that the security was not executed by them or release or satisfaction.

(4) If it appears to the court that a non-compliance with a condition of a security under this Act has occurred, the security shall not be deemed to have been discharged or invalidated, and the subscribers shall not be deemed to have been released or discharged from liability, by reason of—

- (a) an extension of time or other concession;
- (b) any consent to, or acquiescence in, a previous non-compliance with a condition; or
- (c) any failure to bring suit against the subscribers upon the occurrence of a previous non-compliance with the condition.

Proof of  
certain  
matters  
recited in  
deportation  
orders  
Sub-section (1)  
amended by  
No. 17,1979.  
s. 26

**55. ( 1 )** In any proceedings before a court in which the validity or application of a deportation order is in issue, the production of the deportation order, or of a document certified under the hand of the Minister to be a copy of the deportation order, if it contains a statement, in relation to the person to whom the order relates, that—

- (a) he was not born in Australia;
- (b) he is, or was at a particular time, an alien;
- (c) he entered Australia before, on or after a specified date;
- (d) he was not, at the time he entered Australia or at any other specified time, the holder of, or a person included in, an entry permit;
- (e) he was the holder of a temporary entry permit which has expired or been cancelled;

**(0)** within the meaning of a provision of this Act, he evaded an officer for the purpose of entering Australia; or

- (g) for the purpose of securing entry into Australia, he produced to an officer a permit, certificate, passport, visa, return endorsement, identification card or other document which was not issued to him or was forged or was obtained by false representations,

shall, in the absence of proof to the contrary, be deemed to be proof of that statement.

(2) Proof to the contrary for the purposes of the last preceding sub-section on behalf of the person to whom the deportation order relates shall be by the personal evidence of that person, with or without other evidence.

(3) Proof to the contrary by the personal evidence of a person in respect of a matter referred to in paragraph (c), (d), (f) or (g) of sub-section (1) of this section shall not (unless it is proved that that person was born in Australia) be deemed to have been given unless that person in his personal evidence states truly the name of the vessel or, if the vessel was an aircraft, the name of the owner or operator of the aircraft, by which he travelled to Australia and the date and place of his arrival in Australia.

(4) Where a party to proceedings applies to the court for an adjournment of the proceedings for the purpose of enabling him to obtain evidence in rebuttal of any evidence tendered as proof to the contrary for the purposes of this section, the court shall grant an adjournment for such reasonable time as is necessary for that purpose.

(5) In any proceedings in which a person gives personal evidence by way of proof to the contrary in relation to a matter for the purposes of this section, that person is not excused from answering a question put to him on the ground that the answer may tend to incriminate him or make him liable to a penalty, but his answer is not admissible in evidence against him in any other proceedings, other than a prosecution for perjury.

(6) Nothing in this section shall be construed as placing on a party the onus of proving any matter of which evidence may be given under this section by production of a deportation order or of a copy of a deportation order.

56. (1) In a prosecution under section twenty-seven of this Act, an averment of the prosecutor, contained in the information or complaint, stating, in relation to the defendant, a matter specified in any of the paragraphs of sub-section (1) of the last preceding section shall be deemed to be proved in the absence of proof to the contrary by the personal evidence of the defendant either with or without other evidence.

(2) The provisions of sub-sections (3), (4) and (5) of the last preceding section apply in relation to proceedings in which an averment is made in accordance with this section in like manner as they apply in relation to proceedings in which a deportation order, or a copy of a deportation order, is admitted in evidence in accordance with that section.

56A. (1) Where, at or after the departure from a port in Australia of a vessel that has entered Australia from overseas, the master, owner, charterer or agent of the vessel reports in writing to an officer that a specified person was a member of the crew of the vessel on board the vessel at the time of its arrival at that port and is or was absent from the vessel at the time of its departure from that port, and states in the report whether that member left the vessel at that port with leave or without

Reports of  
absences of  
crews of  
vessels  
Inserted by  
No. 10, 1966, s. 8

s. 56A

leave, that report is, for the purposes of proceedings under or in relation to this Act, evidence of the matters contained in the report and—

- (a) if the report states that the member left the vessel with leave—that the member entered Australia, with leave, from the vessel during the vessel's stay at that port and remained in Australia after the vessel left that port; or
- (b) if the report states that the member left the vessel without leave—that the member entered Australia, without leave, from the vessel during the vessel's stay at that port.

(2) Where, during the stay at a port in Australia of a vessel that has entered Australia from overseas, the master of the vessel reports in writing to an officer that a specified person was included in the complement of the vessel, or a member of the crew of the vessel, on board the vessel at the time of its arrival at that port and—

- (a) at any time during the vessel's stay at that port, left the vessel without leave; or
- (b) at any time during the vessel's stay at that port, left the vessel with leave, but has become absent without leave,

the report is, for the purposes of proceedings under or in relation to this Act, evidence of the matters contained in the report.

Proof of  
certain  
matters  
Sub-section (1)  
amended by  
No. 87, 1964, s. 4;  
No. 10, 1966, s. 9

57. (1) In proceedings in a court under this Act or in relation to a deportation order—

- (a) official documents of the Commonwealth or of a State or Territory, and letters and telegrams, or copies of letters and telegrams, and affidavits produced out of official custody and purporting to have been sent or made by an officer, are, if they contain information or statements upon matters relevant to the proceedings, admissible as evidence of that information or of the matters stated;
- (b) w h e r e -
  - (i) there is produced to the court a document that purports to be an identification card or other document of identification in respect of a person and to bear the personal description and photograph of the person to whom the document relates, together with a certificate purporting to be signed by an officer certifying that the document was delivered to an officer by the master, owner, charterer or agent of a specified vessel as relating to a person who was a member of the crew of the vessel when the vessel arrived at a specified port in Australia on a specified date; and
  - (ii) the personal description and photograph appear to be, or to be capable of being, those of a particular person, being a person having a connexion with the proceedings,

the document and certificate are evidence that that person is the person to whom the document relates and was a member of the crew of that vessel when that vessel arrived at that port on that date;

- (c) the production out of official custody of a document purporting to be a report made by the master, owner, charterer or agent of a vessel to an officer as to a matter relevant to the operation of this Act is evidence that the document is such a report;
- (d) for the purpose of proving that a person entered Australia from, or left Australia in, a vessel, a list of any passengers in that vessel, or a passenger card relating to a passenger in that vessel, furnished in accordance with the regulations is admissible in evidence, and production of such a list or passenger card bearing a name that is the same as the name of that person shall be deemed to be proof that that person entered Australia from, or left Australia in, that vessel on the voyage in respect of which the list or passenger card was furnished, unless the contrary is proved; and
- (e) for the purpose of proving that a person has, in a place outside Australia, been convicted of a particular crime (including an attempt to commit a crime) and has been sentenced to a particular sentence in respect of the conviction, fingerprint records, photographs and documents or copies thereof, and certificates in relation to any fingerprint records, photographs or documents or copies thereof, are admissible in the evidence if they-
  - (i) are produced out of the custody of a police or prison officer of the Commonwealth or of a State or Territory; and
  - (ii) purport to be certified or given under the hand of a police or prison officer, or like authority, of a place outside Australia,
 and any such certificate is evidence of the matters stated in the certificate.

(2) In sub-section (1), the reference to official documents of a Territory shall be read, in the case of the Territory of Christmas Island, as including official documents of that Territory that were in existence at the commencement of this sub-section.

Added by  
No. 175,1980,  
s. 9

58. (1) The Minister may, on behalf of the Commonwealth, cause to be established and maintained premises and places (in this section referred to as "immigrant centres") for the reception, accommodation or training of immigrants.

Immigrant  
centres

(2) Immigrants may be admitted to immigrant centres on such terms and conditions, and subject to the payment of such charges, as the Minister approves.

s. 58

(3) The regulations may make provision for and in relation to the regulation of immigrant centres, including provision with respect to the establishment and operation of canteen services in immigrant centres, the conduct or control of persons in immigrant centres and the removal of persons from immigrant centres.

(4) Nothing in this section shall be deemed to affect any arrangements made or to be made in relation to, or the carrying on of the business of, the company known as Commonwealth Hostels Limited.

Heading  
substituted by  
No. 16, 1973, s. 4

### PART III—EMIGRATION OF CERTAIN CHILDREN

Interpret-  
ation  
Substituted by  
No. 16, 1973, s. 5

**59.** In this Part, "child" means a person under the age of seventeen years.

Section 60  
repealed by  
No. 216, 1973,  
s. 3

Preservation  
of State laws  
Amended by  
No. 216, 1973, s. 3

**61.** Nothing in this Part shall be read as intended to prevent or restrict the operation of any law of a State or Territory under which—

- (a) action may be taken to prevent a child from leaving Australia or being taken or sent out of Australia; or
- (b) a person may be punished in respect of the taking or sending of a child out of Australia.

Taking of  
certain  
children out  
of Australia  
prohibited  
Sub-section (1)  
amended by  
No. 10, 1966,  
s. 11; No. 117,  
1979, s. 29

**62.** (1) Where—

- (a) there is in force in relation to a child an order (including an interim order) of a court in Australia entitling a person, either wholly or partly, to the custody or guardianship of, or to access to, a child; or
- (b) a person has instituted proceedings in a court in Australia in which he seeks the making of such an order in his favour in relation to a child and those proceedings are pending,

a person (other than the person referred to in paragraph (a) or (b) of this sub-section, as the case may be) who was or is a party to the proceedings in which the order was made or is sought, or is acting on behalf of, or at the request of, a person who was or is such a party, shall not take or send, or attempt to take or send, the child from Australia to a place outside Australia except with the consent in writing of the person referred to in paragraph (a) or (b) of this sub-section or in accordance with an order of a court made in pursuance of the law of a State or Territory or a law of the Commonwealth (other than this Act) at the time of or after the making of the order or the institution of the proceedings, as the case may be.

Penalty: \$2,000 or imprisonment for 12 months.

(2) For the purposes of this section, proceedings shall be deemed to be pending in a court if an appeal against a decision of that court in those proceedings has been instituted and is pending.

(3) Sub-section (1) of this section applies to a person notwithstanding that that person is one of the persons having or claiming rights to the custody or guardianship of, or of access to, the child.

63. (1) Where a person referred to in paragraph (a) or (b) of sub-section (1) of the last preceding section has served on the master, owner, agent or charterer of a vessel a statutory declaration of that person, in relation to the order or proceedings, in accordance with the next succeeding sub-section, the master, owner, agent or charterer shall not, without reasonable excuse, while the order continues in force or the proceedings remain pending, permit the child referred to in the declaration to leave a port or place in Australia in the vessel for a destination outside Australia otherwise than in the company of, or with the consent in writing of, that person or in accordance with an order of a court made in pursuance of the law of a State or Territory or a law of the Commonwealth (other than this Act) at the time of or after the making of the order, or the institution of the proceedings, referred to in the declaration, as the case may be.

Obligations  
of owners.  
&cc., of  
vessels

Sub-section (1)  
amended by  
No. 10.1966,  
s. 11: No. 117,  
1979, s. 29

Penalty: \$2,000.

(2) A statutory declaration for the purposes of the last preceding sub-section shall be made within seven days before the date of its service and shall contain full particulars of the order or proceedings to which it relates, including—

- (a) the full name of the child and the date of its birth;
  - (b) the full names of the parties to the proceedings in which the order was made or is sought;
  - (c) where the declaration relates to pending proceedings, the name of the court and the nature and date of institution of the proceedings and a statement that the proceedings are pending at the date of the declaration; and
  - (d) where the declaration relates to an order, the terms of the order,
- and shall contain such other matters, if any, as are prescribed.

(3) Service of a declaration under this section on the owner, agent or charterer of a vessel may be effected by delivering the declaration at, or sending it by registered post addressed to him at, his principal place of business in Australia.

(4) The master, owner, agent or charterer of a vessel is not liable in any civil or criminal proceedings in respect of anything done by him in good faith for the purpose of complying with his obligations under this section.

Section 64  
repealed by No.  
16, 1973, s. 6

\* \* \* \* \*

PART IV—MISCELLANEOUS

Obstructing  
or deceiving  
Minister or  
officers

65. A person shall not obstruct, hinder, deceive or mislead the Minister or an officer in the exercise of his powers or the performance of his duties under or for the purposes of this Act or the regulations.

Penalty: \$1,000 or imprisonment for 6 months.

Amended by  
No. 10, 1966,  
s. 11; No. 117,  
1979, s. 29;  
No. 175, 1980,  
S. 10

Identification  
card to be  
deemed to  
continue to be  
in a form  
approved by  
the Minister

65A. Where the Minister revokes his approval of a form of identification card in relation to members of the crews of vessels, an identification card in accordance with that form signed by the master of a vessel not later than three months after the date of that revocation shall, notwithstanding that revocation, be deemed, for the purposes of this Act, to continue to be an identification card in accordance with a form approved by the Minister.

Inserted by  
No. 10, 1966,  
s. 10

Institution of  
prosecutions

66. A prosecution for an offence against this Act or the regulations, other than an offence under Part III of this Act, shall not be instituted except by an authorized officer.

Offences in  
relation to  
escaping  
from custody

66A. (1) A person shall not aid another person in escaping or attempting to escape from lawful custody in which that last-mentioned person is being kept in accordance with a relevant provision of this Act.

Penalty: \$1,000 or imprisonment for 6 months.

Inserted by  
No. 117, 1979,  
s. 27

(2) A person who is being kept in lawful custody in accordance with a relevant provision of this Act shall not escape or attempt to escape from that custody.

Penalty: \$1,000 or imprisonment for 6 months.

(3) In this section, a reference to a relevant provision of this Act shall be read as a reference to sub-section (1) or (1A) of section 36, sub-section (1), (2) or (3) of section 36A, sub-section (1) of section 38 or sub-section (6) of section 39.

Commence-  
ment of  
prosecutions  
Inserted by  
No. 117, 1979,  
s. 27

66B. A prosecution for an offence against this Act or the regulations may be instituted at any time within 5 years after the commission of that offence.

Jurisdiction  
of courts  
Inserted by  
No. 117, 1979,  
S. 27

66C. (1) A provision of the *Judiciary Act* 1903 by which a court of a State is invested with jurisdiction with respect to offences against the laws of the Commonwealth has effect, in relation to offences against this Act, as if that jurisdiction were so invested without limitation as to locality other than the limitation imposed by section 80 of the Constitution.

(2) Subject to section 80 of the Constitution, where a person has committed an offence against a provision of this Act outside a Territory and is found in, or brought into, the Territory, a court of the Territory has the same jurisdiction in respect of the offence as it would have if the offence had been committed in the Territory.

(3) The trial of an offence against a provision of this Act not committed within a State may be held by a court of competent jurisdiction at any place where the court may sit.

66D. (1) The Minister may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him, delegate to an officer any of his powers under this Act other than this power of delegation.

Delegation  
Inserted by  
No. 117,1979,  
s. 27

(2) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Minister.

(3) A delegation under this section does not prevent the exercise of a power by the Minister.

66E. (1) Applications may be made to the Administrative Appeals Tribunal for review of decisions of the Minister under section 12, 13 or 48 other than a decision made on a matter remitted by the Tribunal for reconsideration in accordance with sub-section (3).

Review of  
decisions  
Inserted by  
No. 61,1981,  
s. 60

(2) A person is not entitled to make an application under sub-section (1) in relation to a decision under section 12 or 13 unless—

- (a) the person is an Australian citizen; or
- (b) the continued presence of the person in Australia is not subject to any limitation as to time imposed by law.

(3) After reviewing a decision referred to in sub-section (1), the Tribunal shall either affirm the decision or remit the matter for reconsideration in accordance with any recommendations of the Tribunal.

(4) For the purpose of reviewing a decision referred to in sub-section (1), the Tribunal shall be constituted by a presidential member alone.

(5) Where an application has been made to the Tribunal for the review of a decision under section 12 or 13 ordering the deportation of a person, the order for the deportation of the person shall not be taken for the purposes of section 39 to have ceased or to cease to be in force by reason only of any order that has been made by the Tribunal or a presidential member under section 41 of the *Administrative Appeals Tribunal Act* 1975 or by the Federal Court of Australia or a Judge of that Court under section 44A of that Act.

(6) In this section, "decision" has the same meaning as in the *Administrative Appeals Tribunal Act* 1975.

Regulations

Sub-section (1) amended by No. 87,1964, s. 5 or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular-

No. 10,1966, s. 11, No. 118, 1979,5; No 61, s. 1,81,s. 115

(a) making provision for and in relation to the charging and recovery of fees in respect of-

- (i) applications for entry permits, visas or return endorsements; and
- (ii) the undertaking of English language tests conducted by or on behalf of the Department of Immigration and Ethnic Affairs, whether or not in connection with applications for entry permits or visas;

(aa) making provision for or in relation to the furnishing or obtaining of information with respect to-

- (i) persons on board a vessel arriving at a port in Australia in the course of, or at the conclusion of, a voyage or flight that commenced at, or during which the vessel called at, a place outside Australia; and
- (ii) persons on board a vessel leaving a port in Australia and bound for, or calling at, a place outside Australia;

(ab) making provision for the remission of fees of a kind referred to in paragraph (a) or for exempting persons from the payment of such fees;

- (b) prescribing the practice and procedure in relation to proceedings before a Commissioner or a prescribed authority under this Act, including the summoning of witnesses, the production of documents, the taking of evidence on oath or affirmation, the administering of oaths or affirmations and the payment of expenses of witnesses;
- (c) requiring maintenance guarantees to be given, in such circumstances as are prescribed or as the Minister thinks fit, in relation to persons seeking to enter, or remain in, Australia and providing for the enforcement of such guarantees and the imposition on persons who give such guarantees of liabilities in respect of the maintenance of, and other expenditure in connexion with, the persons in respect of whom the guarantees are given; and
- (d) prescribing penalties not exceeding a fine of \$1,000 or imprisonment for 6 months in respect of offences against the regulations.

(2) Regulations in respect of a matter referred to in paragraph (c) of the last preceding sub-section may apply in relation to maintenance guarantees given before the commencement of this Part in accordance with the regulations that were in force under any of the Acts repealed by this Act.

# Migration Act 1958

s. 67

(3) Sub-paragraph (1) (a) (i) shall not be taken as requiring a fee to be prescribed in respect of every application or as requiring the same fee to be prescribed in respect of all applications.

Added by  
No. 118,1979,  
s. 5

## THE SCHEDULE

Section 4

### ACTS RELATING TO IMMIGRATION AND DEPORTATION REPEALED

*Immigration Restriction Act 1901*  
*Immigration Restriction Amendment Act 1905*  
*Immigration Restriction Act 1908*  
*Immigration Restriction Act 1910*  
*Immigration Act 1912*  
*Immigration Act 1920*  
*Immigration Act 1924*  
*Immigration Act 1925*  
*Immigration Act 1930*  
*Immigration Act 1932*  
*Immigration Act 1933*  
*Immigration Act 1935*  
*Immigration Act 1940*  
*Immigration Act 1948*  
*Immigration Act 1949 Pacific*  
*Island Labourers Act 1901*  
*Pacific Island Labourers Act 1906*  
*Aliens Deportation Act 1948*

## NOTES

1. The *Migration Act 1958* (a) as shown in this reprint comprises Act No. 62, 1958 as amended by the other Acts specified in the following table:

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Migration Act 1958</i>	62, 1958	8 Oct 1958	Parts 1,11 and IV: 1 June 1959 ( <i>see Gazette</i> 1959, p. 1831) Part 111: 10 Nov 1958 ( <i>see Gazette</i> 1958, p. 3857)	
<i>Migration Act 1964</i>	87, 1964	5 Nov 1964	5 Nov 1964	
<i>Migration Act 1966</i>	10, 1966	6 May 1966	6 May 1966	S. 3 (2)
<i>Migration Act 1973</i>	16, 1973	11 Apr 1973	11 Apr 1973	
<i>Statute Law Revision Act 1973</i>	216, 1973	19 Dec 1973	31 Dec 1973	Ss. 9 (1) and 10
<i>Administrative Changes (Consequential Provisions) Act 1976</i>	91, 1976	20 Sept 1976	20 Sept 1976 (b)	S. 4
<i>Migration Amendment Act 1979</i>	117, 1979	29 Oct 1979	Ss. 1,2, 3 (1), 4, 5, 7,11-14, 16-19, 22-25 and 27-29: Royal Assent Remainder: 1 Nov 1979 ( <i>see Gazette</i> 1979, No. S220, p. )	Ss. 9 (2) and (3) and 22 (2)

# Migration Act 1958

## NOTES—continued

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Migration Amendment Act</i> (No. 2) 1979	118, 1979	29 Oct 1979	1 Nov 1979 (see s. 2 and <i>Gazette</i> 1979, No. S220, P. )	
<i>Migration Amendment Act</i> 1980	89, 1980	29 May 1980	S. 3: 1 July 1980 (sees. 2(2) and <i>Gazette</i> 1980, No. S.146, p. 1) Remainder: Royal Assent	
<i>Migration Amendment Act</i> (No. 2) 1980	175, 1980	17 Dec 1980	Ss. 3 (2), 4, 7 (2), 9, 12 and 13: 23 Jan 1981 (see <i>Gazette</i> 1981, No. G3, p. 30) Remainder: 14 Jan 1981	Ss. 11-13
<i>Statute Law Revision Act</i> 1981	61, 1981	12 June 1981	Ss. 58 and 59: 1 Nov 1979 Ss. 60 and 115: Royal Assent (c)	S. 60 (2)

- (a) This citation is provided for by the *Amendments Incorporation Act* 1905 and the *Acts Citation Act* 1976.
  - (b) By virtue of sub-section 2 (7) of the *Administrative Changes (Consequential Provisions) Act* 1976 the amendments made by that Act to the *Migration Act* 1958 are deemed to have come into operation on 22 December 1975.
  - (c) The *Migration Act* 1958 was amended by sections 58-60 and 115 only of the *Statute Law Revision Act* 1981, section 2 of which provides that sections 60 and 115 shall come into operation on Royal Assent and sections 58 and 59 on 1 November 1979.
2. S. 5(1), definition of "protected person"—Now cited as the *Australian Citizenship Act* 1948.
  3. Part II (Sections 6 to 58 inclusive) —By sub-section 25 (7) of the *Australian Citizenship Act* 1948, a person who enters Australia after the commencement of this Part and, at the time of his entry, is a prohibited immigrant within the meaning of this Act or the holder of a temporary entry permit granted under this Act shall not become an Australian citizen under that section.
  4. S. 6—Sub-section 39 (5) of the *Commonwealth Electoral Act* 1918 provides that a person who is the holder of a temporary entry permit for the purposes of this Act or is a prohibited immigrant under this Act is not entitled to enrolment under Part VII of that Act.
  5. S. 16 (1) —The date of commencement of the *Immigration Restriction Act* 1901 was 23 December 1901.

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# **Statute Law (Miscellaneous Provisions) Act (No. 1) 1984**

**No. 72 of 1984**

## ***Migration Act 1958***

### **Paragraph 67 (1) (aa)—**

After "remission", insert ", refund or waiver".



# Torres Strait Treaty (Miscellaneous Amendments) Act 1984

No. 22 of 1984

## PART VII—AMENDMENTS OF THE MIGRATION ACT 1958

### Principal Act

17. The *Migration Act 1958* is in this Part referred to as the Principal Act.

### Interpretation

18. Section 5 of the Principal Act is amended— 25
- (a) by inserting before the definition of "Australian installation" in sub-section (1) the following definition:
- "'area in the vicinity of the Protected Zone' means an area in respect of which a notice is in force under sub-section (5A);";
- (b) by inserting before the definition of "installation" in sub-section (1) 30 the following definition:
- "'inhabitant of the Protected Zone' means a person who is a citizen of Papua New Guinea and who is a traditional inhabitant";
- (c) by inserting before the definition of "return endorsement" in sub-section (1) the following definition: 35
- "'Protected Zone' means the zone established under Article 10 of the Torres Strait Treaty, being the area bounded by the line described in Annex 9 to that treaty;";
- (d) by inserting after the definition of "ticket" in sub-section (1) the following definitions: 40



## Torres Strait Treaty (Miscellaneous Amendments) Act 1984

### PART VII—AMENDMENTS OF THE MIGRATION ACT 1958

#### Principal Act

17. The *Migration Act 1958* is in this Part referred to as the Principal Act.

#### Interpretation

18. Section 5 of the Principal Act is amended— 25

- (a) by inserting before the definition of "Australian installation" in sub-section (1) the following definition:  
    "'area in the vicinity of the Protected Zone' means an area in respect of which a notice is in force under sub-section (5A);";
- (b) by inserting before the definition of "installation" in sub-section (1) the following definition: 9  
    "'inhabitant of the Protected Zone' means a person who is a citizen of Papua New Guinea and who is a traditional inhabitant;";
- (c) by inserting before the definition of "return endorsement" in sub-section (1) the following definition: 35  
    "'Protected Zone' means the zone established under Article 10 of the Torres Strait Treaty, being the area bounded by the line described in Annex 9 to that treaty;";
- (d) by inserting after the definition of "ticket" in sub-section (1) the following definitions: 40

"'Torres Strait Treaty' means the Treaty between Australia and the Independent State of Papua New Guinea that was signed at Sydney on 18 December 1978;

5 "'traditional activities' has the same meaning as in the Torres Strait Treaty;

"'traditional inhabitants' has the same meaning as in the *Torres Strait Fisheries Act 1984*"; and

(e) by inserting after sub-section (5) the following sub-section:

10 (5A) The Minister may, by notice published in the *Gazette*, declare an area adjacent to the Protected Zone and to the south of the line described in Annex 5 to the Torres Strait Treaty to be an area in the vicinity of the Protected Zone for the purposes of this Act".

### **Exemptions**

**19.** Section 8 of the Principal Act is amended-

15 (a) by omitting "or" from the end of paragraph (1) (d);

(b) by adding at the end of sub-section (1) the following word and paragraph:

"or (f) a person who is an inhabitant of the Protected Zone, not being-

20 (i) a person in respect of whom a declaration is in force under sub-section (2); or

(ii) a person who, at the time of entry, is a person of any of the descriptions set out in paragraph 16 (1) (c),

25 who is entering a part of Australia that is in the Protected Zone or in an area in the vicinity of the Protected Zone in connection with the performance of traditional activities.";

30 (c) by omitting from sub-section (2) "or (d)" and substituting ", (d) or (0"

(d) by omitting "or" from the end of paragraph (3) (c); and

(e) by adding at the end of sub-section (3) the following word and paragraph:

"or (e) in the case of a person referred to in paragraph (1) (f) —

35 (i) if he ceases to be an inhabitant of the Protected Zone;

(ii) if he remains in Australia otherwise than in connection with the performance of traditional activities; or

40 (iii) if he enters a part of Australia other than a part of Australia that is in the Protected Zone or in an area in the vicinity of the Protected Zone."

**Carriage of persons to Australia without documentation**

**20.** Section 11C of the Principal Act is amended—

- (a) by omitting "and" from the end of paragraph (1) (a); and
- (b) by 'adding at the end of sub-section (1) the following word and paragraph: 5  
"and (c) is not a person who is exempted from the operation of  
Division 1 of Part **II** by virtue of the operation of  
paragraph 8 (1) (f)".

**Offences in relation to entering or remaining in Australia**

**21.** Section 27 of the Principal Act is amended by omitting from paragraph 10  
(1) (b) "or (c)" and substituting ", (c) or (e)".



# Migration Amendment Act 1983

No. 112 of 1983

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## **An Act to amend the *Migration Act 1958* and for related purposes**

*[Assented to 13 December 1983]*

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

### **Short title, &c.**

1. (1) This Act may be cited as the *Migration Amendment Act 1983*. 5
- (2) The *Migration Act 1958*' is in this Act referred to as the Principal Act.

### **Commencement**

2. This Act shall come into operation on a day to be fixed by Proclamation.

### **Title**

3. The title of the Principal Act is amended by omitting "Immigration,  
10 Deportation and Emigration." and substituting "the entry into, and presence  
in, Australia of aliens, and the departure or deportation from Australia of aliens  
and certain other persons".

## Interpretation

4. Section 5 of the Principal Act is amended—

- (a) by omitting from sub-section (1) the definition of "alien";
- (b) by omitting from sub-section (1) the definition of "immigrant";
- (c) by inserting after the definition of "natural resources" in sub-section (1) the following definition: 5

"non-citizen" means a person who is not an Australian citizen";

- (d) by omitting from sub-section (1) the definition of "protected person";  
and
- (e) by inserting after sub-section (1) the following sub-sections: 10

"( 1 AA) Any power that may be exercised by an authorized officer or by an officer under this Act may also be exercised by the Minister.

"(1AB) Where, in any provision of this Act, reference is made to the exercise of a power by an authorized officer or by an officer and that power is a power which, by virtue of sub-section (1AA), may also be exercised by the Minister, that reference shall be construed as including a reference to the exercise of that power by the Minister." 5

## Heading to Part II

5. The heading to Part II of the Principal Act is omitted and the following heading is substituted: 20

### **"PART II—ENTRY, PRESENCE AND DEPORTATION OF NON-CITIZENS".**

## Non-citizen not to enter Australia without entry permit

6. Section 6 of the Principal Act is amended—

- (a) by omitting from sub-section (1) "An immigrant" and substituting "A non-citizen"; 25
- (b) by omitting from sub-section (1) "prohibited immigrant" and substituting "prohibited non-citizen";
- (c) by omitting from sub-section (2) "an immigrant" and substituting "a non-citizen"; 30
- (d) by omitting from sub-section (2) "the immigrant" and substituting "the non-citizen";
- (e) by omitting sub-section (2A);
- (f) by omitting from sub-section (5) "an immigrant" and substituting "a non-citizen"; 35
- (g) by omitting from sub-section (7) "A woman" and substituting "A person";
- (h) by omitting from sub-section (7) "her husband" (wherever occurring) and substituting "the person's spouse"; and

- (j) by omitting from sub-section (7) "his entry" and substituting "the spouse's entry".

**Conditions on which entry permits may be granted to non-citizens after entry into Australia**

5       **7.** Section 6A of the Principal Act is amended—

- (a) by omitting "an immigrant" (wherever occurring) and substituting "a non-citizen";
- (b) by omitting from paragraph (1) **(d)** "authorised" and substituting "authorized"; and
- 10       (c) by omitting "prescribed immigrant" (wherever occurring) and substituting "prescribed non-citizen".

**Cancellation, expiration and renewal of entry permits**

**8. (1)** Section 7 of the Principal Act is amended—

- (a) by omitting from sub-section (3) "prohibited immigrant" and **15** substituting "prohibited non-citizen"; and
- (b) by omitting sub-section (4). **(2)** Where a person

who, upon the commencement of this Act—

- (a) is a non-citizen within the meaning of the Principal Act as amended by this Act; and
  - 20       (b) is not the holder of an entry permit (not being a temporary entry permit),
- had, at a time before that commencement, ceased to be a prohibited immigrant within the meaning of the Principal Act by virtue of the operation of sub-section 7 (4) of that Act, that person becomes, upon that commencement,
- 25       a prohibited non-citizen for the purposes of the Principal Act as amended by this Act.

**Person to cease to be prohibited noncitizen if granted entry permit**

**9.** Section 10 of the Principal Act is amended by omitting "prohibited immigrant" (wherever occurring) and substituting "prohibited non-citizen".

30       **10.** Sections 12 and 13 of the Principal Act are repealed and the following section is substituted:

**Deportation of non-citizens present in Australia for less than 10 years who are convicted of crimes**

"12. Where-

- 35       (a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence;
- (b) at the time of the commission of the offence the person-
  - (i) was not an Australian citizen; and

- (ii) had been present in Australia as a permanent resident for a period of less than 10 years or for periods that, in the aggregate, do not amount to a period of 10 years; and
  - (c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year, 5
- the Minister may order the deportation of the person."

**Deportation of non-citizens upon security grounds after report by Commissioner**

**11. Section 14 of the Principal Act is amended—**

- (a) by omitting sub-sections (1) and (2) and substituting the following 10 sub-sections:

"(1) If it appears to the Minister that the conduct (whether in Australia or elsewhere) of a person who is a non-citizen (not being a person who has been present in Australia as a permanent resident for a period of at least 10 years or for periods that, in the aggregate, amount to a period of at least 10 years) constitutes, or has constituted, a threat to the security of the Commonwealth, of a State or of an internal or external Territory, the Minister may, subject to this section, order the deportation of the person.

"(2) Where— 20

- (a) a person who is a non-citizen has, either before or after the commencement of this sub-section, been convicted in Australia of an offence;
- (b) at the time of the commission of the offence the person was not an Australian citizen; and 25
- (c) the offence is—
  - (i) an offence against section 24, 24AA, 24AB, 24C, 25 or 26 of the *Crimes Act 1914*;
  - (ii) an offence against—
    - (A) section 6 or 7 of that Act; or 30
    - (B) sub-section 86 (1) of that Act by virtue of paragraph (a) of that sub-section, being an offence that relates to an offence referred to in sub-paragraph (i); or
    - (iii) an offence against a law of a State or of any internal or 35 external Territory that is a prescribed offence for the purposes of this sub-paragraph,

the Minister may, subject to this section, order the deportation of the person."; and

- (b) by omitting from sub-sections (3), (4) and (8) "a person" and "that 40 person" (wherever occurring) and substituting "a non-citizen" and "the non-citizen" respectively.

12. After section 14 of the Principal Act the following section is inserted:

**Definition of permanent resident**

"14A. (1) Where a person has been convicted of any offence (other than an offence the conviction in respect of which was subsequently quashed) the  
5 period (if any) for which the person was confined in a prison for that offence shall be disregarded in determining, for the purposes of section 12 and sub-section 14 (1), the length of time that that person has been present in Australia as a permanent resident.

"(2) In section 12 and sub-section 14 (1), 'permanent resident' means a  
10 person (including an Australian citizen) whose continued presence in Australia is not subject to any limitation as to time imposed by law, but does not include—

(a) in relation to any period before the commencement of this sub-section—a person who was, during that period, a prohibited  
15 immigrant within the meaning of this Act as in force at that time; or

(b) in relation to any period after the commencement of this sub-section—a person who is, during that period, a prohibited non-citizen.

"(3) For the purposes of this section-

20 (a) a reference to a prison includes a reference to any custodial institution at which a person convicted of an offence may be required to serve the whole or a part of any sentence imposed upon him by reason of that conviction; and

25 (b) a reference to a period during which a person was confined in a prison includes a reference to a period-

- (i) during which the person was an escapee from a prison; or
- (ii) during which the person was undergoing a sentence of periodic detention in a prison."

**Repeal of section 15**

30 **13.** Section 15 of the Principal Act is repealed.

**Persons entering Australia to be prohibited non-citizens in certain circumstances**

**14.** Section 16 of the Principal Act is amended—

(a) by omitting from sub-section (1) "as an immigrant" and substituting

35

"is not, or was not, at the time of that entry, an Australian citizen and who";

(b) by omitting paragraphs (1) (b) and (ba) and substituting the following paragraphs:

"(b) at the time of, or prior to, that person's entry into Australia, the person-

(i) produces or produced, or causes or caused to be prodUced, to the Minister or to an officer, in respect of that entry— 5

(A) a permit, certificate, passport, visa, return endorsement, identification card or any other document that was not issued to the person, is D forged or was obtained by false representation; or

(B) a passenger card that contains information that is false or misleading in a material particular; or

(ii) makes or made, or causes or caused to be made, to the Minister or to an officer, in respect of that entry, a statement that is false or misleading in a material particular; 15

"(ba) at the time of, or prior to, the grant of a visa or a return endorsement in respect of the person, the person— 20

(i) produces or produced, or causes or caused to be produced, to the Minister or to an officer, in respect of the grant of that visa or return endorsement, a document of the kind referred to in sub-sub-paragraph (b) (i) (A); or 25

(ii) makes or made, or causes or caused to be made, to the Minister or to an officer, in respect of the grant of that visa or return endorsement, a statement that is false or misleading in a material particular; or";

(c) by omitting from sub-section (1) "prohibited immigrant" and substituting "prohibited non-citizen"; 30

(d) by inserting after sub-section (1) the following sub-section:

"( IAA) Where—

(a) a further entry permit has, either before or after the commencement of this sub-section, been granted to a person authorizing the person to remain in Australia; 35

(b) that entry permit was granted while the person was in Australia; and

(c) the person, in respect of the grant of that entry permit- (i) produced, or caused to be produced, to the Minister or to an officer a document that was not issued to that person, is forged or was obtained by false representation or that contains information that is false or misleading in a material particular; or 40

- (ii) made, or caused to be made, to the Minister or to an officer a statement that is false or misleading in a material particular,

5 that person shall, notwithstanding section 10, be deemed to be a prohibited non-citizen unless he is the holder of an entry permit endorsed with a statement that the person granting that permit recognises him to be a person referred to in this sub-section.";

- (e) by omitting from sub-section (2) "prohibited immigrant" and substituting "prohibited non-citizen"; and

10 (f) by inserting in sub-section (5) "within the meaning of the *Migration Act 1958* as amended by the *Migration Amendment Act (No. 2) 1980*" after "immigrant".

#### **Deportation of prohibited noncitizens**

15. Section 18 of the Principal Act is amended by omitting "prohibited immigrant" and substituting "prohibited non-citizen".

#### **Deportation order to be executed**

16. Section 20 of the Principal Act is amended by adding at the end thereof the following sub-section:

20 "(2) The validity of an order for the deportation of a person shall not be affected by any delay in the execution of that order.".

#### **Duty of master, &c., of vessel or installation which brought deportee to Australia to provide passage**

17. Section 21 of the Principal Act is amended—

- (a) by omitting from sub-section (3) "section thirteen or paragraph (b) or 25(c) of sub-section (1) of section sixteen, of this Act" and substituting "section 12 or paragraph 16 (1) (b) or (c)"; and

30 (b) by omitting from sub-section (3A) "sub-section (2A) of section 5, by virtue of, or by reference to, sub-section (1) of section 6, section 13 or paragraph (a), (b) or (c) of sub-section (1) of section 16" and substituting "sub-section 5 (2A), by virtue of, or by reference to,

sub-section 6 (1), section 12 or paragraph 16 (1) (a), (b) or (c)"; and

- (c) by omitting from paragraph (8) (b) "a migrant's visa" and substituting "a visa known as a resident visa".

#### **Offences in relation to entering or remaining in Australia**

35 18. Section 27 of the Principal Act is amended—

- (a) by omitting from sub-section (1) "An immigrant" and substituting "A non-citizen";

- (b) by omitting paragraph (1) (a) and substituting the following paragraph:

40 "(a) enters Australia in circumstances in which he becomes a prohibited non-citizen by virtue of section 6";

- (c) by omitting from paragraph (1) (aa) "sub-section (1) of section 16" and substituting "sub-section 16 (1) ";
- (d) by omitting from paragraph (1) (ab) "prohibited immigrant" and substituting "prohibited non-citizen";
- (e) by omitting paragraphs (1) (b) and (c) and substituting the following 5 paragraphs:

"(b) becomes a prohibited non-citizen by reason of being a person to whom paragraph 8 (3) (a) or (c) applies; or

- (c) becomes a prohibited non-citizen by virtue of sub-section 16(1) or ( 1 AA) by reason that— 10

(i) he produced, or caused to be produced, after the commencement of the *Migration Amendment Act 1983*, to the Minister or to an officer—

(A) a document that, to his knowledge was not issued to him, is forged or was obtained by false 15 representation; or

(B) a passenger card that, to his knowledge, contains information that is false or misleading in a material particular; or

(ii) he made, or caused to be made, after the 20 commencement of the *Migration Amendment Act 1983*, to the Minister or to an officer, a statement that, to his knowledge, was false or misleading in a material particular,"; and

- (O by omitting sub-section (2A) and substituting the following 25 sub-section:

"(2A) It is a defence to a prosecution of a non-citizen for an offence against paragraph (1) (ab) if the non-citizen satisfies the court that, after he became a prohibited non-citizen, a further entry permit applicable to him had come into force." 30

**Persons concerned in bringing non-citizens secretly into Australia or harbouring prohibited non-citizens**

**19.** Section 30 of the Principal Act is amended—

- (a) by omitting "an immigrant" (wherever occurring) and substituting "a non-citizen"; 35
- (b) by omitting from paragraph (1) (a) "the immigrant" and substituting "the non-citizen"; and
- (c) by omitting "prohibited immigrant" (wherever occurring) and substituting "prohibited non-citizen".

**False papers, &c. 40**

**20.** Section 31 of the Principal Act is amended—

- (a) by omitting from sub-section (1) "an immigrant" (wherever occurring) and substituting "a non-citizen";

- (b) by inserting in paragraph (1) (a) ", or cause to be presented," after "present";
- (c) by omitting paragraph (1) (b) and substituting the following paragraph:

5           "(b) make, or cause to be made, to the Minister or to an officer a statement that, to his knowledge, is false or misleading in a material particular; or";
- (d) by omitting paragraph (1) (c); and
- (e) by omitting from paragraph (1) (d) "to the Minister or to an officer, or  
10 otherwise furnish" and substituting ", or cause to be delivered, to the Minister or to an officer, or otherwise furnish, or cause to be furnished".

**Minister or authorized officer may require prohibited non-citizen to leave Australia**

- 15       **21.** Section 31A of the Principal Act is amended by omitting "prohibited immigrant" and substituting "prohibited non-citizen".

**Prohibited non-citizens, &c., may be prevented from landing**

22. Section 35 of the Principal Act is amended by omitting from paragraph (1) (a) "prohibited immigrant" and substituting "prohibited non-citizen".

20       **Custody of prohibited non-citizen during stay of vessel in port**

23. Section 36 of the Principal Act is amended by omitting "prohibited immigrant" (wherever occurring) and substituting "prohibited non-citizen".

**Custody of prohibited non-citizen during stay of aircraft in Australia**

24. Section 36A of the Principal Act is amended-  
25       (a) by omitting "prohibited immigrant" (wherever occurring) and substituting "prohibited non-citizen"; and  
      (b) by omitting from sub-section (4) "24" and substituting "48".

**Powers of entry and search**

25. Section 37 of the Principal Act is amended-  
30       (a) by omitting from sub-section (1) "prohibited immigrant" and substituting "prohibited non-citizen";  
      (b) by omitting from paragraph (5) (a) "prohibited immigrant" and substituting "prohibited non-citizen";  
      (c) by omitting paragraph (5) (c) and substituting the following  
35 paragraph:

          "(c) any document, book or paper relating to the entry or proposed entry into Australia of a person in circumstances in which that person-  
              (i) would have become a prohibited immigrant within the  
40           meaning of this Act as in force from time to time before

the commencement of the *Migration Amendment Act 1983*; or

(ii) would have become, or would become, a prohibited non-citizen; or"; and

(d) by omitting from paragraph (5) (d) "prohibited immigrant" and substituting "prohibited non-citizen". 5

#### **Arrest of prohibited non-citizen**

26. Section 38 of the Principal Act is amended by omitting "prohibited immigrant" (wherever occurring) and substituting "prohibited non-citizen".

#### **Heading to Division 6 of Part II** 10

27. The heading to Division 6 of Part II of the Principal Act is omitted and the following heading is substituted:

*"Division 6—Migration Agents".*

#### **Interpretation**

28. Section 46 of the Principal Act is amended— 15

- (a) by omitting "an immigration agent" and substituting "a migration agent";
- (b) by omitting from paragraph (a) "of a person into Australia as an immigrant" and substituting "into Australia of a non-citizen intending to seek authority under this Act, prior to entry into Australia, to remain permanently in Australia"; and 20
- (c) by omitting from paragraph (b) "an intending immigrant" and substituting "such a non-citizen".

#### **Persons proposing to act as migration agents to give notice to Department**

29. Section 47 of the Principal Act is amended by omitting from sub-section (1) "an immigration agent" and substituting "a migration agent". 25

#### **Minister may direct persons not to act as migration agents**

30. Section 48 of the Principal Act is amended by omitting "an immigration agent" (wherever occurring) and substituting "a migration agent".

#### **Persons not to describe themselves as registered or approved migration agents** 30

31. Section 49 of the Principal Act is amended by omitting "an immigration agent" and substituting "a migration agent".

#### **Migration agents liable to furnish particulars of fees, &c.**

32. Section 51 of the Principal Act is amended by omitting from sub-section (1) "forty-six of this Act" and substituting "46". 35

**Undertaking to provide passage to be carried out within a reasonable time**

**33.** Section 52 of the Principal Act is amended by omitting "an intending immigrant" and substituting "a non-citizen intending to seek authority under this Act, prior to entry into Australia, to remain permanently in Australia".

5     **Proof of certain matters recited in deportation orders**

**34.** Section 55 of the Principal Act is amended by omitting paragraph.

(1) (b) and substituting the following paragraphs:

"(b) he is, or was at a particular time, a non-citizen;

(ba) he was, at a particular time, being a time before the commencement

**10**         of the *Migration Amendment Act 1983*, an alien within the meaning of this Act as in force at that time;".

**Migrant centres**

**35.** Section 58 of the Principal Act is amended—

(a) by omitting "immigrant centres" (wherever occurring) and  
15 substituting "migrant centres";

(b) by omitting from sub-section (1) "immigrants" and substituting "non-citizens";

(c) by omitting from sub-section (2) "Immigrants" and substituting "Non-citizens"; and

**20**         (d) by inserting in sub-section (2) "in such circumstances," after "centres".

**Review of decisions**

**36.** Section 66E of the Principal Act is amended—

(a) by omitting from sub-section (1) ", 13";

25         (b) by omitting from sub-section (2) "or 13";

(c) by omitting from paragraph (2) (b) "continued presence of the person" and substituting "person is a non-citizen (other than a prohibited non-citizen) whose continued presence"; and

(d) by omitting from sub-section (5) "or 13".

30     **Additional amendments**

**37.** The Principal Act is amended as set out in the Schedule.

**Transitional provisions**

**38. (1)** Where a person was, immediately before the commencement of this Act, a prohibited immigrant by virtue of a provision of the Principal Act,  
35 other than section 16 of that Act, that person becomes, upon that commencement, a prohibited non-citizen for the purposes of the Principal Act as amended by this Act.

**(2)** Where a person was, immediately before the commencement of this Act, deemed to be a prohibited immigrant by virtue of sub-section 16 (1) of the  
Principal Act, the person is, upon that commencement, deemed to be a  
168

prohibited non-citizen by virtue of sub-section 16 (1) of the Principal Act as amended by this Act.

(3) An entry permit, visa, return endorsement or any other instrument in force under the Principal Act immediately before the commencement of this Act has, subject to the Principal Act as amended by this Act, effect after the commencement of this Act as if it were in force under the Principal Act as amended by this Act. 5

(4) Where, before the commencement of this Act, the Minister had ordered the deportation of a person under the Principal Act and the order had not been revoked before that commencement — 10

- (a) the order continues to have effect; and
- (b) the Principal Act continues to apply to and in relation to the deportation of the person,

as if the amendments made by this Act had not been made.

(5) For the purposes of proceedings for an offence against paragraph 27 (1) (ab) of the Principal Act, it is a defence if the person charged satisfies the court that — 15

- (a) after he had become a prohibited immigrant within the meaning of the Principal Act, a further entry permit applicable to him had come into force, whether before or after the commencement of this Act; or 20
- (b) he had, before the commencement of this Act, ceased to be a prohibited immigrant by virtue of sub-section 7 (4) of the Principal Act.

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## SCHEDULE

Section 37

## ADDITIONAL AMENDMENTS

Provision	Amendment
Sub-section 4 (2)	Omit "nine", substitute "9".
Sub-section 4 (5)	(a) Omit "paragraph (a) of the last preceding sub-section", substitute "paragraph (4) (a)". (b) Omit "an immigrant", substitute "a person".
Sub-section 5(1) (definition of "entry permit")	Omit "six of this Act", substitute "6".
Sub-section 5(1) (definition of "officer")	(a) Omit "of Immigration and Ethnic Affairs". (b) Omit "authorised", substitute "authorized".
Sub-section 5(1) (definition of "temporary entry permit")	Omit "(6) of section six of this Act", substitute "6 (6)".
Sub-section 5(5)	Omit "the last preceding sub-section", substitute "sub-section (4)". Omit "thirty", substitute "30".
Paragraph 5 (5) (a)	Omit "the last preceding sub-section", substitute "sub-section (3)".
Sub-section 6 (4)	Omit "sixteen", substitute "16".
Sub-section 6 (8)	Omit "an immigrant", substitute "a non-citizen".
Sub-section 8 (1)	Omit "the next succeeding sub-section", substitute "sub-section (2)".
Paragraph 8 (1) (c)	(a) Omit "of this Part". (b) Omit "the next succeeding sub-section", substitute "sub-section (2)".
Paragraph 8 (1) (d)	Omit "the next succeeding sub-section", substitute "sub-section (2)".
Paragraph 8 (1) (e)	(a) Omit "(a)", substitute "(1) (a)". (b) Omit "(e), of the last preceding sub-section", substitute "(1) (e)".
Sub-section 8 (2)	(a) Omit "of this section". (b) Omit "prohibited immigrant", substitute "prohibited non-citizen".
Paragraph 8(3) (a)	Omit "(a) of that sub-section", substitute "(1) (a)".
Paragraph 8(3) (b)	Omit "(b) of that sub-section", substitute "(1) (b)".
Paragraph 8 (3) (c)	(a) Omit "(c) or (d) of that sub-section", substitute "(1) (c) or (d)". (b) Omit "the last preceding sub-section", substitute "sub-section (2)".
Paragraph 8(3) (d)	Omit "(e) of that sub-section", substitute "(1) (e)".
Sub-section 8 (4)	Omit "(b) of sub-section (1)", substitute "(1) (b)".
Section 9	Omit "an immigrant", substitute "a non-citizen".
Sub-section 1 ic (3)	Omit "(b) of sub-section (1)", substitute "(1) (b)". Omit "thirty", substitute "30".
Sub-section 14 (3)	Omit "the last preceding sub-section", substitute "sub-section (3)".
Sub-section 14 (4)	Omit "five", substitute "5".
Sub-section 14 (5)	(a) Omit "the next succeeding sub-section", substitute "sub-section (7)". (b) Omit "of this section".
Sub-section 14 (6)	Omit "of this section".
Sub-section 14 (8)	Omit "ten of this Act", substitute "10".
Sub-section 16 (1)	Omit "(1) of section six, paragraph (c) of sub-section (3) of section eight, or paragraph (a) of sub-section (1) of section, sixteen, of this Act", substitute "6 (1), paragraph 8 (3) (c), or paragraph 16(1) (a)".
Sub-section 21 (1)	Omit "the last preceding sub-section", substitute "sub-section (1)".
Sub-section 21(2)	(a) Omit "of this section". (b) Omit "thirty", substitute "30".
Sub-section 21(4)	Omit "of this section".
Sub-section 21(5)	Omit "of this section".

SCHEDULE—continued

Provision	Amendment
Sub-section 21 (6)	Omit "of this section" (first occurring).
Sub-section 21(7)	Omit "the last preceding sub-section", substitute "sub-section (6)".
Paragraph 21(8) (d)	Omit "twenty-one", substitute "21".
Sub-section 22 (3)	Omit "of this section".
Paragraph 23(b)	Omit "the last preceding paragraph", substitute "paragraph (a)".
Paragraph 23(c)	Omit "of this section".
Paragraph 23(d)	Omit "the last preceding paragraph", substitute "paragraph (c)".
Sub-section 26 (2)	Omit "twenty-three of this Act", substitute "23".
Sub-section 27 (4)	Omit "two", substitute "2".
Paragraph 28(a)	
Paragraph 28 (b)	<ul style="list-style-type: none"> <li>• Omit "prohibited immigrant", substitute "prohibited non-citizen".</li> <li>• (a) Omit "(d) of sub-section (1) of section eight of this Act", substitute "8(1) (d)".</li> <li>• (b) Omit "prohibited immigrant", substitute "prohibited non-citizen".</li> <li>• (c) Omit "(c) of sub-section (3) of that section", substitute "8 (3) (c)".</li> </ul>
Section 28	Omit "One thousand dollars", substitute "\$1,000".
Sub-section 29 (3)	<ul style="list-style-type: none"> <li>• Omit "of this section".</li> </ul>
Sub-section 318 ( 1 )	<ul style="list-style-type: none"> <li>• Omit "(6A) of section 6", substitute "6 (6A)".</li> </ul>
Sub-section 31B (2)	<ul style="list-style-type: none"> <li>• Omit "prohibited immigrant", substitute "prohibited non-citizen".</li> </ul>
Sub-section 31B (5)	<ul style="list-style-type: none"> <li>• (a) Omit "of Immigration and Ethnic Affairs".</li> <li>• (b) Omit "that Department" (wherever occurring), substitute "the Department".</li> </ul>
Sub-section 33(5)	Omit "either of the last two preceding sub-sections", substitute "sub-section (3) or (4)".
Section 34	Omit "the last preceding section", substitute "section 33".
Sub-section 35 (2)	Omit "the last preceding sub-section", substitute "sub-section (1)".
Sub-section 37 (2)	Omit "the last preceding sub-section", substitute "sub-section (1)".
Sub-section 37 (4)	<ul style="list-style-type: none"> <li>• Omit "three", substitute "3".</li> </ul>
Sub-section 38 (2)	<ul style="list-style-type: none"> <li>• Omit "forty-eight", substitute "48".</li> </ul>
Sub-section 38 (5)	Omit "the next succeeding sub-section", substitute "sub-section (6)".
Sub-section 38 (6)	<ul style="list-style-type: none"> <li>• Omit "the next succeeding section", substitute "section 39".</li> </ul>
Sub-section 39 (1)	<ul style="list-style-type: none"> <li>• Omit "of this section".</li> </ul>
Sub-section 39 (5)	<ul style="list-style-type: none"> <li>• (a) Omit "the last preceding sub-section", substitute "sub-section (4)".</li> <li>• (b) Omit "the next succeeding sub-section", substitute "sub-section (6)".</li> </ul>
Sub-section 40(1)	<ul style="list-style-type: none"> <li>• (a) Omit "the last two preceding sections", substitute "sections 38 and 39".</li> <li>• (b) Omit "five", substitute "5".</li> </ul>
Sub-section 40 (2)	Omit "the last two preceding sections", substitute "sections 38 and 39".
Sub-section 40 (3)	<ul style="list-style-type: none"> <li>• Omit "the last preceding sub-section", substitute "sub-section (2)".</li> </ul>
Sub-section 40 (4)	<ul style="list-style-type: none"> <li>• (a) Omit "of this section".</li> <li>• (b) Omit "the last two preceding sections", substitute "sections 38 and 39".</li> </ul>
Sub-section 40 (5)	Omit "the last two preceding sections", substitute "sections 38 and 39".
Sub-section 42 (1)	Omit "prohibited immigrant", substitute "prohibited non-citizen".
Sub-section 42 (2)	Omit "the last preceding sub-section", substitute "sub-section (1)".
Sub-section 42 (3)	<ul style="list-style-type: none"> <li>• Omit "the last preceding sub-section", substitute "sub-section (2)".</li> </ul>
Sub-section 44 (1)	Omit "prohibited immigrants", substitute "prohibited non-citizens".
Sub-section 45 (2)	Omit "the last preceding sub-section", substitute "sub-section (1)".
Sub-section 45(4)	Omit "two", substitute "2".
Sub-section 45(6)	Omit "the last preceding sub-section", substitute "sub-section (5)".
Paragraph 47 (1) (a)	Omit "of Immigration and Ethnic Affairs".

SCHEDULE—continued

Provision	Amendment
Sub-section 47 (2)	(a) Omit "of Immigration and Ethnic Affairs". (b) Omit "(a) of the last preceding sub-section", substitute "(1) (a)".
Sub-section 47 (4)	Omit "of this section".
Sub-section 48 (2)	(a) Omit "the last preceding sub-section", substitute "sub-section (1)". (b) Omit "forty-six of this Act", substitute "46".
Sub-section 48 (3)	(a) Omit "of this section". (b) Omit "forty-six of this Act", substitute "46".
Sub-section 50(1)	• Omit "forty-six of this Act", substitute "46".
Sub-section 50 (2)	• Omit "forty-six of this Act", substitute "46".
Sub-section 50 (5)	• Omit "the last preceding sub-section", substitute "sub-section (4)".
Sub-section 53 (4)	• Omit "(4) of section fifty of this Act", substitute "50 (4)".
Sub-section 55 (2)	• Omit "the last preceding sub-section", substitute "sub-section (1)".
Sub-section 55 (3)	• Omit "(c), (d), (f) or (g) of sub-section (1) of this section", substitute "(1) (c), (d), (f) or (g)".
Sub-section 56 (1)	(a) Omit "twenty-seven of this Act", substitute "27". (b) Omit "(1) of the last preceding section", substitute "55 (1)".
Sub-section 56 (2)	Omit "(3), (4) and (5) of the last preceding section", substitute "55 (3), (4) and (5)".
Section 59 .....	Omit "seventeen", substitute "17".
Sub-section 62 (1)	• Omit "of this sub-section" (wherever occurring).
Sub-section 62 (3)	• Omit "of this section".
Sub-section 63 (1)	• (a) Omit "(a) or (b) of sub-section (1) of the last preceding section", substitute "62 (1) (a) or (b)". (b) Omit "the next succeeding sub-section", substitute "sub-section (2) of this section".
Sub-section 63(2)	Omit "the last preceding sub-section shall be made within seven", substitute "sub-section (1) shall be made within 7".
Section 65A .....	Omit "three", substitute "3".
Section 66 .....	Omit "of this Act".
Sub-section 66A (3)	Omit "(1) or (1A) of section 36, sub-section (1), (2) or (3) of section 36A, sub-section (1) of section 38 or sub-section (6) of section 39", substitute "36 (1) or (1A), 36A (1), (2) or (3), 38 (1) or 39(6)".
Sub-paragraph 67 (1) (a) (ii)	Omit "of Immigration and Ethnic Affairs".
Sub-section 67 (2)	Omit "(c) of the last preceding sub-section", substitute "(1) (c)".

NOTE

1. No. 62, 1958, as amended. For previous amendments, see No. 87, 1964; No. 10, 1966; Nos. 16 and 216, 1973; No. 91, 1976; Nos. 117 and 118, 1979; Nos. 89 and 175, 1980; No. 61, 1981; and No. 51, 1982.



# Migration (Miscellaneous Amendments) Act 1983

No. 84 of 1983

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**An Act to make certain amendments consequential upon the enactment of the *Migration Amendment Act 1983* and for related purposes**

*[Assented to 14 November 1983]*

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

## **PART I—PRELIMINARY**

### **Short title**

- 5       **1.** This Act may be cited as the *Migration (Miscellaneous Amendments) Act 1983*.

### **Commencement**

- 2. (1)** Subject to sub-section (2), this Act shall come into operation on the day on which the *Migration Amendment Act 1983* comes into operation.
- 10       **(2)** Part VII shall come into operation on the day on which section 22 of the *Navigation Amendment Act 1980* comes into operation or on the day on which the *Migration Amendment Act 1983* comes into operation, whichever is the later.

**PART II—AMENDMENT OF AUSTRALIAN CITIZENSHIP ACT  
1948**

**Principal Act**

**3.** The *Australian Citizenship Act 1948* is in this Part referred to as the Principal Act.

**Transitional provisions**

**4.** Section 25 of the Principal Act is amended by omitting sub-section (7) and substituting the following sub-sections:

"(7) A person who entered Australia after the commencement of Part II of the *Migration Act 1958* and before the commencement of the *Migration Amendment Act 1983* and, at the time of his entry, was— 10

(a) a prohibited immigrant within the meaning of the *Migration Act 1958*;  
Or

(b) the holder, within the meaning of that Act, of a temporary entry permit granted under that Act, 15  
shall not become an Australian citizen under this section.

"(7A) A person who enters Australia after the commencement of the *Migration Amendment Act 1983* and, at the time of his entry, is—

(a) a prohibited non-citizen within the meaning of the *Migration Act 1958*; or 20

(b) the holder, within the meaning of that Act, of a temporary entry permit granted under that Act,  
shall not become an Australian citizen under this section."



# Migration Amendment (Emigration of Certain Children) Act 1983

No. 73 of 1983

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## An Act to amend the *Migration Act 1958*

[Assented to 28 October 1983]

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title, &c.

1. (1) This Act may be cited as the *Migration Amendment (Emigration of Certain Children) Act 1983*.

(2) The *Migration Act 1958* is in this Act referred to as the Principal Act.

Commencement

2. This Act shall come into operation on the day on which Part II of the *Family Law Amendment Act 1983* comes into operation.

### 10 Repeal of Part III

3. Part I II of the Principal Act is repealed.

Institution of prosecutions

4. Section 66 of the Principal Act is amended by omitting ", other than an offence under Part III of this Act,".

### NOTE

I.No. 62, 1958, as amended. For previous amendments, see No. 87, 1964; No. 10, 1966; Nos. 16 and 216, 1973; No. 91, 1976; Nos. 117 and 118, 1979; Nos. 89 and 175, 1980; No. 61, 1981; and No. 51, 1982.



## Off-shore Installations (Miscellaneous Amendments) Act 1982

No. 51 of 1982

### PART VI—AMENDMENTS OF THE MIGRATION ACT 1958

#### Principal Act

42. The *Migration Act 1958*<sup>5</sup> is in this Part referred to as the Principal Act.

#### Interpretation

25      43. Section 5 of the Principal Act is amended—

(a) by inserting before the definition of "authorized officer" in sub-section  
(1) the following definitions:

"'Australian installation' means an installation that is deemed to be  
part of Australia by virtue of the operation of section 5B;

30      "'Australian seabed' means so much of the seabed adjacent to  
Australia as is—

(a) within the area comprising-

(i) the areas described in Schedule 2 to the  
*Petroleum (Submerged Lands) Act 1967*; and

35      (ii) the Coral Sea area; and

(b) part of -

(i) the continental shelf of Australia;

- (ii) the seabed beneath the territorial sea of Australia (including the territorial sea adjacent to any island forming part of Australia); or
- (iii) the seabed beneath waters of the sea that are on the landward side of the territorial sea of Australia and are not within the limits of a State or Territory;

"'Australian waters' means waters above the Australian seabed;"

- (b) by inserting after the definition of "authorized officer" in sub-section (1) the following definitions: 10

"'continental shelf' has the same meaning as in the Convention on the Continental Shelf, being the convention a copy of which in the English language is set out in Schedule 1 to the *Petroleum (Submerged Lands) Act 1967*;

"'Coral Sea area' has the same meaning as in the *Petroleum (Submerged Lands) Act 1967*"; 15

- (c) by inserting before the definition of "master" in sub-section (1) the following definition:

"'installation' means—

- (a) an off-shore industry fixed structure; or 20
- (b) an off-shore industry mobile unit;"

- (d) by inserting "or installation" after "vessel" (wherever occurring) in the definition of "master" in sub-section (1);

- (e) by inserting after the definition of "member of the crew" in sub-section (1) the following definition: 25

"'natural resources' means the mineral and other non-living resources of the seabed and its subsoil;"

- (f) by omitting "or a proclaimed airport" from the definition of "port" in sub-section (1) and substituting ", a proclaimed airport or an Australian installation" . 30

- (g) by inserting after sub-section (2) the following sub-section:

"(2A) For the purposes of this Act, where an installation that has been brought into Australian waters from a place outside the outer limits of Australian waters becomes attached to the Australian seabed — 3 5

- (a) the installation shall be deemed to have entered Australia at the time when it becomes so attached; and
- (b) any person on board the installation at the time when it becomes so attached shall be deemed to have travelled to Australia on board that installation, to have entered Australia at that time and to have been brought into Australia at that time."; and 40

- (h) by adding at the end thereof the following sub-sections:

"(7) A reference in this Act to an off-shore industry fixed structure shall be read as a reference to a structure (including a pipeline) that—

(a) is not able to move or be moved as an entity from one place to another; and

5 (b) is used or is to be used off-shore in, or in any operations or activities associated with, or incidental to, exploring or exploiting natural resources.

"(8) A reference in this Act to an off-shore industry mobile unit shall be read as a reference to—

10 (a) a vessel that is used or is to be used wholly or principally in—

(i) exploring or exploiting natural resources by drilling the seabed or its subsoil with equipment on or forming part of the vessel or by obtaining substantial quantities of material from the seabed or its subsoil with equipment of that kind; or

15

(ii) operations or activities associated with, or incidental to, activities of the kind referred to in sub-paragraph (i); or

(b) a structure (not being a vessel) that(i) is able to float or be floated;

20

(ii) is able to move or be moved as an entity from one place to another; and

(iii) is used or is to be used off-shore wholly or principally in—

25 (A) exploring or exploiting natural resources by drilling the seabed or its subsoil with equipment on or forming part of the structure or by obtaining substantial quantities of material from the seabed or its subsoil with equipment of that kind; or

30 (B) operations or activities associated with, or incidental to, activities of the kind referred to in sub-sub-paragraph (A).

35 "(9) A vessel of a kind referred to in paragraph (8) (a) or a structure of a kind referred to in paragraph (8) (b) shall not be taken not to be an off-shore industry mobile unit by reason only that the vessel or structure is also used or to be used in, or in any operations or activities associated with, or incidental to, exploring or exploiting resources other than natural resources.

40 "(10) The reference in sub-paragraph (8) (a) (ii) to a vessel that is used or is to be used wholly or principally in operations or activities associated with, or incidental to, activities of the kind referred to in sub-paragraph (8) (a) (i) shall be read as not including a reference to a vessel that is used or is to be used wholly or principally in—

(a) transporting persons or goods to or from an installation; or

- (b) manoeuvring an installation, or in operations relating to the attachment of an installation to the Australian seabed.

"(11) An installation shall be taken to be attached to the Australian seabed if—

- (a) the installation— 5
  - (i) is in physical contact with, or is brought into physical contact with, a part of the Australian seabed; and
  - (ii) is used or is to be used, at that part of the Australian seabed, wholly or principally in or in any operations or activities associated with, or incidental to, exploring or 10 exploiting natural resources; or
- (b) the installation—
  - (i) is in physical contact with, or is brought into physical contact with, another installation that is taken to be 15 attached to the Australian seabed by virtue of the operation of paragraph (a); and
  - (ii) is used or is to be used, at the place where it is brought into physical contact with the other installation, wholly or principally in or in any operations or activities 20 associated with, or incidental to, exploring or exploiting natural resources."

**44.** After section 5A of the Principal Act the following section is inserted in Part I:

**Certain installations to be part of Australia**

**"5B. ( 1)** For the purposes of this Act, an installation that— 25

- (a) becomes attached to the Australian seabed after the commencement of this sub-section; or
- (b) at the commencement of this sub-section, is attached to the Australian seabed,

shall, subject to sub-section (2), be deemed to be part of Australia and shall be 30 deemed not to be a place outside Australia.

"(2) An installation that is deemed to be part of Australia by virtue of the operation of this section shall, for the purposes of this Act, cease to be part of Australia if—

- (a) the installation is detached from the Australian seabed, or from 35 another installation that is attached to the Australian seabed, for the purpose of being taken to a place outside the outer limits of Australian waters (whether or not the installation is to be taken to a place in Australia before being taken outside those outer limits); or
- (b) after having been detached from the Australian seabed otherwise than 40 for the purpose referred to in paragraph (a), the installation is moved for the purpose of being taken to a place outside the outer limits of

Australian waters (whether or not the installation is to be taken to a place in Australia before being taken outside those outer limits) .".

**Carriage of persons to Australia without documentation**

- 5       **45.** Section 11C of the Principal Act is amended by adding at the end thereof the following sub-section:

"(7) A reference in this section to a vessel shall be read as including a reference to an installation."

**Persons entering Australia in certain circumstances to be prohibited immigrants**

- 10       **46.** Section 16 of the Principal Act is amended by inserting in paragraph (4) (b) "(other than an Australian installation)" after "place".

**Duty of master, &c., of vessel or installation which brought deportee to Australia to provide passage**

**47.** Section 21 of the Principal Act is amended-

- 15       (a) by inserting in sub-section (1) "(not being a person referred to in sub-section (3A))" after "a person";
- (b) by inserting in sub-section (3) "(not being a person referred to in sub-section (3A)) " after "a person";
- (c) by inserting after sub-section (3) the following sub-section:
- 20               "(3A) Where the Minister has ordered the deportation of a person, being a person who is deemed to have entered Australia by virtue of the operation of sub-section (2A) of section 5, by virtue of, or by reference to, sub-section (1) of section 6, section 13 or paragraph (a), (b) or (c) of sub-section (1) of section 16, an authorized officer may, by notice in
- 25   writing, require the master, owner, agent or charterer of the installation on which the deportee arrived in Australia to provide, without charge to the Commonwealth, a passage for the deportee to a place outside Australia."; and
- (d) by omitting from sub-section (8) all the words from and including 30 "The master," to and including "for a deportee, if" and substituting the following:
- "The master, owner, agent or charterer of a vessel shall not be required, under sub-section (1) or (3), to remove a deportee from Australia or to provide a passage for a deportee, and the master,
- 35       owner, agent or charterer of an installation shall not be required, under sub-section (3A), to provide a passage for a deportee if".

**48.** After section 23 of the Principal Act the following section is inserted:

**Production of identity documents by person in charge of installation**

"23A. The person in charge of an installation that has been brought into Australian waters from a place outside the outer limits of Australian waters for the purpose of being attached to the Australian seabed— \_ 5

- (a) shall, upon the arrival of the installation at the place at which it is to be so attached, have in his possession an identity document in respect of each person on board the installation;
- (b) shall, upon the arrival of the installation at the place at which it is to be so attached, if so required by an officer, produce to the officer the 10 identity documents referred to in paragraph (a);
- (c) shall, before the installation is detached from the Australian seabed, or from another installation that is attached to the Australian seabed, for the purpose of being taken to a place outside the outer limits of Australian waters, if so required by an officer, produce an identity 15 document in respect of each person who is on board the installation at the time when it is to be so detached; and
- (d) shall not, where a requirement has been made of him under paragraph (c), cause the installation to depart from the place at which it was attached to the Australian seabed unless the requirement has been 20 complied with.

Penalty: \$500."

**Custody of prohibited immigrant during stay of vessel in Australia**

**49.** Section 36 of the Principal Act is amended—

- (a) by omitting from sub-section (1) "taken ashore by an officer and"; 25
- (b) by inserting in sub-section (1) "at such place as the authorized officer directs" after "authorized officer directs" (first occurring);
- (c) by omitting from sub-section (1A) "taken ashore by an officer and"; and
- (d) by inserting in sub-section (1A) "at such place as the authorized officer 30 directs" after "authorized officer directs" (first occurring).

**Custody of prohibited immigrant during stay of aircraft in Australia**

**50.** Section 36A of the Principal Act is amended by adding at the end thereof the following sub-section:

"(9) A reference in this section to a proclaimed airport shall be read as 35 including a reference to an Australian installation."

**Powers of entry and search**

**51.** Section 37 of the Principal Act is amended by inserting after sub-section (2) the following sub-section:

"(2A) A reference in sub-section (1) or (2) to a vessel shall be read as 40 including a reference to an Australian installation." 181

## APPENDIX II

### AUSTRALIA,,d--



## MIGRATION REGULATIONS

*Incorporating all amendments by legislation made to 28 February 1981*

### 5. ( 1 ) Where—

- (a) a vessel arriving at a port in Australia in the course of, or at the conclusion of, an overseas voyage or an overseas flight carries overseas passengers; and
- (b) the master of the vessel has not been required under this sub-regulation to furnish a list of passengers in respect of the voyage or flight,

the master shall, on the request of an officer, furnish to the officer a list of all the overseas passengers on board setting out, to the best of the master's knowledge and belief, in respect of each passenger—

- (c) the name of the passenger;
- (d) the intended address in Australia of the passenger;
- (e) the place in Australia at which the passenger's journey in the vessel ends; and
- (f) whether the passenger is a British subject.

(2) Where a list of passengers on a vessel is furnished under the last preceding sub-regulation, the medical officer of the vessel or, if there is no medical officer of the vessel, the master of the vessel shall furnish with the list a certificate signed by him—

- (a) certifying that, in his opinion, none of the passengers on the list, with the exception of the passengers, if any, whose names are set out in the certificate, is suffering from a prescribed disease or a prescribed physical or mental condition; and
- (b) where passengers are named in the certificate as being excepted from the certificate\_\_ setting out opposite to the name of each of the passengers so excepted the nature of the disease or physical or mental condition from which the passenger is, in the opinion of the medical officer or the master, suffering,

together with a number of copies of the certificate equal to the number of copies of the list required to be furnished under sub-regulation (7) of this regulation.

(3) Each of the following diseases or physical or mental conditions is a prescribed disease or a prescribed physical or mental condition, as the case may be, for the purposes of the last preceding sub-regulation:

- (a) mental illness;
- (b) deaf mutism;
- (c) blindness;
- (d) infirmity from any cause;
- (e) any mental or physical condition that is of a serious nature; and
- (f) any disease that is of a serious nature or is infectious or contagious.

(4) Where a vessel arriving at a port in Australia in the course of, or at the conclusion of, an overseas voyage or an overseas flight carries overseas passengers whose journey in the vessel ends at that port, the master of the vessel shall, on the request of an officer, furnish to the officer a list of those passengers setting out, to the best of the master's knowledge and belief, in respect of each passenger, such of the following particulars as the officer specifies:

- (a) the name of the passenger;
- (b) the intended address in Australia of the passenger; and
- (c) whether the passenger is a British subject.

(5) Where—

(a) a vessel arriving at a port in Australia in the course of an overseas voyage or an overseas flight carries passengers—

- (i) who were on board the vessel when it left a place outside Australia at the commencement of, or during the course of, the voyage or flight; and
- (ii) who intends to journey in the vessel beyond Australia; and

(b) the master of the vessel has not been required under this sub-regulation to furnish a list of passengers in respect of the voyage or flight,

the master shall, on the request of an officer, furnish to the officer a list of all the passengers referred to in paragraph (a) of this sub-regulation setting out, to the best of the master's knowledge and belief, in respect of each passenger

- (c) the name of the passenger;
- (d) the nationality of the passenger; and
- (e) the number, and place of issue, of the passport held by the passenger.

(6) Where overseas passengers on board a vessel leaving a port in Australia and bound for, or calling at, a place outside Australia have joined the vessel at that port, the master of the vessel shall, on the request

of an officer, furnish to the officer a list of those passengers setting out, to the best of the master's knowledge and belief, in respect of each passenger—

- (a) the name of the passenger; and
- (b) the place where the passenger's journey in the vessel ends.

(7) An officer who requests the master of a vessel to furnish a list referred to in any of the preceding sub-regulations may, when making the request, require that a specified number (not exceeding six) of copies of the list be furnished with the list, and, if the officer so requires, the master shall furnish the specified number of copies accordingly.

(8) This regulation does not apply in relation to a vessel of the regular armed forces of a Government recognized by the Commonwealth.

#### PART IV—MAINTENANCE GUARANTEES

20. (1) For the purposes of this Part, the maintenance of a person includes—

- (a) accommodation of that person;
- (b) surgical or dental treatment of that person; and
- (c) an allowance for the maintenance of that person paid to or in respect of that person, including a special benefit payable under Division 6 of Part VII of the *Social Services Act* 1947-1958, but not including any other pension, allowance or benefit under that Act.

(2) Where maintenance consists of the provision of accommodation, goods or services for which a charge is payable, the value of the maintenance shall, for the purposes of this Part, be deemed to be equal to the charge so payable.

21. (1) The Minister may, in such circumstances as he thinks fit, require maintenance guarantees to be given in relation to persons seeking to enter or remain in Australia.

(2) A maintenance guarantee shall be given in such form and for such period as the Minister determines.

22. (1) Where, during the period for which a maintenance guarantee under this Part has been given in respect of a person, maintenance of that person has been provided by the Commonwealth, a State, or a public or charitable institution, or the funds of the Commonwealth, a State or such an institution have been otherwise expended, either directly or indirectly, in respect of the maintenance of that person, an amount equal to the value of the maintenance provided or the funds so expended (less any amount paid in respect of the maintenance by or on behalf of that person) is a debt due and payable to the Commonwealth, the State or the person or body

conducting the institution, as the case may be, by the person who gave the maintenance guarantee.

(2) A debt due and payable under the last preceding sub-regulation may be sued for and recovered in a court of competent jurisdiction by the Commonwealth, the State or the person or body conducting the institution, as the case may be, or by a person authorized by the Commonwealth, the State or that person or body, as the case may be, to sue for and recover such a debt.

(3) The Minister of State for Social Security may, in his discretion, write off any debt due to the Commonwealth by virtue of this regulation.

23. (1) Subject to this regulation, the provisions of the last preceding regulation apply in relation to maintenance guarantees given before the commencement of these Regulations in accordance with the regulations that were in force under any of the Acts repealed by the Act.

(2) Notwithstanding anything contained in a maintenance guarantee referred to in the last preceding sub-regulation or contained in the regulations referred in that sub-regulation, an amount paid by the Commonwealth by way of an age, invalid or widow's pension or of an unemployment, sickness or rehabilitation benefit or allowance to or in respect of the person in relation to whom the maintenance guarantee was given shall not be recoverable by the Commonwealth.

(3) Nothing in sub-regulation (1) of this regulation authorizes the recovery under a maintenance guarantee referred to in that sub-regulation of an amount expended in the provision of accommodation for the person in relation to whom the maintenance guarantee was given.

## PART V—IMMIGRANT CENTRES

24. (1) There shall be a Director of each immigrant centre maintained under section 58 of the Act.

(2) Subject to the directions of the Secretary to the Department of Immigration and Ethnic Affairs, the Director of an immigrant centre has the management and control of the immigrant centre on behalf of the Commonwealth and may, in particular—

- (a) admit persons to the immigrant centre;
- (b) direct a person not to enter the immigrant centre;
- (c) direct a person to leave the immigrant centre; and
- (d) give such directions to a person with respect to his conduct in the immigrant centre as are, in the opinion of the Director, necessary for the maintenance of order and health, the protection and preservation of property and the comfort of persons accommodated in the immigrant centre.

(3) A direction under this regulation may be given orally or in writing.

(4) A person shall not refuse or fail to comply with a direction given to him under this regulation.

(5) A member of the police force of the Commonwealth or of a State or Territory may, at the request of the Director of an immigrant centre, remove a person from the immigrant centre or prevent a person from entering the immigrant centre.

25. (1) The Minister may cause to be established and operated at an immigrant centre maintained in pursuance of section 58 of the Act a canteen service for the supply of goods and refreshments to, and the entertainment and recreation of, persons from time to time accommodated at or employed in the immigrant centre.

(2) The Minister may make arrangements for the establishment and operation of a canteen service referred to in the last preceding sub-regulation by the Australian Services Canteens Organization Board of Management constituted by the Australian Services Canteens Organization Regulations.

(3) It is not necessary, under or by reason of any law of a State, to obtain or have any licence or permission for—

- (a) keeping intoxicating liquor;
- (b) supplying intoxicating liquor, on sale or otherwise, to persons accommodated at or employed in an immigrant centre;
- (c) supplying intoxicating liquor, at the expense of persons accommodated at or employed in an immigrant centre, to their guests; or
- (d) permitting the consumption of intoxicating liquor,

at a canteen operated in pursuance of these Regulations, or at premises at an immigrant centre used by a club conducted with the approval of the Director of the immigrant centre and consisting of persons accommodated at, or employed in, the immigrant centre, where the keeping, supplying or permitting takes place in the course of the operations of the canteen, or of the club, as the case may be.

#### PART VI—MISCELLANEOUS

26. The following diseases, and physical and mental conditions are prescribed for the purposes of paragraph (c) of sub-section (1) of section 16 of the Act:

- (a) serious mental deficiency, dementia, insanity, epilepsy, drug addiction, alcoholism;
- (b) syphilis, tuberculosis, leprosy, trachoma;
- (c) cancer or other malignant condition, extensive paralysis, blindness, deaf mutism, organic disease of the nervous system, leukaemia, primary anaemia.

## APPENDIX III

### RELEVANT SECTIONS OF THE RACIAL DISCRIMINATION ACT 1975 AND THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

#### **Racial Discrimination Act Relevant Sections**

9.(1) Its (sic) is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

(2) The reference in sub-section ( 1 ) to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes a reference to any right of a kind referred to in Article 5 of the Convention.

(3) Sub-section (1) does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.

(4) The succeeding provisions of this Part do not limit the generality of sub-section (1).

**10.(I)** If, by reason or, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that—

- (a) authorizes property owned by an Aboriginal or Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
- (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander, not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which sub-section (1) applies and a reference in that sub-section to a right includes a reference to a right of a person to manage property owned by him.

18. A reference in this Part to the doing of an act by reason of the race, colour or national or ethnic origin of a person includes a reference to the doing of an act for two or more reasons that include the first-mentioned reason, provided that reason is the dominant reason for the doing of the act.

**Racial Discrimination Convention**  
**Relevant Articles**

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**ARTICLE 5**

In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by an individual, group or institution;
- (c) Political rights, in particular rights to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
  - (i) The right to freedom of movement and residence within the border of the State;
  - (ii) The right to leave any country, including one's own, and to return to one's country;
  - (iii) The right to nationality;
  - (iv) The right to marriage and choice of spouse;
  - (v) The right to own property alone as well as in association with others;
  - (vi) The right to inherit;
  - (vii) The right to freedom of thought, conscience and religion;
  - (viii) The right to freedom of opinion and expression;
  - (ix) The right to freedom of peaceful assembly and association;
- (c) Economic, social and cultural rights, in particular:
  - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
  - (ii) The right to form and join trade unions;
  - (iii) The right to housing;
  - (iv) The right to public health, medical care, social security and social services;
  - (v) The right to education and training;
  - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks.

## APPENDIX IV

### RELEVANT ARTICLES FROM THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

#### ARTICLE 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of that State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

#### ARTICLE 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

#### ARTICLE 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

## ARTICLE 10

- I. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;  
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which will be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

## ARTICLE 12

- I. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

## ARTICLE 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

## ARTICLE 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;

- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right, and to have legal assistance assigned to him, in any case where the interests of justice require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### ARTICLE 16

Everyone shall have the right to recognition everywhere as a person before the law.

#### ARTICLE 17

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- 2. Everyone has the right to protection of the law against such interference or attacks.

#### ARTICLE 23

- 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
- 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
- 3. No marriage shall be entered into without the free and full consent of the intending spouses.
- 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

#### ARTICLE 24

- 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
- 2. Every child shall be registered immediately after birth and shall have a name.
- 3. Every child has the right to acquire a nationality.

#### **ARTICLE 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### **ARTICLE 27**

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

## APPENDIX V

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### Relevant Principles from the Declaration of the Rights of the Child

#### *Principle 1*

The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

#### *Principle 2*

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

#### *Principle 6*

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

#### *Principle 8*

The child shall in all circumstances be among the first to receive protection and relief.

## **APPENDIX VI**

### **Relevant Paragraphs from the Declaration on the Rights of Disabled Persons**

2. Disabled persons shall enjoy all the rights set forth in this Declaration. These rights shall be granted to all disabled persons without any exception whatsoever and without distinction or discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, state of wealth, birth or any other situation applying either to the disabled person himself or herself or to his or her family.

3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age which implies first and foremost the right to enjoy a decent life, as normal and full as possible.

4. Disabled persons have the same civil and political rights as other human beings; paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons applies to any possible limitation or suppression of those rights for mentally disabled persons.

8. Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.

9. Disabled persons have the right to live with their families or with foster parents and to participate in all social, creative or recreational activities. No disabled person shall be subject, as far as his or her residence is concerned, to differential treatment other than that required by his or her condition or by the improvement which he or she may derive therefrom. If the stay of a disabled person in a specialised establishment is indispensable, the environment and living conditions therein shall be as close as possible to those of the normal life of a person of his or her age.

10. Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

## APPENDIX VII

### Submissions and Their Contents

<i>Name</i>	<i>State</i>	<i>Sub. No.</i>	<i>Issues Raised</i>
Administrative and Clerical Officers' N.S.W. Association, N.S.W. Branch		112	Arrest; Detention
ALSO Foundation	Vic.	41	Discrimination against homosexual people
Amnesty International W.A. Branch	W.A.	111	Refugees
A n d e r s o n , A .	Q l d	7	Deportation of PNCs
Anonymous		32	Overseas students
Anti-Discrimination	N.S.W.	119	Discrimination against homosexual people
Aqbal, M.	N.S.W.	72	Prohibited non-citizens; Deportation; Australian born children of prohibited non-citizens
Arabic Maintenance Guarantee Group	N.S.W.	55	Assurance of support
Association of Ethnic Chinese from N.S.W. Indo-China in Australia		85	Assurance of support; Sponsorship
Australian Asian Community Welfare Association	Vic.	73	Discrimination against disabled people; Discretionary powers; Review; Deportation; Social Security benefits; Welfare workers; Australian born children of PNCs
Australian Association for Better Hearing	W.A.	14A, B, C, D,	Discrimination against deaf people
Australian Association for the Mentally Retarded Inc.	A.C.T.	95	Discrimination against intellectually disabled people
Australian Chinese Community Association of N.S.W.	N.S.W.	52	Search and arrest; Detention; Discretionary powers; Change of status
Australian Council for Rehabilitation of Disabled (ACROD)	A.C.T.	68	Discrimination against disabled people
Australian Council for Rehabilitation of Disabled (ACROD), W.A. Division	W.A.	75	Discrimination against disabled people
Australian Deafness Council	W.A.	14	Discrimination against deaf people
Australian Federal Police Association	Vic.	78	Search; Arrest; Detention
Australian Festival of Light and Community Standards Organisation	Qld	93A, B	Monoculturalism and multiculturalism
Australian Hellenic Institute	A.C.T.	39	Deportation; Discretionary powers
Australian Institute of Multicultural Affairs	Vic.	60	Review; Discretionary powers; Search and arrest; Detention; Deportation
Australian Irish Welfare Bureau	Vic.	79	Change of status
Australian Red Cross Society	Vic.	70	Detention; Legal assistance; Welfare assistance; Interpreter services
Australian Social Welfare Union, N.S.W. Branch	N.S.W.	28	Social welfare workers and PNCs

<i>Name</i>	<i>State</i>	<i>Sub No.</i>	<i>Issues Raised</i>
Better Hearing Australia	W.A.	14C	Discrimination against deaf people
Browne, G.	A.C.T.	96	Processing delays in obtaining entry visa for spouse
Byers, C.	N.S.W.	1	Discrimination in favour of people from New Zealand; Deportation
Cheatle, W.	S.A.	90	Change of status
Chryssavgis, M., Griffiths, B. and Vasta, S.	N.S.W.	50	A range of issues mainly related to PNCs
Chung, E.	W.A.	3	Family reunion; Sponsorship; Discrimination against Asians
Cooper, J.	W.A.	98	Change of status
Council for Civil Liberties	N.S.W.	62	Entry into Australia; Assurance of support; Review; Search and arrest; Detention; Deportation
Crocombe, N.	Tas.	26	Refugees
Currie, W.	N.S.W.	102	Rights of migrants
Department of Foreign Affairs	A.C.T.	46	Refugees
Department of Immigration and Ethnic Affairs	A.C.T.	118	Comments on important issues raised by the Inquiry. Statistical tables attached
de Detrich, P.	N.S.W.	25	Processing delays in obtaining entry visa for spouse
Dezsery, A.	S.A.	22	Dual citizenship
Doble, J.	Vic.	80	Entry visas for spouses of Australian citizens
Drozdz, J.	N.S.W.	104A,B	Multiculturalism
Dwyer, T.	A.C.T.	9	Constitutional power to create citizenship
Epilepsy Foundation of Victoria	Vic.	29A	Discrimination against people with epilepsy
Ethnic Affairs Commission of N.S.W.	N.S.W.	65	A wide range of issues relating to migrant legislation and administration
Ethnic Affairs Commission of S.A.	S.A.	56	Refugees; Discretionary powers; Review; Discrimination against disabled people; Issues relating to PNCs
Ethnic Affairs Commission of Vic.	Vic.	76	Detention; Deportation; Review; Discretionary powers; Assurance of support
Ethnic Child Care Development Unit	N.S.W.	45	Discrimination against women, children and disabled people; Discretionary powers; Deportation; Detention; Welfare workers
Ethnic Communities' Council of N.S.W.	N.S.W.	84	A range of issues relating to migration legislation and administration
Ethnic Communities' Council of S.A. Inc.	S.A.	54	Sponsorship by pensioners; Review
Ethnic Communities' Council of Vic.	Vic.	64	A range of issues relating to migration legislation and administration
Ethnic Communities' Council of W.A.	W.A.	43	A range of issues relating to migration policy and administration

<i>Name</i>	<i>State</i>	<i>Sub No.</i>	<i>Issues Raised</i>
Federation of Australian Jewish Welfare Societies	Vic.	49	Discretionary powers; Review; Assurance of support; Migrant selection; Detention; Self-incrimination
Field, A.	Qld	36	Multiculturalism; Discrimination against White Anglo-Celtics
Gartner, C.	Vic.	105	Reciprocal superannuation benefits
Golding, J.	N.S.W.	12	Review
Goulden, T. and Hounslow, B.	N.S.W.	117	Discrimination against homosexual people
Gribble, C.	N.S.W.	8	Sponsorship
Griffin, M.	A.C.T.	97	Family reunion; Migrant selection
Hodgkin, M.	W.A.	24	Overseas students
Hounslow, B.	N.S.W.	113	Granting of work permits during change of status determinations
Income Maintenance Guarantee Group	N.S.W.	38A,B	Assurance of support; Special benefits
Indian Community of Woolgoolga	N.S.W.	87	Family reunion; Sponsorship
Indo-China Refugee Association, Qld	Qld	48	Refugees; Sponsorship; Deportation; Discrimination against disabled people; Interpreter services; Welfare workers; Australian born children of PNCs
Interagency Migration Group	N.S.W.	57A,B,C,	A range of issue relating to migration legislation, policy and administration
International Prisoners Aid Association, Australasian, Far East Region	S.A.	40A,B	Australians serving prison sentences overseas
Ketelhohn, J.	Vic.	11A,B	Detention; Bail
Kos, O.	Vic.	58	Discrimination against Croatians in issue of visitors visas
Laroque, G.	N.S.W.	106	Deportation; Detention; Court proceedings
Legal Aid Commission of Vic.	Vic.	47A,B	Review; Detention; Bail; Change of status; Refugees; Legal assistance; Access to information
Legal Services Commission of S.A.	S.A.	63	Deportation; Review
Limb, P.	N.S.W.	20A	Discrimination against black South Africans in issue of visas
Lindsay, N.	W.A.	20B	Discrimination against black South Africans in issue of visas
Little, J.	Vic.	33A,B	Rights of PNCs accompanied by documented case studies of legal proceedings
Ludwig, J.	N.S.W.	59	Granting of work permits during determination of refugee status
Macdonald, W.	N.S.W.	17	Processing delays in obtaining entry visa for spouse
Mackerras, C.	Qld	27	Discrimination against political views, women, disabled people; Detention costs

<i>Mune</i>	<i>State</i>	<i>Sub. No.</i>	<i>Issues Raised</i>
Markus, A.	N.S.W.	67	Processing delays in obtaining entry permit for spouse
Marrickville Legal Centre	N.S.W.	86	Detention; Court proceedings; Processing delays for change of status; checking on marriage validity
Machini, G.	W.A.	20	Discrimination against black South Africans in issue of visas
Mayberry, G.	W.A.	8	Discrimination against women
McCormack, G.	Vic.	34	Discrimination against political views in granting visas for temporary entry
McKenzie, D.	Vic.	91	PNCs
Melkman, N.	N.S.W.	16	Discrimination against Jews
Migrant Resource Centre of Canberra and Queanbeyan	N.S.W.	44	Discriminatory immigration policies and procedures
Migrant Resource Centre of S.A. Inc. S.A.	S.A.	31	Deportation; Refugees; Assurance of support; Family reunion; Welfare workers; Discrimination against disabled people
Moore, G.	Vic.	77	Discrimination against Anglo-Indians
Mount Druitt Multicultural Centre	N.S.W.	110	Racial discrimination in issue of visas
Au Muoi	Vietnam	69	Discrimination against disabled people
Murray, B.	A.C.T.	109	Discretionary powers; Checking on marriage validity; Change of status; Deportation; Search and arrest
National Epilepsy Association of Australia and Australian Council of the Disabled (ACROD)	Vic.	29	Discrimination against people with epilepsy
New Settlers Federation of Aust.	N.S.W.	81	A range of issues relating to migration policy and administration with case studies
N.S.W. Social Welfare Workers Union	N.S.W.	6	Discrimination against homosexual people
9th National Conference of Lesbians & Homosexual Men	Vic.	30	Discrimination against homosexual people
Orr, G.	Vic.	107	Adopted children
Perth Asian Community Centre	W.A.	74	A range of issues relating to migration policy and administration
Phillips, K.	N.S.W.	108	Right to free movement
Plant, R.	N.S.W.	114	Discrimination in selection of refugees from Indo-China
Polish Community Social Welfare Office	W.A.	92	Change of status
Polish Welfare and Information Bureau in N.S.W.	N.S.W.	100	Refugees; Interpreting services; Entry permits; Overseas students; Assurance of support
Privacy Committee	N.S.W.	83	Privacy and search warrants
Public Interest Advocacy Centre	N.S.W.	23	PNCs and Freedom of Information
Queensland Council for Civil Liberties	Qld	71	Search warrants; Self-incrimination; Deportation; Review; Bail

<i>Name</i>	<i>State</i>	<i>Sub No.</i>	<i>Issues Raised</i>
Queensland Immigration Control Association	Qld	I 5A,B	Discrimination against white Anglo-Celtic Australians in multiculturalism
Ritchie, J.	N.S.W.	82	Sponsorship of companions
Robb, V.	Qld	37	Discrimination against white Anglo-Celtic Australians in multiculturalism
Rodan, E.	Vic.	42A,B	Detention; Deportation; Change of status with case studies
Rogers, G.	W.A.	2	Delays in processing family reunion application
Roshey, H.	Qld	88	Discrimination against Indians in issue of visas
Saini, C.	Qld	115	Racial discrimination against Indians
Sharpe, J.	Vic.	66	Discretionary powers; Review
Sing, M.	N.S.W.	61	Delays in processing sponsorship application
Smith, L.	N.S.W.	5	PNCs
Sobolewski, T.	S.A.	103	Interpreter services
Society of St. Vincent de Paul, Archdiocesan Central Council of Canberra & Goulburn	A .C.T.	51	Legislative and systemic violation of human rights in treatment of migrants
Soosai, A.	Vic.	94	Sponsorship; Change of status
Springvale Community Aid and Advice Bureau	Vic.	21	Sponsorship; Assurance of support
State Relief Committee, Vic.	Vic.	35	Refugees, Assurance of support; Deportation
Taggart, W.	N.S.W.	13	Selection; Review; Refugees; Deportation; Bail; Legal assistance
Tebbutt, H.	N.S.W.	10	Search warrants
de Teliga, J.	N.S.W.	25A	Processing delays in obtaining entry visa for spouse
Temple, N.	Vic.	4	Family reunion; Sponsorship; Assurance of support; Discrimination against white Anglo-Celtic Australians
Tindall, J.	Vic.	101	Discrimination against Asian women in detention
Tunny, J.	N.S.W.	99	Refugees
Tzovaras & Company, Solicitors and Attorneys	N.S.W.	53	Change of status; Checking on marriage validity; Review; Bail; Legal assistance
United Nations Association of Aust., W.A. Division	W.A.	116	Refugee status; Detention
Varma, P.	S.A.	89	Family reunion; Sponsorship; Firm job offers
Waye, P.	S.A.	19	Deportation; Selection; Review; Australian born children of prohibited non-citizens
Welfare Rights Centre	N.S.W.	120	Assurance of support

## APPENDIX VIII

### Public Hearings

<i>Location</i>	<i>Date</i>	<i>No. of written submissions from given State</i>	<i>Members of HRC present</i>	<i>No. of Witnesses examined</i>
Melbourne	14-15 Nov. 1983	29	Dame Roma Mitchell, Mr P.H. Bailey & Mrs N. Ford (15/11 only)	21
Sydney	21-22 Nov. 1983	46	Mr P.H. Bailey & Mrs N. Ford	39
Adelaide	6 Dec. 1983	10	Dame Roma Mitchell	10
Perth	8-9 Dec. 1983	16	Dame Roma Mitchell & Prof. P. Boyce	16
Brisbane	12 Dec. 1983	10	Dame Roma Mitchell & Dr C. Gilbert	10
Canberra	15 Dec. 1983, & 27 Feb. 1984	10	Dame Roma Mitchell, Mr P.H. Bailey & Mrs N. Ford	15
Hobart (Consultation)	12 Dec. 1983	1	Prof. M. Aroney	1

## APPENDIX IX

### List of Witnesses

<i>Name and Organisation</i>	<i>Place</i>
Aqbal, M	Sydney
Baltinos, S, New Settlers Federation	Sydney
Berry, K, Dept. of Foreign Affairs	Canberra
Bellens, J, Interagency Migration Group	Sydney
Byrt, P, Aboriginal Legal Service	Adelaide
Blackmore, H, Australian Deafness Council	Perth
Besi, P, Ethnic Communities Council, NSW	Sydney
Browne, G	Canberra
Burns-McCrivie, K, Social Welfare Union, NSW	Sydney
Casey, J, Interagency Migration Group & Social Welfare Union, N.S.W.	Sydney
Cheatle, R	Adelaide
Cheatle, W	Adelaide
Chelliah, R, Perth Asian Community Centre	Perth
Chong, P	Perth
Christie, H, Legal Aid Commission	Perth
Clothier, M, Legal Aid Commission	Melbourne
Cooper, J	Perth
Correll, D, Aust. Council for Rehabilitation of the Disabled	Canberra
de Detrich, P	Sydney
Dezsery, A	Adelaide
Dique, J, Immigration Control Association	Brisbane
D'Mello, A	Melbourne
Dobley, M	Melbourne
Dowell, K, Aust. Federal Police Association	Melbourne
Drozd, J	Canberra
Dwyer, T	Canberra
Eames, G, Legal Services Commission of S.A.	Adelaide
Flick, G, Aust. Institute of Multicultural Affairs	Sydney
Francis, D	Brisbane
Frost, Dame Phyllis, State Relief Committee	Melbourne
Gardini, A, Ethnic Affairs Commission, S.A.	Adelaide
Gardiner, J, Gay Legal Rights Coalition	Melbourne
Goodman, R	Brisbane
Goss, L, Interagency Migration Group	Sydney
Griffin, R	Canberra
Harrison, A, Polish Community	Perth
Hemsley, G, Norwood Community Legal Service	Adelaide
Hodgkin, M, Council for Welfare of Overseas Students	Perth
Hook, D	Brisbane
Hounslow, B, Income Maintenance Guarantee Group	Sydney
Hunt, S, Australian Chinese Community Association, NSW	Sydney
Jamieson, P, Ecumenical Migration Centre	Melbourne
Jones, M	Melbourne
Kalowski, J, Ethnic Communities Council, NSW	Sydney
Kalsigiannis, T, NSW Council of Civil Liberties	Sydney
Kidney, R	Perth
Kos, O	Melbourne
Koutsounadis, V, Ethnic Child Care Centre	Sydney
Koya, M, New Settlers Federation	Sydney
Kuriata, T, Polish Community in Melbourne	Melbourne
Lam, C, Australian Chinese Community Association, NSW	Sydney
Lane, tt	Sydney

<i>Name and Organisation</i>	<i>Place</i>
Lawless, M, Department of Immigration and Ethnic Affairs	Canberra
Lean, R, Task Force on Multicultural Education	Adelaide
Lefert, B, ACROD, WA	Perth
Liffman, M, Ecumenical Migration Centre	Melbourne
Limb, P	Perth
Lippman, W, Ethnic Communities Council	Melbourne
Little, J	Melbourne
Loder, D, Australian Association for Better Hearing	Perth
McCallum, E	Melbourne
McCormack, G	Melbourne
McGirr, J, Privacy Committee	Sydney
McIntyre, B	Perth
McKinnon, W, Department of Immigration and Ethnic Affairs	Canberra
Manocha, J, Ethnic Communities Council	Canberra
Mark, S, Interagency Migration Group	Sydney
Masri, G, Interagency Migration Group	Sydney
Mayberry, G	Perth
Maxton, A, National Epilepsy Association	Melbourne
Meokmaw, N	Sydney
Norman, P, Internat. Prisoners Aid Assoc.	Adelaide
Nunan, N, Qld Council for Civil Liberties	Brisbane
Papadopoulos, G, Ethnic Affairs Commission	Melbourne
Pierpeluigi, C, Migrant Resources Centre	Perth
Plant, R	Canberra
Rigby, N, Aust. Assoc. for Mentally Retarded	Canberra
Ritchie, J	Sydney
Robb, V	Brisbane
Rodan, E	Melbourne
Romano, D, Migrant Resource Centre	Canberra
Rashey, H	Brisbane
Shanahan, B, Irish Welfare Bureau	Melbourne
Shama, P	Sydney
Sharpe, J	Melbourne
Sheehan, R, National Epilepsy Association	Melbourne
Sheppard, G, Ethnic Affairs Commission	Melbourne
Sims, A, Springvale Community Aid and Advice Bureau	Melbourne
Singh, T	Sydney
Smith, L	Sydney
Sobolewski, T	Adelaide
Soosai, A	Melbourne
Sung, R, Ethnic Child Care Centre	Sydney
Tabar, P, Arabic Maintenance Guarantee Group	Sydney
Taggart, W	Sydney
Tang, P, Indian Welfare Association	Sydney
Tarozzi, A	Perth
Tebbut, P	Sydney
Thorsen, T	Brisbane
Tzovaras, T	Sydney
Varan, E	Sydney
Varma, P	Adelaide
Veszely, J, Migrant Emergency Fund	Perth
Waite, J	Perth
Waters, P, Interagency Migration Group	Sydney
Weyman, C	Sydney
White, J	Perth
Wilkinson, H, Aust. Assoc. for Mentally Retarded	Canberra
Wyvill, A, South Brisbane Legal Service	Brisbane

## APPENDIX X

### Case Studies

CASE STUDY I: A man who had been a permanent resident in Australia since April 1976 was unable to get approval for his spouse and children to join him from Turkey for eight years. In the interim his wife died.

1. A man who had been in Australia for over two years and was granted permanent resident status in April 1976, under the amnesty of that year, applied to sponsor his family — spouse and four young children — from Turkey in May 1976.
2. A medical examination of his spouse revealed that she had a mitral valve disease which however was considered by the interviewing officer to be well compensated as she had had four normal deliveries. The condition was not a risk to public health and the man planned to support his spouse (who did not work) and family in Australia as he was already doing and continued to do by sending the bulk of his earnings to Turkey.
3. Nevertheless his application to be reunited with his family was rejected for three different reasons. The first was that the medical condition of his spouse was considered to have a poor prognosis. The second reason was that the interviewing officer in Ankara, exercising his discretion, decided that they were 'a very unsatisfactory family'. (This same officer interviewing another family for reunion purposes concluded that the 'mother is illiterate and dressed like a typical Turkish peasant . . . All look like peasants'. They also were rejected.) Finally, the Minister, who personally considered their case, together with four others, rejected four out of five on the basis that spouses and dependent children of persons granted amnesty were a special category of immigrant and '. . . it was not envisaged that [the amnesty] would confer an unqualified right of entry on the relatives of amnesty grantees'. In the family which the Minister approved for entry to Australia, one of the children had a severe spinal deformity which meant that 'he would become a burden on the community in later life'. The case therefore did not differ markedly from that of this family rejected because of the spouse's heart disease.
4. The man, however, was not informed of the rejection of his application and, having been given provisional approval to sponsor his family, travelled by plane to Turkey, collected his family and arrived in Rome on 23 June 1977 en route to Australia, only to be told that they did not have visas and that they did not have approval to enter Australia.
5. He did not receive notice of rejection of his sponsorship until August 1977, fifteen months after his original application and a month after he had spent money on fares for his family and himself. Letters informing both him and his family did not provide adequate reasons for rejection of the application.
6. During 1979-80 he continued to attempt to have his family join him through Ministerial representations. He travelled back to Turkey in April 1980 to see his family and to apply again. He also sought advice about bringing his spouse to Australia on a visitor's visa to have a heart operation but this was refused because the interviewing officer considered that 'I could hardly give her a visit visa knowing that she wished to remain [in Australia]'.

7. In 1981 he applied for his children only to migrate because his spouse was sick. When she died in October 1982, he asked for urgent consideration of his application because the children were alone in Turkey.
8. Processing continued to be delayed because of DIEA requirements of evidence of his employment, suitable accommodation, firm job offers for the two eldest children and a copy of his spouse's death certificate. Although these requirements were mitigated by a Ministerial directive that 'parents and children are not to be separated on economic grounds', he had already responded to the first advice, arranging for employment for his children.
9. At the end of 1983, he submitted an enquiry form to the Department as he still had not received a reply to his application.
10. Finally, on 26 April 1984, permission for the children to migrate to Australia to join their father was granted — eight years after he had first applied.

CASE STUDY II: A man married to an Australian citizen was unable to obtain a change of status under s.6A(1)(b) of the Migration Act for three years. During the entire period his marriage was treated with suspicion and investigated as a marriage of convenience.

1. A man came to Australia from Turkey in 1980, and married an Australian citizen on 21 March 1981.
2. On 23 March 1981 he was arrested and taken into custody at Villawood Detention Centre where he was held for one month as a suspected prohibited non-citizen while officers considered whether his marriage was one of convenience for the purpose of circumventing immigration law.
3. His detention for seven days from 1 April 1981 was not renewed again until eight days later on 9 April. Similarly an eight day period elapsed between the renewal of 15 April and his eventual release on a reporting basis on 23 April. This was contrary to s.38(3A) of the Act which states that 'The period for which the detention in custody of a person brought before a prescribed authority may be authorised under subsection (3) by that prescribed authority shall not exceed 7 days from the date of the authorization . .
4. The Control Branch officer who located the man reported: 'I saw [him] briefly on the afternoon of 23/3/81 when in bad English and with a self satisfied smirk [he] informed me he was married'. The officer obtained evidence about the man from a frightened nephew of the man's spouse and from his cousins who were interviewed with the aid of a neighbour acting as interpreter. A prosecution was considered against the cousins pursuant to s.30(2)(aa) or s.65 of the Act because these people had previously had the man staying with them for a period.
5. The man was first interviewed to discover the intention and purpose of the marriage on 25 March, while in detention. His spouse was interviewed separately on 24 March. The interviewing officer, exercising his discretion under the Act concluded: 'I am prepared to believe that [he] has slept with [his spouse] on the odd occasion . . . I find it extremely difficult to believe that [this man] who is an athletic, good looking 26 year old man would marry an obese, rather dimwitted nearly 41 year old woman for love . . . In fact it is easy to feel sorry for [the spouse] who had been used but is not bright enough to realise it and who has been desperately searching for a man'.

6. He was interviewed about his marriage again at Villawood on 9 April 1981. After a session lasting four and a half hours the officer considered that 'in my view there is very little point interviewing intelligent people like [this man] who refuse to answer or avoid the question'. Questions he was asked included:
  - whether he had slept with his spouse before he married her
  - how often he had had sex with her
  - when they had sex for the first time
  - whether his wife was not overweight and old, too old to have children
  - whether it was not normal to get engaged before marriage
  - whether it was not normal to marry someone of his own age.
7. The man claims that during the period he was not offered legal assistance. His passport and other papers were taken from him and not returned until 24 February 1984. The assumption underlying the inquiry into his marriage was that he wished to stay in Australia and he continued to maintain this during the entire period. Yet he was never counselled, despite his poor English facility, that he was required to apply for an extension of his temporary entry permit and permanent residence.
8. He was finally released from detention a month later on 23 April 1981 on the proviso that he must not work and that he must report twice weekly to DIEA. (He was obliged to continue reporting for another two and a half years.) However his marriage continued to be scrutinised as a marriage of convenience for another three years.
9. His spouse supported him for a year until he was granted a work permit on 4 May 1982 because his spouse had broken her arm and could not work and their situation was difficult. Nevertheless he found it hard to obtain employment because he could not show that he would be remaining in Australia permanently and had to report in the city office of DIEA which was a substantial distance from his place of work.
10. On 12 August 1982 a check by DIEA officers, which involved questioning neighbours, revealed that the couple were still living together as man and wife. However on 9 November 1982 an official advised that the case be treated with caution because: 'whilst they may be living in the same house they might not be sharing the same bedroom'. It was recommended that he be given a long temporary entry permit to see if the couple would remain together in the interim. The permit was issued in February and it was decided not to interview the couple again until July 1983.
11. On 11 February 1983 when he became aware that he must lodge a formal application for permanent residency, the assessment of the application by the officer was: 'I'm certain they both live at the same place but not as man and wife . . . She is very overweight and of somewhat startling appearance — he is young, healthy and good looking — a totally contrasting couple'. She was in tears and the interviewing officer suggested that it was because of 'pressure of performance'. It was considered that 'this does not seem to be a viable marriage. The cultural, mental and physical differences between the two are immense'.
12. Nine months later, as he had received no communication from DIEA regarding his change of status application, he applied for a further entry permit on 4 October 1983 and submitted another application for permanent residence — for which he was charged an additional \$50. A month later, having still received no information he lodged a permanent residence inquiry form. In December he made a Freedom of Information request. A complaint lodged by the Human Rights Commission Conciliation Branch in January 1984 was never answered by DIEA.

13. The couple were interviewed at last on 13 March 1984 and at this point, three years after investigations had commenced, the officer finally concluded: 'I am quite satisfied that the marriage is genuine'. Permanent residence was granted in May 1984.

CASE III: A woman applying to come to Australia on a working holiday was advised by the office in Britain that she would be eligible to change her status to permanent resident in Australia under existing policy directives. Delays in processing her change of status application and a change of immigration policy meant that she became ineligible for permanent residence and had to leave Australia before her case was considered by the Ombudsman.

1. A woman from Britain applied in December 1981 to come to Australia on a working holiday visa. (She had been in Australia previously between 1976 and 1978.)
2. She was advised that under the existing policy she would be eligible to apply for permanent residence once she was in Australia.
3. She applied for change of status at the Perth office of DIEA shortly after she reached Australia but was told to return eleven months later when her case would be looked at.
4. She applied again on 29 October 1982 and was granted an extension of her visa for another six months.
5. She was not invited for an interview until 22 March 1983 when she was informed that her occupation in retail trade management had no demand rating. However she was advised that her employer could test the labour market in her field by advertising the vacancy extensively and supplying justification for the rejection of any local candidates. The interviewer ascertained that she had a boyfriend but that she was not living with him and had no marriage plans. He recommended, as she recalled in her evidence to the Commission's public hearing in Perth, that 'I should find myself a nice Australian boyfriend, or if I was to obviously get married, have a de facto relationship or even spend three or four nights a week with an Australian male, that should give me a chance of being able to remain in Australia'.
6. Her employer complied with the directions to test the labour market and contacted DIEA on 24 April 1983 to inform it that his company had prepared their case.
7. They were informed that, on 6 April 1983, the Minister for Immigration and Ethnic Affairs had announced a new policy with regard to working holiday makers seeking permanent resident status. Qualifications or employment prospects henceforth would no longer 'of themselves constitute a sufficient basis for the grant of an entry permit. Applicants must demonstrate either that there are strong compassionate or humanitarian grounds for the grant of an entry permit or that they are the spouse, child or aged parent of an Australian citizen or permanent resident'.
8. Despite the fact that the woman had come to Australia and applied for permanent residence under different policy directives which entitled her to apply for change of status, she was now ineligible and her application was rejected.
9. She requested a review of her decision and was issued a further extension of her visa to 6 November 1983.
10. By 23 October 1983, as her temporary entry permit was due to expire and she had as yet heard nothing about her appeal to the Immigration Review Panel, she requested

but was not granted a further extension. It was not until 30 November that she was informed that her appeal was unsuccessful because of the lack of compassionate or humanitarian grounds.

11. She commenced Ministerial representations and submitted her complaint on 20 December 1983 to the Ombudsman who concluded that she had a valid case on the basis of the initial advice she received and the unreasonable delays in processing her change of status application.
12. However, although the Ombudsman's office requested that her departure be deferred pending investigation of her case, she was not granted an extension of her temporary entry permit.
13. The Perth Office of DIEA considered that 'given that such an investigation is unlikely to result in reversal of the Departmental and Ministerial decision (no jurisdiction over Ministerial decision), and given that there appears an element of procrastination on the part of [the woman] in an attempt to delay the inevitable of her being required to leave, it is felt that the directive for her to depart by 16/2/84 be maintained. She could as easily be informed of the results of the Ombudsman's inquiry if she returned to the U.K.'.
14. Central Office advised that although she was using every avenue to prolong her stay, her departure should not be enforced provided that the Ombudsman could expedite his submission.
15. However the woman, who was in an insecure position without formal permission to remain in Australia and who was under pressure from Perth office of DIEA not to pursue the Ombudsman's inquiry, decided to depart on 11 February 1984. The Ombudsman's office then decided that, in view of the fact that she was no longer in Australia, they would not pursue the complaint.
16. The woman has since applied again to come to Australia under the Employment Nomination Scheme.

CASE IV: A man from India, arrested as a prohibited non-citizen, was held in custody pending deportation for over six months. The man, who served a twenty day sentence in prison for overstaying his temporary entry permit, was then left in Parramatta Gaol for another four months until he was released into custody at Villawood Detention Centre.

1. A man arriving on a transit visa en route to New Zealand, in April 1981, remained in Australia and was arrested as a suspected PNC on 21 September 1982.
2. In a section 38 hearing on 23 September, the magistrate ordered his detention at Villawood for 14 days.
3. He was prosecuted under section 27(1)(ab) of the Act and sentenced to one month's imprisonment at Pan'amatta Gaol on 6 October.
4. A deportation order was made against him on 18 October but he was not served with a copy of the order until six months later on 20 April 1983.
5. The man, after serving twenty days, was released from his sentence for good behaviour on 26 October 1982.
6. However he was left in Parramatta Gaol for another four months until he was eventually released into custody at Villawood on 23 February 1983.

7. When the man complained that he had been forgotten in Parramatta, DIEA claimed that there had been a great deal of pressure on accommodation at detention centres during 'Operation Drive' in September 1982.
8. The reason for the man's continued detention was that he did not possess a re-entry visa for India. Negotiations between DIEA and the Indian authorities to obtain a visa took six months to finalise.
9. During this period the man was charged at the rate of \$85 per day for the 119 days spent at Parramatta — a rate which was more than double the amount of \$37 per day charged for custody in a detention centre.
10. When he was eventually released into custody at Villawood, he was refused access to the person making representations for him because that person was not a solicitor and he was refused permission to call Channel 10's 'Action Line'.
11. It was finally decided that it was not possible to justify in court the man's continued detention over such a prolonged period and he was released on a reporting basis on 31 March 1983 — after six months detention. However, as the man had no money and was prohibited from working, he requested accommodation at a hostel. This was refused.
12. DIEA was advised by the Indian authorities that the man had a British subject passport and had therefore forfeited his Indian citizenship. A visa could only authorise his stay in India for three months. It would then be necessary to apply for further permission to stay and this permission would need to be renewed annually. Citizenship could not be granted under five years. There was therefore no undertaking given by the Indian authorities that the man would be permitted to remain in India permanently.
13. However DIEA was determined to deport the man and, when he reported on 20 April 1983, he was arrested again and taken into custody. He was deported two days later.
14. The delays in obtaining a visa for the man and his continued detention in gaol instead of a detention centre meant that he was liable for costs under section 27A(1) and (7) of the Act of \$11 840.00.

## APPENDIX XI

### The Villawood and Maribyrnong Immigration Detention Centres

#### Visits in September and October 1984

##### Reasons for the Inquiry

- I. During the course of the public hearings, complaints were made concerning the infringement of human rights at Immigration Detention Centres, especially at Villawood. Arrangements were made to visit the Villawood and Maribyrnong Centres.

##### Procedures of the Inquiry

2. On 26 September, Commissioner Norma Ford held discussions with DIEA and later visited the Maribyrnong Immigration Detention Centre (the Maribyrnong Centre).
3. On 6 October, the Deputy Chairman, Mr Peter Bailey, and Commissioner Norma Ford visited the Villawood Immigration Detention Centre (the Villawood Centre). They also held discussions with officers of DIEA.
4. At the time of these visits, the custodial function of the two Centres was exercised by the Australian Federal Police (A.F.P.). Since 20 October, his custodial function has been transferred to the Australian Protective Service (A.P.S.), the Department of Administrative Services (D.A.S.). During November, Commission Ford held discussions with DIEA and D.A.S. concerning this change. Continuing consultation has been held between the Commission and the Department. The co-operation of DIEA, the A.F.P. and D.A.S. is gratefully acknowledged.

##### Conditions at the Maribyrnong Centre

5. In comparison with the Villawood Centre, the regimen at Maribyrnong continued to be more relaxed, as noted in the Commission's *Report No. 6 The Observance of Human Rights at the Villawood Immigration Detention Centre*. Detainees were issued with two documents, neither of which was available at the 1983 inspection. One (in a large number of appropriate languages) contained information on access to legal and consular advice. The other (printed in English) contained information concerning house rules and rights. Attached to the latter were forms to be filled in by detainees who wished to make telephone calls, or to see the Centre Manager or Welfare Officer. The Centre contained a wide range of recreation equipment, and all detainees interviewed by Norma Ford expressed satisfaction with the conditions under which they were held at the Centre. Relationships between the staff and detainees appeared to be satisfactory.
6. Some problems were evident. These included:
  - (a) members of A.F.P. did not wear identifying numbers or their names as previously recommended by the Commission
  - (b) the recently completed building housing the Maribyrnong Centre contains inadequate visiting facilities: these consist of booths with screens separating visitors from the detainee, thus excluding contact visits as recommended in the

Commission's *Report No. 6*. Contact visits were available in the premises occupied by the Centre.

7. Proposed Improvements: building plans have been drawn up to extend the present visit facility. The plans incorporate alterations to provide for contact visits, and contain provision for two private interview rooms and for added outdoor recreation areas. These alterations are estimated to cost approximately \$250 000 and are expected to commence in March 1985.

### **Conditions at the Villawood Centre**

8. It was observed that several improvements had been made since the Centre had been visited in 1983. These improvements included:
  - installation of recreation equipment and some improvements in the internal recreation area
  - installation of curtaining in both male and female dormitories to afford greater privacy to detainees
  - erection of partitions in toilets
  - installation of lockers for detainees to enable safe storage of, and access to, personal property
  - appointment by DIEA of a Centre Manager to monitor day to day operations
  - issuing of visitors' passes at the Centre instead of at the Department's office in the city
  - commencement of contact visits in the remodelled dining room in October 1984 when visitors' booths were removed prior to the commencement of building alterations
  - the provision in October 1984 of a post box on an external wall of the Centre to enable detainees to post personal mail from inside the Centre.
9. Other improvements were reported at the time of the visit. These improvements included:
  - non-admission of children, pregnant women and women with young children
  - appointment of a welfare officer
  - regular weekly visits of legal aid representatives.
10. Some problems were evident. These included:
  - (a) members of the A.F.P. did not wear identifying numbers or names as previously recommended by the Commission in *Report No. 6*
  - (b) closed circuit television surveillance in areas open to detainees, although minor adjustments had been made, continued to be intrusive and had not been discontinued as recommended by the Commission in *Report No. 6*
  - (c) detainees did not have access to their sleeping quarters during the day as recommended by the Commission in *Report No. 6*. Advice was given that access was dependent upon sufficient staff resources being made available
  - (d) detainees were not given information on house rules and rights as recommended by the Commission in *Report No. 6*
  - (e) there appeared to be a lack of reading material in appropriate languages available to detainees as recommended by the Commission in *Report No. 6*. A detainee complained that such material as he had was provided by friends

- (f) the newly installed post box was installed on the wall of the exercise yard, an area to which detainees had limited access
  - (g) because of the low number of detainees held at the Centre at the time, the Welfare Officer did not attend the Centre on a full-time basis. As numbers build up, it is essential that the Welfare Officer be appointed on a full-time basis as recommended by the Commission in *Report No. 6*
  - (h) a satisfactory system of access to records of occurrences, messages and requests as recommended in *Report No. 6* had not been established.
11. A contract had been let for the construction of an administrative and reception complex at the Centre. This will provide much needed space within the main building for such things as contact visits and storage of detainees' possessions. Refurbishment plans include improvements to and extension of recreation areas. Work had begun on the contract program which will cost \$600 000.
  12. When DIEA became aware earlier this year that the role of the A.F.P. at Detention Centres would be transferred to the A.P.S., it concentrated upon ensuring that proper operational procedures were prepared for implementation by the A.P.S. when it assumed the custodial responsibilities from the A.F.P. DIEA understood that the A.F.P. had difficulties in undertaking new procedures and training programs at a time when it knew it would forgo a function.
  13. DIEA, D.A.S. and A.P.S. have held further talks with Commissioner Ford in November 1984. DIEA has established a close working relationship with the A.P.S. and has kept the Commission informed. Positive achievements to date include:
    - the preparation (almost completed) of a new detailed set of operational and procedural instructions for the management of Detention Centres
    - the drawing up of lines of responsibility to ensure that there is no hiatus in control which could work to the disadvantage of the detainees
    - the abolition of visitors' passes
    - the undertaking to produce a Detainee Information Booklet explaining the Centre's operations
    - at the Villawood Centre, the removal of cameras from the male and female showers, lavatories, family units, male and female recreation rooms and dining rooms.

### **The Protective Services**

14. On 20 October 1984, the A.P.S. took over the protective service component of the A.F.P. Despite a national recruiting campaign, which resulted in a large number of members of the A.F.P. transferring to the A.P.S., the A.P.S. is severely understaffed, which is a cause of concern for the management of the Centre. Inadequate staffing resources may place constraints upon the implementation of policy improvements.
15. Problems following from inadequate staffing resources include:
  - constraints upon implementation of promised improvements such as access to sleeping quarters, and more extensive visiting rights; and
  - constraints upon mounting the intensive training courses needed to develop staff knowledge and commitment and to ensure that attitudes complement new procedures.





