HUMAN RIGHTS COMMISSION

REPORT NO. 22

HUMAN RIGHTS, FAMILY MIGRATION. AND DISABLED FAMILY MEMBERS

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17 November 1986

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

Dear Attorney-General,

Pursuant to section 9(1)(c) of the Human Rights Commission Act 1981, we present this report to you on Human Rights, Family Migration and Disabled Family Members.

Yours sincerely,

Chairman
for and on behalf of the
Human Rights Commission

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FUNCTIONS OF THE COMMISSION

Section 9 of the Human Rights Commission Act 1981 (Cwlth) 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 dicussion, 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.

I. BACKGROUND

This report focuses on two issues arising out of the Government's family reunion policy which were the subject of recommendation in the Commission's Report No. 13 *Human rights and the Migration Act 1958*, and which have been the subject of further complaints since the preparation of that report, namely:

(a) a confusion between disability and health; and

(b) an automatic exclusion from migration to Australia of families with disabled members, or of family members with disabilities seeking to join their families in Australia.

Both of these can result in serious discrimination against families with members who are disabled, and in infringement of the relevant human rights in the International Covenant on Civil and Political Rights (ICCPR) and the Declaration on the Rights of Disabled Persons (the Declaration). The relevant rights are set out in Appendix 1.

2. In its Report No. 13, the Commission drew attention, notably in paragraphs 92 and following, to problems of human rights arising from the administration of the Family Reunion Program (now included in the Family Migration, and Independent and Concessional categories), which forms a key part of Australia's immigration policy. The relevant section of the report is reproduced in Appendix 2. The Commission noted that the greatest numbers of visas issued for permanent residence in Australia under the immigration policy for 1983-84 were in the family migration category. Family migration was also the subject of the greatest number of human rights complaints received by the Commission at the time it was preparing its Report No. 13.

3. In its Report, the Commission emphasised the importance the ICCPR attaches to the family as the fundamental group unit of society. It saw the Government's family reunion policy as a welcome compliance with Article 23 of the ICCPR, which provides that the family is entitled to the protection of the State. It noted that in some circumstances the sponsorship scheme could operate in such a way as to result in enforced separation of the family and infringement of Article 23 (paragraph 95). It went on to say that immediate family members, even if disabled, should not be prevented from joining with spouses or parents in Australia, although it would accept some limitations on grounds such as national security or contagious disease.

4. The Commission has before it a number of unresolved complaints involving persons who appear to be unable to obtain approval to immigrate because of disability. Their cases are included in the summaries in Appendix 3. Although not all the cases have yet been resolved, it seemed to the Commission important to bring to your notice, and the notice of the Parliament, the problems that have arisen as a result of not following up actively the recommendations in the Commission's Report No. 13. Because the Human Rights Commission Act ceases to have effect after 9 December 1986, and the issues have already been canvassed in Report No. 13, the Commission submits this report and expresses the hope that action will be taken on it in accordance with the recommendations contained in Chapter IV.

II. DISABILITY AND HEALTH

5. It seems that the practice of the Department of Immigration and Ethnic Affairs is to advise disabled people, whose entry into Australia is refused, that they have been refused on health grounds even when a reconsideration of the case on compassionate grounds has led to refusal of entry on other grounds. Alternatively when, following review on compassionate grounds, a disabled person is permitted to enter Australia, the final decision is expressed in terms of waiving the health standard even when the disabled person is quite healthy.Further, perusal of the complaints received by the Commission suggests that disabled applicants are not given a clear picture from the outset that, at least on review, considerations not limited to their disability are taken into account.Accordingly, they are at a disadvantage because they do not realise that instead of concentrating on the problems of their disability, they might be better advised to highlight the positive claims they have to enter Australia.

6. In all the instances set out in paragraph 5, the equation of disability and health appears to result in a discrimination against persons with a disability who are, by ordinary measures, healthy. They are discriminated against because of their disability and both paragraph 10 of the Declaration and Article 26 of the ICCPR are infringed.

7. The Department recently issued revised guidelines concerning the approach to be taken to the health of those seeking to migrate to Australia. The guidelines are set out in the *Health Standards for Permanent or Long-Term Entry or Stay in Australia, Guidelines for Australian Government Medical Officers* issued by the Department in February 1986. The Standards are designed to 'help protect Australian public health and to minimise the risk that through ill-health people will become a burden on public funds or be unable to pursue their intended occupation in Australia' (section 1.1 of the Standards). The Standards are to be read in conjunction with

the relevant section of the *Migrant Entry Handbook* (see Appendix 4). Although the Handbook indicates a passing awareness of the fact that there is a distinction between health and disability, the basic thrust of both the Handbook and the Standards ignores this important distinction.

8. The Commission welcomes the fact that the revised health standards are now available for public inspection - in Report No. 13 the Commission noted that the standards then in use were contained in an internal manual of the Department of Health (paragraph 101). In its Report the Commission recommended that the revisions then 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 ... 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 (paragraph 106).

While the revised Standards are a definite improvement over the earlier ones, the Commission is concerned that they still reflect a confusion between health and disability. No doubt this is in part due to the continued operation of s. 16(1)(c)(i) of the Migration Act and the associated reg. 26 of the Migration Regulations. The Commission recommended in Report No. 13, which was tabled in the Parliament in May 1985, that both provisions should be revised with the object of confining them to diseases which would give reasonable ground for automatic refusal to enter, e.g. because of severe risk of contagion (paragraphs 105-107 - see Appendix 3).

9. It is important to recognise that there is a clear distinction between health in the sense in which that term is ordinarily understood and disability. A disabled person is not necessarily diseased or unhealthy, even if disease, as in the case of poliomyelitis, originally caused the disability. Therefore to refuse a healthy disabled person entry to Australia on health grounds cannot be justifiable. Health standards should be applied in immigration matters as a means

proportional to their ends. That is to say, it may be appropriate to exclude persons from Australia who are carriers of disease because their entry will be harmful to others.

But to exclude on health grounds a person confined to a wheelchair who is not the bearer of any transmittable disease, is simply not relevant to the need to keep the bearers of disease out of Australia.

10. Failure to distinguish between the two concepts results, in the view of the Commission, in an infringement of the rights of disabled persons to 'protection against treatment of a discriminatory nature' (paragraph 10 of the Declaration) and to have 'the same civil and political rights as other human beings' (paragraph 4 of the Declaration). To treat them automatically as unhealthy and therefore a potential risk to the community in the same way as, for example, those having syphilis or other sexually transmitted diseases or leprosy is unjust. The Commission recognises that another factor included in the 'health' category is an assessment of whether the condition of the person may lead to costly claims on Australia's health and welfare system. Those are factors which may properly be included in an assessment of eligibility for migration, but are not directly relevant to the question of discrimination discussed in this Chapter.

11. Put another way, the Commission recognises that it is a legitimate entitlement of Australia to make choices about those who are to be given the privilege of migrating to Australia under the Family Migration Program. But a clear distinction must be made, in assessing persons for eligibility for family migration, between health risks and disabilities. For the purposes of the Commission, a 'disabled person' is defined in paragraph 1 of the Declaration, as

> any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities.

It is a confusion in thought, and an injustice in action, to equate the two states simply because the term 'disability' may loosely be applied to both - to the person disabled by some kind of contagious illness and the person disabled by a condition that may affect his or her capacity for work or self-care but is not itself any risk to the health of others. Case No. 5 in Appendix 3 contains a good illustration of the problem.

III. FAMILIES WITH DISABLED MEMBERS

12. It seems clear from information received from the Department of Immigration and Ethnic Affairs that, notwithstanding the Commission's recommendations in Report No. 13, exclusion is still the starting point in the decision-making process involving cases of disabilities in family migration. This means that a family which includes a member with disabilities and which wishes to migrate, or a family member with disabilities who wishes to join other members of the family in Australia, will almost always be advised that migration will not be possible if the disability is such that it fails to meet the 'health' standard. If the case is pressed, it appears that the Department's next step is to ask whether there are special circumstances, especially of a compassionate nature, which justify waiving the usual health standard. The criteria applied have been identified in a section of the *Migrant Entry Handbook* dealing with this topic see Appendix 4. See also Appendix 2.

13. The Commission repeats the view expressed in its Report No. 13 that exclusion should not be treated as a starting point for consideration of family migration applications where disabilities are involved (paragraphs 109 and 110). That would represent an action inconsistent with paragraphs 2 and 4 of the Declaration. Rather, a disabled person who is a member of a family should be assessed on the basis of the ordinary selection criteria applicable to other applicants within the Family Migration Program. Where a person is found to have a condition which does not enable him or her to live independently, information about how the family has looked after and cared for that person, and how they propose to do it in the future, should be sought and taken into account at the outset. Whatever criteria are developed to determine whether individuals may be permitted to migrate to Australia, it should be easier for a person with a disability to gain

entrance as a member of a family. This is because, even if the disability results in reduced eligibility (as does the lack of certain skills or language), the fact that the person is a member of a family would presumably give some added ground for eligibility. If the criteria for the family as a whole (including the disabled member) are met, then the disabled family member should not have to make out a special case for entry on the basis of any outstanding qualities or compassionate or humanitarian considerations. Case No. 8 in Appendix 3 clearly illustrates the problem.

IV. RECOMMENDATIONS

14. Having made inquiries relating to the complaints of the persons whose cases are briefly summarised in Appendix 3, the Commission recommends that:

1. Criteria should be developed for decision-making under the family migration program which are consistent with Australia's human rights obligations and contain no discrimination against disabled applicants. In particular:

   Disabled applicants should be treated on the same basis as other applicants - the starting point in the decision-making process involving a disabled applicant should never be exclusion.

2. Section 16(1)(c)(i) of the Migration Act and regulation 26 of the Migration Regulations should be revised to remove the discrimination against disability, as recommended in paragraph 104 of the Commission's Report No. 13.

3. The unresolved cases included in Appendix 3 should be further considered, using criteria developed in accordance with the recommendations in this Report.

APPENDIX 1

RELEVANT HUMAN RIGHTS

EXTRACTS FROM INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

International Covenant on Civil and Political Rights

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 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 ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Declaration on the Rights of Disabled Persons

1. The term "disabled person" means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities.

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.

10. Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

APPENDIX 2

EXTRACT FROM HUMAN RIGHTS COMMISSION REPORT NO. 13, HUMAN RIGHTS AND THE MIGRATION ACT 1958

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/fiancees, 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' 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' 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,

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 fiances, 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.' In human rights terms, the system can have the effect of

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.[6]

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

6. *Migrant Entry Handbook.* para. 6.13.3.

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 disablity 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 inadvertance, 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.' 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 (ha) 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.' 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

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. (ACT.) 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.[9] 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.' 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.

APPENDIX 3

EXAMPLES OF COMPLAINTS RECEIVED BY THE COMMISSION

INVOLVING FAMILY MEMBERS WITH DISABILITIES

1. Mr M. Barakat

Mr Michael Barakat of Sydney applied to sponsor his brother (aged 33) and family for migration to Australia from Lebanon in 1982. In 1984 he was advised that his brother was refused permission to come to Australia because he has mitral stenosis, and muscular atrophy of his right leg due to poliomyelitis. Although the rest of Mr Barakat's family lives in Lebanon, he was concerned about the effect the deprivations and conflict existing there were having on his brother's health. Despite representations made on his behalf by Members of Parliament and the Commonwealth Ombudsman, Mr Barakat was unsuccessful in getting the decision changed and complained to the Commission. The Department responded to the complaint in October 1986 advising that Mr Barakat's application was rejected on medical grounds because long terms costs to Australia were not outweighed by family reunion and other factors, given that most of the family are in Lebanon.

2. Mrs K.C. Bennett

Mrs Bennett, who has an established family in Australia, applied in July 1982 to sponsor the emigration from Sri Lanka of her mother (aged 67) and brother (aged 35). The brother has Down's Syndrome; there are no other close relatives in Sri Lanka.

Mrs Bennett made representations to the Minister for Immigration and Ethnic Affairs through her local Federal Member after her application was refused on health grounds. In October 1983 she the Minister confirmed the decision to refuse the application because her brother did not meet the medical standards for entry. Mrs Bennett complained to the Commission in December 1983. In October 1986 the Department advised the Commission that entry of

the mother and brother had been approved subject to maintenance guarantees.

3. Mr and Mrs F. Denver

The Denvers applied to migrate to Australia from Ireland in 1984. Mr Denver is a qualified brick and stone layer. However, their application was refused because their child, aged 8 years, has Down's Syndrome. Before a complaint was lodged on their behalf to the Commission, representations to the Department of Immigration and Ethnic Affairs by the National Association on Intellectual Disability had been unsuccessful. The Department advised the Commission in October 1986 that the application was rejected on medical grounds because significant likely costs to the Australian community were not outweighed by other factors.

4. Mr T.H. Diec

Mr Diec applied in 1978 to sponsor the emigration from Vietnam of his parents, a sister and a brother. In 1980 Mr Diec's father died. The brother is mildly mentally retarded and has muscular atrophy of the lower limbs, which confines him to a wheelchair. Mr Diec has two other sisters resident and employed in Australia. In September 1983 the application was rejected on the grounds that Mr Diec's brother did not meet medical standards for entry to Australia. Mr Diec's mother made a submission in 1984 to the Commission's inquiry into the Migration Act and a complaint was made to the Commission on Mr Diec's behalf. Mr Diec also requested a review of the decision by the Department of Immigration and Ethnic Affairs, but was advised in February 1985 that the decision was to be maintained. In October 1986, in responding to the complaint to the Commission, the Department advised that after re-examination of the case, Mr Diec's entry to Australia had been approved, subject to maintenance guarantees.

5. Mrs C. Joseph

Mrs Joseph sponsored her 26 year old brother for migration to Australia from Sri Lanka in 1983. He was refused entry on health grounds by the Department of Immigration and Ethnic Affairs because he has muscular atrophy of his right leg due to residual poliomyelitis. Mrs Joseph is the only member of her family in Australia, with her father, mother and three siblings residing in Sri Lanka. The Department advised the Commission in October 1986 that Mrs Joseph's application will be re-examined.

6. Mr D.D. Lu

Mr Lu applied to sponsor the emigration of his parents and five siblings from Vietnam in 1985. One brother (aged 13) is mildly mentally retarded. Mr Lu is the only member of the family resident in Australia and came to Australia as a refugee. In July 1985, Mr Lu's legal representatives complained to the Commission on his behalf after the Immigration Review Panel had upheld a decision to refuse Mr Lu's application on the grounds that the brother did not meet medical requirements. In December 1985, the Minister for Immigration and Ethnic Affairs affirmed the decision. The Department advised the Commission in October 1986 that this decision was upheld on medical grounds because the long term costs to the Australian community were not outweighed by other considerations, given that seven family members remain in Vietnam.

7. Ms D. Mach

Ms Mach applied in 1982 to sponsor the emigration of her parents (aged 64 and 62) and two brothers (aged 34 and 20) from North Vietnam. The elder brother is moderately mentally retarded and is blind in one eye. The father had retired from a business supplying livestock to restaurants and the younger brother is a student who had been treated for tuberculosis. Another brother and two sisters reside and are employed in Canberra, A.C.T. The family remaining in Vietnam are wholly dependent for support on money sent to them by the members of the family in Australia.

Ms Mach's application was rejected in August 1984 because the brothers did not meet medical standards for entry into Australia.

A review of this decision occurred in July 1985, following representations to the Minister through Ms Mach's Federal Member, but the decision was upheld. In December 1985 Ms Mach complained to the Human Rights Commission. The Department of Immigration and Ethnic Affairs responded to the complaint, saying that the application was rejected on medical grounds because the family reunion factors did not outweigh likely costs to the Australian community given that most of the family are in Vietnam. Ms Mach has put forward further information to the Department pointing out that the family is equally divided between Australia and Vietnam and giving details of the ability of the family here to support the members of the family seeking to migrate.

8. Mrs Y. Thambyah

Mrs Thambyah applied on three occasions since 1973 for her daughter (aged 39) to be allowed entry to Australia. On each occasion the application was refused on health grounds because her daughter has a congenital thyroid condition and related medical problems. Six of Mrs Thambyah's nine children are with her in Australia and as a family they send money regularly to Sri Lanka for the upkeep of the invalid daughter. They feel that she will not be a financial burden on the Australian health and welfare system because the only care she requires is to live with someone and to take regular medication. The family in Australia have undertaken to provide for all her needs. The Department advised the Commission in October 1986 that Mrs Thambyah's application would be re-examined.

9. Mr P.H. Truong

Mr Truong applied to sponsor his father, mother and brother for entry to Australia from Vietnam but this was refused by the Department of Immigration and Ethnic Affairs in January 1986 on health grounds because the brother, aged 20, has epilepsy and

moderate mental retardation. At the time of complaint to the Commission, the matter was under review in the Department.

In his complaint, Mr Truong said that his family were more than willing to provide support to the brother, who was capable of looking after himself within the family situation.

APPENDIX 4

MIGRANT ENTRY HANDBOOK

EXTRACT RELATING TO HEALTH REQUIREMENTS

5.13 Further consideration of cases where health requirements are not met

5.13.1 While failure to meet the health requirements generally results in refusal of the application there may be special circumstances, especially compassionate ones, which justify consideration being given to waiving the usual standards.

5.13.2 Whether or not such circumstances exist depends on assessment of individual cases. However, in view of the family reunion objective (which leads to a range of other selection concessions) all applications in Category 1 are to be reconsidered where health standards are not met. Factors to be taken into account in reconsidering cases are set out below.

5.13.3 Once a case has been assessed as justifying reconsideration a judgement is to be made after weighing up the following factors:

the extent of social welfare, medical, hospital or other institutional or day care currently required in the home country and likely future requirements

the availability of these services in the intended area of settlement in Australia

the potential lifetime charge to Australian public funds

the willingness and ability of a sponsor to provide any support and care required over and above that expected by the normal sponsorship

the applicant's and family's current and expected ability to cope with the particular health problem or disability

the short and long-term educational and occupational prospects for the applicant in Australia

the degree of relationship with family already in Australia and the balance of family disposition

any outstanding qualities possessed by the applicant and the family which would provide significant contribution to some sphere of Australian life

other compassionate or humanitarian aspects of the individual case.

5.13.4 Officers will usually need to consult with a Regional Medical Director or the Department of Health Canberra to obtain certain of the details. The Supplementary Medical Advice form (Attachment 9) should be used for this purpose if it has not already been completed.

5.13.5 Sponsors should be aware of the health problem. Before any consultations with a sponsor are arranged the consent of the applicant, or in the case of a minor child, the principal applicant, to disclosure of the medical details must be obtained.