ADMINISTRATIVE REVIEW COUNCIL

G.P.O. Box 9955
Canberra, A.C.T. 2601

24 December 1985

Dear Attorney-General,
I have pleasure in submitting to you herewith a report by the Administrative Review Council on Review of Migration Decisions.

Yours sincerely,

E. J. L. Tucker
Chairman

The Hon. Lionel Bowen, M.P.
Attorney-General
Parliament House
Canberra, A.C.T. 2600
The members of the Administrative Review Council at the date of the Council’s adoption of this Report were as follows:

Mr E. J. L. Tucker (Chairman)
Mr A. J. Ayers, A.O.
The Honourable Xavier Connor, Q.C.
Mr L. J. Curtis
The Honourable Mr Justice J. D. Davies
Mr J. Disney
Mr L. J. Hartigan, A.O.
Air Vice Marshal J. C. Jordan, A.O.
Mr D. G. Mackay
Mr P. R. Munro
Mr A. D. Rose
Dr C. A. Saunders
Mr R. J. Young

The members of the Committee responsible for overseeing the Migration project at the date of the Council’s adoption of this Report were as follows:

Mr E. J. L. Tucker (Chairman)
The Honourable Mr Justice J. D. Davies
Mr J. Disney
Professor J. E. Richardson, A.O.
Mr A. D. Rose

The Council expresses its gratitude to the members of its Secretariat, both past and present, for the assistance given by them in preparing this report and in particular to its current Director of Research (Dr John Griffiths) and its present and immediately past Principal Project Officers (Mr Ron Fraser and Ms Lindsay Shaw respectively).
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SUMMARY


2. The Council has examined existing avenues for review of migration decisions (paras 58-89) and, in particular, the role of the Immigration Review Panels which currently make recommendations to the Minister in respect of a large number of appeals. While recognising that a significant number of primary decisions are either reversed or modified following Immigration Review Panel review, the Council considers that the Panels suffer from several deficiencies and that they do not provide an adequate alternative to an effective system of external review on the merits (see paras 72-3).

3. It is the Council’s view that there is a need for a system of external review on the merits to be available in respect of many migration decisions. Significant personal interests may be affected by such decisions, which may relate not only to persons seeking to enter or remain in Australia but also to Australian citizens and permanent residents who may have interests of a family, personal or business nature which are affected by particular migration decisions. The Council believes that in principle a special duty is owed to the latter group of persons to provide them with a right to obtain an independent review on the merits of decisions which affect their interests.

4. The Council also considers that there is a need to bring the migration jurisdiction into line with other areas of Commonwealth administration, such as social security and repatriation, where there already exist systems of external review on the merits. In the Council’s opinion, the availability of such review is important in ensuring that decisions are made fairly, on the basis of existing fact and in accordance with the requirements of the law.

5. In devising a system of review on the merits in the migration field, the Council has taken account of many other factors including the high volume of primary decisions, the broad and legislatively unstructured nature of the discretionary powers exercised by primary decision makers, the Minister’s personal involvement in some decisions, the fact that many decisions are taken at Australian posts overseas, the potential for abuse of a review system particularly in delaying the implementation of primary decisions, the relevance of the illegal status of some persons subject to migration decisions, the desirability of rationalising rights of review of migration decisions and the cost of establishing and operating a merits review system.

6. The proposals for reform recommended by the Council in this report include the following major features:
   • The structuring of discretionary powers in the migration field, where appropriate, by the embodiment in legislative form, preferably in the Act or Regulations, of identifiable principles and criteria (paras 138-57)
   • The provision of outlines of reasons for decisions made by primary decision makers (paras 158-68)
• The establishment by statute of a two-tier system of merits review comprising Immigration Adjudicators at the first level and the Administrative Appeals Tribunal (‘the AAT’) at the second level, with review by Adjudicators being a prerequisite to AAT review in most cases (paras 173-266)
• Decisions taken personally by the Minister to be subject to review by the AAT without prior review by Adjudicators (para. 203)
• In relation to certain classes of decisions which are subject to the proposed two-tier system of merits review, review by the AAT of an Adjudicator’s decision should only be available if the Tribunal grants leave (paras 181-8)
• Adjudicators should preferably act as single-person authorities to hear appeals and should exercise the power of determinative, rather than recommendatory, decision making (paras 192-202)
• The AAT should also exercise a power of determinative, rather than recommendatory, decision making in its migration jurisdiction, consistent with most of its other jurisdictions (paras 265-6)
• The Minister should be empowered to table a certificate, the effect of which is to exclude review on the merits in relation to a particular decision, if the Minister is of the opinion that it is in the public interest because of considerations such as national security, defence, or international relations, that final responsibility for that decision should remain with the Government (para. 267)
• The provision of accommodation and support services for Immigration Adjudicators, including the creation of a specialist immigration advisory service independent of the Department to advise and assist applicants for review (paras 238-45)
• Various other recommendations dealing with the membership, procedures and operations of both the Adjudicators and the AAT (paras 204-37 and 251-64)

7. The Council proposes that the following classes of decisions should be subject to review in accordance with the proposed two-tier structure of merits review at the instance of any person whose interests are affected by a decision unless some restriction on standing is otherwise specified (decisions marked with an asterisk are those to which a requirement of leave applies if review is sought from the AAT):

**Migration Act and Regulations**

• A decision to refuse a migrant entry or temporary entry visa, but only at the instance of an Australian citizen or permanent resident whose interests are affected by the decision (paras 291-6)*
• A decision to cancel a migrant entry or temporary entry visa (paras 297-300)
• A decision requiring the provision of a maintenance guarantee (para. 301)
• A decision to refuse entry to a person who has a visa, or a return endorsement, or who is exempt from the requirement to possess an entry permit (paras 302-8)*
• A decision to grant a temporary entry or other permit on a basis inconsistent with that on which a visa has been granted, other than a decision to grant a temporary entry permit to allow eligibility for permanent residence to be determined (paras 314-5)
• A decision to refuse an application for change of status from temporary to permanent resident (paras 346-75)*
• A decision to refuse to grant a temporary entry permit to a prohibited non-citizen, at the instance only of an Australian citizen or permanent resident whose interests are affected (paras 376-7)*
• A decision to declare that the continued presence in Australia of a person who is in an exempt class of persons is undesirable (paras 378-82)*
• A decision to refuse or cancel a resident return visa or a return endorsement (paras 383-5)
• A decision to refuse change of status from one category of temporary entry to another, but only at the instance of an Australian citizen or permanent resident whose interests are affected (paras 386-7)*
• A decision to cancel a temporary entry permit (paras 388-9)*
• A decision to refuse to extend a temporary entry permit, but only at the instance of an Australian citizen or permanent resident whose interests are affected, or at the instance of any person whose interests are affected by the decisions where a person is seeking an extension for medical treatment not available in that person’s home country, or for the purpose of continuing an approved course of study (paras 390-2)*
• A decision not to grant a temporary entry permit to a person who has been granted refugee status and who wishes to apply for permanent resident status (paras 374-5)
• A decision to require voluntary departure, at the instance only of an Australian citizen or permanent resident whose interests are affected (paras 393-8)*
• A decision to deport a prohibited non-citizen pursuant to section 18 of the Migration Act, at the instance only of an Australian citizen or permanent resident whose interests are affected (paras 407-12)*
• A decision to refuse to deport, at the request of the spouse of a deportee, the spouse and dependent children of the deportee (paras 413-4)
• A decision by a Commonwealth agency to take action to recover a debt arising under regulation 22 of the Migration Regulations (paras 416-7)
• A decision to require a security to secure compliance with the provisions of the Migration Act or Regulations (para. 417A)

**Overseas Student Charge Legislation**

• A decision that a person is liable to pay a charge (para. 418)
• A decision determining the rate of a charge (para. 418)
• A decision refusing a temporary entry permit to an overseas student (para. 418)
• Decisions that a student is not exempt from, or entitled to a refund or remission of, a charge (para. 418).

8. Decisions from which a right of review should lie directly to the AAT at the instance of any person whose interests are affected by such a decision, unless otherwise specified are:

**Migration Act**

• A decision to refuse a claim for refugee status by a person who has arrived in Australia, but only after the leave of the AAT has been obtained (paras 320-45)
• A decision to deport a person pursuant to section 12 of the Migration Act, at the instance only of an Australian citizen or permanent resident whose interests are affected by the decision (paras 400-1)
• A decision to deport a person pursuant to section 14 of the Migration Act, except where it has been made on the grounds of an adverse or qualified security assessment provided by the Australian Security Intelligence Organisation, but only at the instance of an Australian citizen or permanent resident whose interests are affected where the basis for deportation is conviction of a criminal offence (paras 402-6)

9. The Council has noted that shortly before it finalised its report, the High Court delivered judgment in *Kiaa v. Minister for Immigration and Ethnic Affairs* (18 December 1985, (1985) 62ALR 321). The Court ruled by a majority of four to one that, contrary to the view expressed in earlier High Court and Federal Court decisions, the principles of natural justice apply to the making of a deportation order under section 18 of the Migration Act. The significance of the High Court’s decision may, however, extend beyond section 18 deportation orders. The Council has noted that in his judgment Mr Justice Brennan expressed the view that
'the Act as it stood at the time when the deportation orders were made did not displace the presumption that Parliament intended that an exercise of powers conferred by ss.6, 6A, 7 and 18 should be conditioned on observance of the principles of natural justice’ (p. 377). The Council has recommended in this report that a right of review on the merits should be available in respect of each of those decisions, as well as in relation to other migration decisions. The Council recognises that the High Court’s decision was concerned with common law requirements of procedural fairness and that considerations relevant in determining whether administrative decisions should be subject to review on the merits extend beyond notions of procedural fairness. It believes, however, that the High Court’s decision provides general support for the approach taken by the Council in this report.
LIST OF RECOMMENDATIONS

Recommendation 1: The structuring of discretionary powers (paras 138-57)
(1) In order to lay down identifiable principles and criteria applicable to the exercise of the discretionary powers conferred by the Migration Act and Regulations, those powers should be structured, wherever appropriate, by embodiment of such principles and criteria in legislative form, preferably in the Act or Regulations.
(2) Pending the completion of this task, the Minister should table in the Parliament succinct rules setting out the principles and criteria applicable to the exercise of discretionary powers in the area of migration, but not having legislative force.

Recommendation 2: Outlines of reasons (paras 158-68)
The Department should formulate procedures which provide that:
(a) a written outline of reasons is to be furnished to a person who is the subject of a migration decision which affects that person’s interests adversely, unless that is precluded by such considerations as national security, international relations and defence;
(b) such an outline of reasons shall refer briefly to the grounds on which the decision has been made in terms of the relevant legislative and policy considerations, the person’s particular circumstances, and the reasoning processes followed; and the outline should preferably be expressed in ordinary rather than legal language;
(c) if the terms of a decision are furnished orally, the person to whom they are furnished is to be advised that that person will, as soon as practicable, be notified in writing of the terms of the decision and will be given an outline of the reasons upon which the decision is based; such material shall be furnished accordingly; and
(d) where the person notified of the terms of a decision is or may be entitled to a statement of the reasons for the decision pursuant to section 13 of the Administrative Decisions (Judicial Review) Act and/or section 28 of the Administrative Appeals Tribunal Act, the notification is to include advice of that fact.

Recommendation 3: Notification of review rights (paras 169-71)
Legislation should provide that:
(a) in order to inform persons about the availability of rights of merits review of migration decisions, a written notification to a person of the terms of a migration decision which may affect that person’s interests adversely shall also contain a brief explanation of the review processes and information regarding the availability of advice and assistance from sources such as the proposed immigration advisory service (see Recommendation 19);
(b) such a notification shall also be accompanied by information, in those languages that are reasonably common amongst immigrants to Australia, about means by which they may obtain a translation or explanation of the notification; and
(c) where a decision is directly reviewable by the Administrative Appeals Tribunal, and not by the Immigration Adjudicators (see Recommendations 5 and 28(3)), a person subject to such a decision shall be informed of that fact.

Recommendation 4: Establishment of two-tier system of review (paras 173-80)
A two-tier review structure should be established for the review on the merits of decisions in the field of migration.
Recommendation 5: Requirement of leave for certain appeals, prerequisites to second-level review, and referral of cases ( paras 181-90)
Legislation should provide that:
(a) review by the second-level review authority of decisions of the first-level review authority is subject to the granting of leave by the second-level authority in the following classes of decision:
   (i) a decision to refuse a migrant entry or temporary entry visa;
   (ii) a decision to refuse entry to a person who has a visa, or a return endorsement, or who is exempt from the requirement to possess an entry permit under the Migration Act;
   (iii) a decision to refuse an application for a change of status from temporary to permanent resident made in accordance with section 6A of the Migration Act;
   (iv) a decision to declare, pursuant to sub-section 8(2) of the Migration Act, that the continued presence in Australia of a person who is a member of an exempt class of persons under paragraph 8(1)(d), (e) or (f) is undesirable;
   (v) a decision to refuse change of status from one category of temporary entrant to another;
   (vi) a decision to cancel a temporary entry permit;
   (vii) a decision to refuse to extend a temporary entry permit;
   (viii) a decision under sub-section 6(2), 6(5) or 7(2) of the Migration Act to refuse to grant a temporary entry permit to a prohibited non-citizen;
   (ix) a decision to require voluntary departure made pursuant to section 31A of the Migration Act; and
   (x) a decision to deport a prohibited non-citizen pursuant to section 18 of the Migration Act;
(b) in determining the grant or refusal of leave the second-level review authority is required to take account of the following considerations:
   (i) the significance to the applicant and otherwise of the issues involved in the decision sought to be reviewed;
   (ii) any error of law or fact appearing in the decision sought to be reviewed;
   (iii) any significant evidence not reasonably available to either the applicant or the respondent at the time of the decision sought to be reviewed;
   (iv) the desirability and the practicality of there being a hearing of the issues in dispute;
   (v) the availability or otherwise of assistance to the applicant before the first-level review authority; and
   (vi) any other matter which the Administrative Appeals Tribunal considers it appropriate to take into account;
(c) the second-level review authority has a discretion to determine applications for leave on the basis of the written documents alone without conducting an oral hearing;
(d) subject to paragraph (e) of this recommendation, and to Recommendations 8 and 28(3), review by the first-level authority is a prerequisite to review by the second-level authority; and
(e) the first-level review authority, either of its own motion or at the request of either of the parties, is empowered to refer a case directly to the second-level review authority for determination.

Recommendation 6: First-level review authority: Immigration Adjudicators ( paras 191-9)
Legislation should provide for the establishment of a first-level review authority to consist of Immigration Adjudicators who sit as single-person authorities to hear, subject to Recommendation 8, appeals on the merits from decisions specified in Recommendation 28(1).
Recommendation 7: Review by Immigration Adjudicators to be determinative ( paras 200-2)
Legislation should provide that Immigration Adjudicators exercise a power of determinative, rather than recommendatory, decision making.

Recommendation 8: No review by Immigration Adjudicators of ministerial decisions (para. 203)
Legislation should provide that decisions of a kind which are recommended for review on the merits, and which are made personally by the Minister, are not reviewed by Immigration Adjudicators but are reviewed directly by the second-level review authority.

Recommendation 9: Appointment of Immigration Adjudicators ( paras 204-9)
(1) Legislation should provide for:
(a) Immigration Adjudicators to be appointed by the Governor-General in Council, in both full-time and part-time categories;
(b) persons appointed to the position of Immigration Adjudicator to be persons who have a capacity for objective assessment and sound judgment, actual or potential ability to conduct review proceedings, and a general understanding of the perspectives of public administration and of immigrants and ethnic communities;
(c) a Chief Adjudicator to be appointed to co-ordinate the operations of Immigration Adjudicators on a national basis;
(d) a Senior Adjudicator to be appointed for each State and Territory;
(e) Senior Adjudicators to be appointed on a full-time basis except where the volume of work justifies a part-time appointment only;
(f) the Chief Adjudicator to be empowered to delegate any of his or her powers to a Senior Adjudicator and, where appropriate, to other Adjudicators, other than the power of delegation itself.

(2) In the appointment of persons to be Immigration Adjudicators regard should be had to the principle that, if any former officers of the Department of Immigration and Ethnic Affairs are appointed to the office, the number of such appointments should not be so high that community perception of the Adjudicators’ independence would be put at risk.

Recommendation 10: Terms of office of Immigration Adjudicators (para. 210)
Legislation should provide that Immigration Adjudicators, including the Chief Adjudicator, are appointed for terms not exceeding five years, although in the case of Senior Adjudicators and Adjudicators appointments might normally be for three years. All Adjudicators, including the Chief Adjudicator, should be eligible for re-appointment.

Recommendation 11: Time limits, stay orders and documentation ( paras 215-9) 
Legislation should provide that:
(a) an appeal to the Immigration Adjudicators shall be generally lodged in writing but in exceptional cases, such as point of entry appeals, an application for review may be made orally; appeals shall be lodged within a period of 28 days from the date of the furnishing of a written outline of the reasons for a decision to the person subject to that decision, or within such further time as is permitted by an Adjudicator; a decision by an Adjudicator granting or refusing an extension of time shall be subject to review by the Administrative Appeals Tribunal if the Tribunal gives leave to apply for such review;
(b) the Chief Adjudicator, or a Senior Adjudicator, is empowered to grant a stay in respect of the implementation of a reviewable decision where the Chief Adjudicator or Senior Adjudicator considers that this would, in all the circumstances, be just and reasonable; decisions granting or refusing a stay of the implementation of a primary decision are
subject to review by the Administrative Appeals Tribunal if the Tribunal gives leave to apply for such review; and

(c) the Department is required to provide the Immigration Adjudicators with any documents held by it upon which it proposes to rely, and any other documents necessary to a proper understanding of the primary decision, within 14 days of the Department receiving notification of an appeal, subject to the discretion of the Adjudicators to vary the time limit where necessary or appropriate.

**Recommendation 12: Access to documentary evidence ( paras 220-1)**
Legislation should provide that an applicant for review shall be given access to all information and documentary evidence on which the Department intends to rely, subject to limitations modelled on sections 35 and 36 of the Administrative Appeals Tribunal Act.

**Recommendation 13: Hearings provisions ( paras 223-8)**
Legislation should provide that:

(a) Immigration Adjudicators are required to conduct an oral hearing subject to a discretion to dispense with such a hearing where the parties so agree or the applicant is unable or unwilling to participate personally or through a representative;

(b) Immigration Adjudicators are empowered to require the production of documentary evidence and summon witnesses, and, where it appears desirable in the course of adjudication, to require that evidence be given on oath or affirmation subject to a penalty for giving false evidence; and

(c) Immigration Adjudicators are not bound by the rules of evidence, and proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of all relevant legislation, and a proper consideration of the matters at issue, permit.

**Recommendation 14: Representation of parties ( paras 229-31)**
Legislation should provide that a party to a review proceeding may be represented, if the party so wishes, by a person of his or her own choosing (whether legally qualified or not).

**Recommendation 15: Decisions and statements of reasons ( paras 232-3)**
Legislation should provide that:

(a) Immigration Adjudicators are required to give a decision in writing and provide a statement of the reasons for a decision;

(b) such a statement may be given orally, but, where requested by either of the parties, a written statement of reasons for a decision shall be provided as soon as practicable but within 14 days of such a request being received; and

(c) failure to provide a statement of reasons within the time specified does not operate to invalidate the decision. (However, see Recommendation 21 as to the effect on time limits relating to applications for leave to seek review by the Administrative Appeals Tribunal.)

**Recommendation 16: Hearings in public ( paras 234-6)**
Legislation should provided that hearings by Adjudicators shall be held in public unless an Adjudicator directs otherwise.

**Recommendation 17: Protection of Adjudicators, representatives and witnesses (para. 237)**
There should be provision similar to section 60 of the Administrative Appeals Tribunal Act for the protection of Immigration Adjudicators, representatives and witnesses appearing in review proceedings.
Recommendation 18: Accommodation and support services (paras 238-45)
For the purposes of the operation of the first-level review authority, provision should be made for:
(a) suitable accommodation for Immigration Adjudicators, their staffs and hearing rooms and other support services, in locations separate from the Department in the capital city of each State and Territory;
(b) the conduct, where necessary, of hearings in locations other than capital cities;
(c) the servicing of the first-level review authority by staff employed by the Department but responsible, in their day-to-day duties, to the Chief Adjudicator or a Senior Adjudicator;
(d) the provision of adequate translation and interpreter services for adjudication hearings from the Department’s existing translation and interpreter service;
(e) the allocation of funds for the purpose of meeting travel and accommodation expenses of applicants where an Adjudicator so orders on the grounds that it is just and reasonable in the circumstances, and of meeting the costs of any witnesses summoned by an Adjudicator; and
(f) the creation of a ‘hotline’ advisory service to give basic information directing enquirers to sources of advice and assistance.

Recommendation 19: Specialist immigration advisory service, and assistance to migrant welfare groups (paras 241-2)
Provision should be made for:
(a) the creation of a specialist immigration advisory service independent of the Department to assist applicants for review both in deciding whether or not to seek review of decisions affecting them and in preparing and conducting their cases; and
(b) the training of members of appropriate migrant welfare groups to enable them to provide advice and assistance to persons affected by adverse decisions and the allocation to such groups of funds to enable them to provide such advice and assistance as a continuing service.

Recommendation 20: Second level of review: Administrative Appeals Tribunal (paras 246-50)
(1) Legislation should provide that the second level of merits review in the migration jurisdiction is provided by the Administrative Appeals Tribunal.
(2) Legislation should also provide that: when review by the Immigration Adjudicators is a prerequisite to review by the Administrative Appeals Tribunal, the Tribunal shall review the original decision, as affirmed or varied by the Immigration Adjudicators; where the applicant appeals, the respondent is the Minister or the Secretary of the Department; and where the Minister or Secretary of the Department appeals, the respondent is the original applicant.

Recommendation 21: Time limits for lodging applications (paras 251-5)
(1) Legislation should provide that:
(a) applications for leave of the Administrative Appeals Tribunal to seek further review of a primary decision which has been reviewed by the Immigration Adjudicators shall be lodged within 28 days of the furnishing of a written statement of reasons by an Adjudicator;
(b) applications for direct review by the Administrative Appeals Tribunal of primary decisions, as provided for in Recommendation 28(3), shall be lodged within 28 days of the furnishing by a primary decision maker of a written outline of reasons for the decision; and
(c) the Tribunal is empowered to extend the time limit for lodging applications in particular cases.

(2) Section 29 of the Administrative Appeals Tribunal Act should be modified accordingly.
Recommendation 22: Time limits for lodgment of documents (paras 256-7)
Legislation should provide that where a decision is subject to review by the Administrative Appeals Tribunal (either directly or after the grant of leave), the time limit for lodgment of a statement of reasons and other relevant material by the Department is 28 days from the date of receiving notice of an application for review or grant of leave to appeal, except where the Tribunal directs otherwise, and that section 37 of the Administrative Appeals Tribunal Act is amended accordingly.

Recommendation 23: Constitution of the Administrative Appeals Tribunal (paras 258-64)
(1) The provisions of the Administrative Appeals Tribunal Act should apply in relation to the constitution of the Tribunal to hear appeals in its current and proposed Migration Act jurisdiction. Sub-section 66E(4) of the Migration Act 1958 should be repealed.
(2) In practice the Tribunal should ordinarily be constituted in its migration jurisdiction by a Presidential or Senior Member and two other members of the Tribunal, but the President should retain discretion as to the Tribunal’s constitution in individual cases.
(3) Appointment should be made to the Tribunal of persons who have an affinity with the problems which arise in the migration area and who have an understanding of the differing cultural backgrounds of migrants.

Recommendation 24: Review by the Administrative Appeals Tribunal to be determinative (paras 265-6)
Legislation should provide that the Administrative Appeals Tribunal exercises a power of determinative rather than recommendatory decision making in its migration jurisdiction, as it does in most of its other jurisdictions.

Recommendation 25: Ministerial certificates (para. 267)
Legislation should provide that:
(a) the Minister is empowered to issue a certificate, the effect of which is to exclude review on the merits in relation to a particular decision, stating that the Minister is of the opinion that it is in the public interest, because of considerations such as those of national security, defence or international relations, that responsibility for the decision should remain with the Government;
(b) a certificate issued in accordance with paragraph (a) shall be personally signed by the Minister and shall specify one or more grounds upon which the certificate is issued; and
(c) the Minister is required to table a copy of the certificate in the Parliament within 15 sitting days of its issue.

Recommendation 26: Accrual and exercise of rights of review (paras 268-69)
Legislation should provide that all rights to review on the merits existing at the date of any review by an Immigration Adjudicator or the Administrative Appeals Tribunal shall be exercised concurrently.

Recommendation 27: Standing to seek review (paras 279-85)
(1) Subject to the exceptions identified in Recommendations 28(1) and (3):
(a) legislation should provide that sections 27, 30 and 31 of the Administrative Appeals Tribunal Act apply to determine who has standing for the purposes of Administrative Appeals Tribunal review in its proposed migration jurisdiction; and
(b) provisions modelled on sections 27, 30 and the first part of section 31 should be enacted with regard to review by Immigration Adjudicators.
(2) Legislation should provide that a decision of an Immigration Adjudicator concerning standing is subject to review by the Administrative Appeals Tribunal provided that the leave of the Tribunal is first obtained.

Recommendation 28: Decisions subject to review ( paras 291-420)

(1) Legislation should provide that the following classes of decisions made under the Migration Act and Migration Regulations are subject to review by the Immigration Adjudicators, and, subsequently, subject to any leave requirement which may apply (see Recommendation 5), by the Administrative Appeals Tribunal, at the instance, unless otherwise specified, at each level of review, of any person whose interests are affected by such a decision:

(a) a decision to refuse a migrant entry or temporary entry visa, but only at the instance of an Australian citizen or permanent resident whose interests are affected by the decision;

(b) a decision to cancel a migrant entry or temporary entry visa;

(c) a decision requiring the provision of a maintenance guarantee (assurance of support);

(d) a decision to refuse entry to a person who has a visa, or a return endorsement, or who is exempt from the requirement to possess an entry permit under paragraph 8(1)(d), (e) or (f) of the Migration Act;

(e) a decision to grant a temporary entry permit which is subject to conditions which are inconsistent with the basis on which a visa has been granted, or a decision to grant any other permit inconsistent with the basis on which a visa has been granted, other than a decision to grant a temporary entry permit for the purpose of allowing entry while eligibility for permanent residence is determined;

(f) a decision to refuse an application for change of status from temporary to permanent resident made in accordance with section 6A of the Migration Act other than a decision taken under paragraph 6A(1)(c) in relation to change of status to permanent resident based on an applicant’s status as a refugee (see Recommendation 28(3)(a));

(g) a decision under sub-section 6(2), 6(5) or 7(2) of the Migration Act to refuse to grant a temporary entry permit to a prohibited non-citizen, at the instance only of an Australian citizen or permanent resident whose interests are affected;

(h) a decision to declare, pursuant to sub-section 8(2) of the Migration Act, that the continued presence in Australia of a person who is in an exempt class of persons under paragraph 8(1)(d), (e) or (f) of the Migration Act is undesirable;

(i) a decision to refuse or cancel a resident return visa or a return endorsement;

(j) a decision to refuse change of status from one category of temporary entrant to another, but only at the instance of an Australian citizen or permanent resident whose interests are affected;

(k) a decision to cancel a temporary entry permit;

(l) a decision to refuse to extend a temporary entry permit, but only at the instance of an Australian citizen or permanent resident whose interests are affected or at the instance of any person whose interests are affected by the decision where a person is seeking an extension for the purpose of medical treatment not available in that person’s home country, or for the purpose of continuing an approved course of study;

(m) a decision not to grant a temporary entry permit to a person who has been granted refugee status and who wishes to apply for permanent resident status in accordance with paragraph 6A(1)(c);

(n) a decision to require voluntary departure made pursuant to section 31A of the Migration Act, at the instance only of an Australian citizen or permanent resident whose interests are affected;

(o) a decision to deport a prohibited non-citizen pursuant to section 18 of the Migration Act, at the instance only of an Australian citizen or permanent resident whose interests are affected;
(p) a decision under section 19 of the Migration Act to refuse to deport, at the request of the spouse of a deportee, the spouse and any dependent children of a deportee;
(q) a decision by a Commonwealth agency to take action to recover a debt arising under regulation 22 of the Migration Regulations, unless a right of appeal in respect of such a decision is already provided for to the Social Security Appeals Tribunal and the Administrative Appeals Tribunal; and
(r) a decision to require a security to secure compliance with the provisions of the Migration Act or the Migration Regulations.

(2) Legislation should provide that the following classes of decisions made under the Overseas Students Charge legislation are subject to review by the Immigration Adjudicators, and subsequently by the Administrative Appeals Tribunal, at the instance of a person whose interests are affected by such a decision:
(a) a decision under section 5 of the Overseas Students Charge Act that a person is liable to pay a charge;
(b) a decision under regulation 3 of the Overseas Students Charge Regulations determining the rate of a charge;
(c) a decision under section 6 of the Overseas Students Charge Collection Act refusing a temporary entry permit to an overseas student;
(d) a decision under regulation 4 of the Overseas Students Charge Collection Regulations that a student is not exempt from a charge;
(e) a decision under regulation 5 of the Overseas Students Charge Collection Regulations that a student is not entitled to a refund of a charge;
(f) a decision under regulation 8 of the Overseas Students Charge Collection Regulations that a student is not entitled to a remission of a charge.

(3) Legislation should provide that decisions from which a right of review lies directly to the Administrative Appeals Tribunal at the instance, unless otherwise specified, of any person whose interests are affected by such a decision, are:
(a) a decision to refuse a claim, by a person who has arrived in Australia, for refugee status under paragraph 6A(1)(c) of the Migration Act;
(b) a decision to deport a person pursuant to section 12 of the Migration Act, at the instance only of an Australian citizen or permanent resident whose interests are affected by the decision; and
(c) a decision to deport a person pursuant to section 14 of the Migration Act, except where it has been made on the grounds of an adverse or qualified security assessment provided by the Australian Security Intelligence Organisation, at the instance of:
   (i) in the case of a decision made under the provisions of sub-section 14(1) - any person affected by the decision;
   (ii) in the case of a decision made under the provisions of sub-section 14(2) - an Australian citizen or permanent resident whose interests are affected.

(4) Sub-sections 14(3) to (8) of the Migration Act should be repealed following the introduction of external review on the merits of deportation decisions made under section 14.

(5) In relation to review of a refugee status decision referred to in paragraph (3)(a) above, an applicant, before lodging an application for review, should be required to obtain the leave of the Tribunal in accordance with the general principles specified in Recommendation 5.

(6) Legislation should provide that:
(a) a person who has been refused entry to Australia but is in possession of a valid visa or is exempt from the requirement to possess a visa is permitted to remain for the purposes of the hearing of an appeal, but may be held in custody subject to the recommendations below;
(b) a prescribed authority under section 40 of the Migration Act shall inquire into whether there are reasonable grounds for continuing to detain an applicant in custody for more than 48 hours pending the hearing of an appeal, and to authorise the detention of the applicant for such periods as are necessary;
(c) in circumstances where the Department is seeking leave to appeal to the Administrative Appeals Tribunal, provisions similar to those referred to in paragraph (b) shall apply;
(d) a decision to detain a person in custody shall be made only after consideration of whether the person concerned is likely to abscond or to pose a threat to the community; and
(e) a prescribed authority is empowered to release on reasonable conditions a person being held in custody.
INTRODUCTION

General
1. Migration has constituted a major part of Australian historical experience and migrants continue to influence and direct the path of Australia’s cultural, social and economic development in significant ways. For several decades successive governments have actively encouraged migration to Australia through policies designed to provide migrants and their children with an opportunity to preserve and extend their own heritage (see Ministerial Statement of 18 May 1983, House of Representatives, Parliamentary Debates, p.662).

2. As a result of government policy after 1945, over 4 million persons from more than 100 countries settled in Australia, a number of whom were refugees. Today, more than 20% of Australia’s population was born overseas and another 20% has at least one parent born overseas.

3. A desire to attract migrant settlers is one factor currently shaping the approach to official decisions in the field of migration; so also is the desire of governments to exercise control over visitors and to select from among those who wish to settle in Australia. Australia is not in the position of some other countries whose policies are designed to restrict new permanent settlers to those who should be accepted on humanitarian or compassionate grounds (although these concerns are important components in Australia’s present policies), and Australia does not presently have the problems associated with a large population of ‘guest workers’. Nonetheless, decisions concerning migration matters are high in number, are capable of affecting deep personal interests and generate much passion and controversy.

4. Another feature of Australia’s immigration administration is the number of visitors and other temporary residents who come to Australia. For example, the Minister recently stated that in 1984 Australia received over one million temporary residents and other visitors for the first time, an increase of 7.5% over 1983 (‘Immigration Serving Immigrants and Australia’, tabled in the House of Representatives, Parliamentary Debates, 17 October 1985, p. 2332). In turn, this large number of visitors and temporary residents leads to problems where in particular instances visitors overstay the period for which they are lawfully permitted to remain in Australia, and where conditions of entry are not adhered to.

5. One function of the Administrative Review Council is to consider the law and practice relating to the review of administrative decisions and to make recommendations as to any improvements that might be made therein. The Council has undertaken an examination of review of migration decisions in the context of Australia’s status as a multi-cultural community with a policy of continuing and controlled migration. It is the Council’s view, developed at length in the report as a whole, that the nature of the interests affected by migration decisions is such that it is desirable in general to have rights and entitlements clearly spelled out in legislation or easily accessible policy statements, and for primary decisions to be amenable to an effective system of external review on the merits.

Origin and scope of report
6. On 18 March 1977 the Administrative Review Council resolved as follows:
The Council is to commence as soon as possible an examination of powers conferred by legislation administered by the Department of Immigration and Ethnic Affairs (the Department) and of decision making under those powers for the purpose of considering the
review of those decisions and other matters that come within the statutory functions of the Council.
The legislation administered by the Department comprises:

- Australian Citizenship Act 1948 and Regulations
- Australian Institute of Multicultural Affairs Act 1979 and Regulations
- Departure Tax Act 1978
- Departure Tax Collection Act 1978 and Regulations
- Immigration (Education) Act 1921, in so far as it relates to migrant adult education
- Immigration (Guardianship of Children) Act 1946 and Regulations
- Migration Act 1958 (the Act) and Regulations

7. The extensive and complex nature of this project has led to its being undertaken in separate stages. This report is the last of three completed by the Council since it initiated the project. Earlier reports, submitted to the Attorney-General on 13 June 1980 and 4 August 1983 respectively, were Report No. 7, Citizenship Review and Appeals System (AGPS, 1981), tabled in the Senate on 29 October 1981, and Report No. 19, Rights of Review Under the Migration Act 1958 and Related Legislation: Interim Report on the Constitution of the Administrative Appeals Tribunal (AGPS, 1983), tabled in the Senate on 15 September 1983. The primary objective of the recommendations contained in the former report was the creation of a right of appeal to the AAT in respect of certain decisions made pursuant to the Australian Citizenship Act 1948. The Australian Citizenship Amendment Act 1984 has substantially achieved that objective. Report No. 7 also contained recommendations regarding powers conferred by other laws administered by the Department, in particular powers contained in the Aliens Act 1947 and the Immigration (Guardianship of Children) Act 1946. In relation to the Aliens Act, the Council recommended that one section of that Act be made reviewable by the AAT unless the Act was repealed in the near future. The Aliens Act 1947 has since been repealed by the Aliens Act Repeal Act 1984.

8. In relation to the Immigration (Guardianship of Children) Act, the Council recommended that the problems which it had identified in relation to that Act should be considered by the Government or referred to the Family Law Council or the Australian Law Reform Commission when they were considering child welfare laws. The Act has since been amended, by the Statute Law (Miscellaneous Provisions) Act (No. 1) 1985, to provide for review by the AAT of a number of decisions of the Minister.

9. Report No. 19 recommended that appropriate legislative action be taken to enable the AAT to be constituted in its current Migration Act jurisdiction by any presidential member, rather than only by a Judge of the Federal Court as was previously required, pending the consideration by the Government of the Council’s earlier general recommendation that all existing prescriptions on the constitution of the Tribunal should be repealed (see ARC Third Annual Report 1979, para. 84 and ARC Fourth Annual Report 1980, paras 165-6). The recommendation concerning presidential members was implemented by the passage of the Statute Law (Miscellaneous Provisions) Act (No. 2) 1983 which amended sub-section 40(2) of the Statute Law (Miscellaneous Amendments) Act (No. 1) 1982. As noted above, however, the Council in making the recommendation indicated that it saw its implementation as only a short-term solution to an immediate problem.

10. The present report is concerned largely with review of decisions taken under the Migration Act and Regulations, and in particular decisions taken under Divisions 1, 1A, and 2 of Part II of the Migration Act 1958, that is, with decisions concerning entry to Australia, visas and return endorsements, and deportation. The Migration Act and Regulations together are the legislative means for controlling entry to, and residence in, Australia.
11. The Council has not examined decisions relating to the enforcement of the Migration Act, as it does not consider that such decisions are appropriate for review on the merits. Such matters are, in the Council’s opinion, more appropriate for review by the courts, whether in the consideration of criminal charges brought against persons or by way of judicial review (see Council’s Report No. 23, Review of Customs and Excise Decisions: Stage Two (AGPS, 1985), paras 154-69). The Council notes, also, that Report No. 13 of the Human Rights Commission, Human Rights and the Migration Act 1958 (ALPS, 1985) deals with such matters in considerable detail.

12. As it stated in its Report No. 7 (para. 33), the Council does not consider that the laws referred to in paragraph 6 which are administered by the Minister for Immigration and Ethnic Affairs, other than the Migration Act and Regulations, confer powers of decision which at present either require or are suited for rights of review on the merits.

13. Legislation relating to overseas students charges has been examined in this report notwithstanding that it is not at present administered by the Department of Immigration and Ethnic Affairs. The Council considers that it is convenient to deal with the legislation as part of this project because it was administered by that Department before 13 December 1984 and it was only after that date that its administration was transferred by Administrative Arrangements Order to the Department of Education.

14. The Council is conscious of the lengthy period it has taken it to complete this report. Migration administration is a complex and changing field, and the scope of the issues to be canvassed is wide. Throughout the course of the project the Council’s resources have been over stretched when compared with the function with which it is entrusted.

Structure of the report

15. This report is divided into five chapters. Chapter 1 describes the existing system of primary decision making and review, surveying briefly the relevant legislation and the policies which have been adopted in order to give content to the wide-ranging discretionary powers contained in the legislation. Some of the important or distinctive features of primary decision making in the migration field are briefly referred to in this chapter. After a reference to the general rights of review which apply to the migration area among others, there is an examination and preliminary assessment of the special rights of review which apply to migration decisions. There are Appendixes to this Part which contain more detail on matters such as legislative provisions and migration policy, as well as statistics relating to migration decisions and their review.

16. Chapter 2 brings together a number of general considerations which are relevant to the provision of review in the migration field. These include: the need for review on the merits of migration decisions; the nature of the interests affected by migration decisions and the implications for the provision of review; certain general considerations concerning such matters as national sovereignty, human rights and community expectations; the implications for ministerial responsibility of the introduction of external merits review; the prospects for the rationalisation and simplification of review rights as a result of the introduction of full external determinative review on the merits; and a brief reference to the significance in migration decisions of the delay factor.

17. Chapter 3 contains the Council’s proposals for reform. The first section explains the Council’s proposals for structuring more formally and precisely the wide discretionary powers
which exist in the migration area by specifying principles and criteria in a combination of legislative and other forms. That section also discusses a proposed two-tier system of external determinative review on the merits. The second section of the chapter deals in detail with the decisions recommended for review. Chapter 4 is concerned with the staffing and cost implications of the Council’s proposals. Chapter 5 contains the dissenting views of one member of the Council, Mr Julian Disney, on two matters.

18. In summary, the Council concludes that the existing means of review of migration decisions are inadequate since they fail to provide for effective review on the merits in respect of a wide range of migration decisions which are suited to review. Many of the recommendations in this report aim to overcome that deficiency and to rationalise and simplify the existing means of review through the establishment of a two-tier determinative structure of external review on the merits consisting of Immigration Adjudicators as a first level review authority (providing for a relatively expeditious, economical and informal review process) and the AAT as a final review authority (providing, subject to a leave requirement in certain classes of decisions, for the consideration of cases in greater depth and for the development and enunciation of principles of general application). It is proposed in this report that most classes of migration decision should be amenable to this two-tier system of review; however, certain qualifications in relation to such matters as standing to seek review are recommended in relation to particular classes of decision. The Council has concluded that not all classes of migration decisions are suitable for review on the merits. It also considers that some classes should be subject to review directly by the AAT without prior review by Immigration Adjudicators. Finally, the Council considers that, notwithstanding that many classes of migration decisions ought in principle to be subject to merits review, the Minister for Immigration and Ethnic Affairs should be empowered to certify to the Parliament that the Minister believes on specified grounds that it is in the public interest that final responsibility for a particular migration decision should remain with government and not be reviewed on the merits by an external tribunal.

Consultation

19. In the course of preparing this report, members of the Council’s Secretariat undertook extensive consultations which involved several visits to the Central Office of the Department and visits to each of its State and Territory Regional Offices as well as to its Newcastle and Townsville Area Offices. Over 100 officers of the Department were consulted on policies and procedures operating in the migration area and on attitudes towards the review of migration decisions. Consultations were also held with each State Government Immigration Office; some members of the Immigration Review Panels; the Ethnic Communities Councils; a variety of ethnic welfare organisations; several legal aid centres and other persons who the Council considered could assist in the project. In addition, an Issues Paper was distributed to a variety of persons and organisations for comment and, on 25 October 1980, the Council held a seminar on immigration matters which was attended by representatives of Commonwealth and State Government agencies, representatives of ethnic community organisations, and individuals having an interest in immigration issues. (See Appendix 7 containing details of the participants in the Immigration Seminar in 1980.)

20. The Council provided the Department in mid-1984 with copies of its draft report as it then stood, and has received detailed comments from the Department on many aspects of the draft. Those comments have been taken into account in the preparation of the final report, and the Council is grateful to the Department for the assistance it has given. As part of this ongoing process of consultation the Council has had the benefit of a visit to its meeting on 6 September 1985 by the present Minister for Immigration and Ethnic Affairs, Mr C.H. Hurford, MP, and of
discussions concerning central issues between its Migration Committee and the Secretary of the Department, Mr W.B. McKinnon, CBE, and officers of his Department.
21. The Council does not wish at this point to set out in detail the views expressed by the Department following the preparation of the Council’s draft report, since these views are discussed at the appropriate points in the report. The Council notes, however, that the Department accepts that the current development of administrative law is in the direction of reducing the open-ended and non-reviewable nature of many administrative discretions and that it has no objection in principle to external determinative review by a single body such as the AAT.

21A. In its research into the administration of migration legislation and policies the Council has taken into account the exposition and recommendations contained in the recently published Report No. 13 of the Human Rights Commission (see para. 11 above). This report refers to the Commission’s report where that seems appropriate. In particular, Chapter 2, ‘The Migration Act and its Administration’, contains helpful background material on the development of migration legislation and policy, and the Council has not sought to duplicate that material. While the Commission’s report contains comments and recommendations on certain matters concerning review of migration decisions (see in particular Chapter 8, ‘Discretion, Delegation and Review’), it is noted in that report that the Administrative Review Council is reviewing the Migration Act ‘with the object of proposing new review arrangements’ and that the area of review is left to the Council (‘Executive Summary’, para. 8, and paras 63 and 318). The Council has taken note of the Commission’s recommendations in this area, but has arrived at its conclusions as a result of its own research and deliberations. Unless otherwise stated, references to the Commission’s report do not necessarily indicate agreement with views expressed therein.
CHAPTER 1

THE EXISTING SYSTEM OF DECISION MAKING AND REVIEW

Introduction

22. It is a major characteristic of the migration field that the legislation confers wide discretionary powers on administrators. The legislation does not itself enunciate detailed objectives, and the Government and the Department have filled the gap by a combination of ministerial and departmental policies and guidelines, many of which are to be found in departmental manuals and instructions. The existence of these wide discretionary powers, and of the manner in which they have been administratively 'structured' by a range of policies, principles and criteria, has implications both for primary decision making and for the provision which should be made to ensure the most adequate and effective forms of review. These implications are discussed below in relation to ministerial responsibility (paras 117-19) and the structuring of powers (paras 138-57).

23. Until recently the major recourse of those dissatisfied with decisions taken under such policies was to make representations through members of Parliament to the Minister or to the Department, or, to a lesser extent, to take legal action to seek judicial review of decisions at common law. In recent years reforms of Commonwealth administrative law have provided new avenues for reviewing such decisions, for example by applying to the Federal Court for orders under the Administrative Decisions (Judicial Review) Act 1977 (AD(JR) Act); by making complaints to the Commonwealth Ombudsman about matters of administration which may have been defective; or by drawing the attention of the Human Rights Commission to actions which may have been contrary to human rights.

24. In addition, there are some diverse and limited provisions for review of specific migration decisions. Some have been instituted by government as a matter of internal administration only, such as the establishment in 1982 by the then Minister of Immigration Review Panels to advise him on appeals in relation to a number of specified matters; and the Determination of Refugee Status (DORS) Committee established to advise the Minister on refugee applications, a Committee which has both primary decision making and limited review responsibilities (see paras 74-5). Other review provisions take a statutory form, such as those in section 14 of the Migration Act which establishes an office of Commissioner for the purpose of considering requests by non-citizens to examine decisions by the Minister to deport such persons on security grounds. A further example of a statutory review provision in this area is contained in section 66E of the Migration Act which confers jurisdiction on the AAT to review decisions of the Minister under sections 12 of that Act (concerning criminal deportation) and 48 (concerning the Minister’s power to give directions to a person not to act as a migration agent). The powers of the AAT under these provisions are limited to affirming the Minister’s decision or remitting the matter for reconsideration in accordance with any recommendations of the Tribunal.

25. These rights of review have grown on an ad hoc basis and without overall consideration of whether there is a need for a general right of external review on the merits of migration decisions. It is one of the primary objectives of this report to give consideration to the issues which arise in relation to that question.
The legislative and policy framework

INTRODUCTION
26. This section seeks to summarise the principal legislative provisions relating to migration with which this Report is concerned, and the associated policy framework which has been adopted by government and administrators.

Prohibited non-citizens
27. There is one matter which affects several classes of decision and therefore requires separate mention at this point, and that is the situation of ‘prohibited non-citizens’ (or ‘illegal immigrants’). As discussed in Appendix 1 the government has issued a comprehensive policy statement in respect of ‘illegal immigrants’. The term ‘illegal immigrants’ is intended in that statement to comprehend the following classes of persons whom the Act designates as ‘prohibited non-citizens’:

- non-citizens who do not hold a current entry permit who enter Australia (sub-s.6(1));
- persons who held temporary entry permits which have expired or been cancelled, unless further entry permits come into force on such expiration or cancellation (‘overstayers’ - sub-s.7(3));
- certain categories of person exempt from the need to obtain an entry permit under sub-section 8(1) whose status subsequently changes in certain ways (sub-s.8(3));
- non-citizens who enter Australia by means of evasion of officials, employment of false documents or false statements, or who fall within certain categories relating to health or criminal or deportation record (‘deemed prohibited non-citizens’ - sub-s.16(1)); and
- persons to whom a further entry permit has been granted while they were in Australia as a result of the employment of false documents or false statements (also ‘deemed prohibited non-citizens’ - sub-s.16(1A)).

28. In short, it may be said that prohibited non-citizens or ‘illegal immigrants’ are people who are in Australia without lawful authority. They include the so-called ‘overstayers’, such as those people who enter Australia as tourists or to visit family or for other short-term purposes and who stay beyond their visitor entry permit, or those who are permitted a temporary stay for a specific purpose (such as for study or training, business discussions, medical treatment or working holidays), and who then remain without permission.

29. A prohibited non-citizen may cease to be a prohibited non-citizen if and when an entry permit or further entry permit is granted (s.10). However, certain categories of ‘deemed prohibited non-citizens’ under section 16 of the Act only cease to be such if they are the holders of entry permits endorsed with a statement that the person granting that permit recognises the person to be a person referred to in sub-section 16(1).

30. The Act specifies offences and penalties in relation to people who become prohibited non-citizens (s.27).

31. The following discussion of particular classes of decisions includes where appropriate reference to the special position of prohibited non-citizens (see especially paras 39, 42-3, 45, and 47).

32. There are five main classes of migration decisions which will be discussed in the order shown:

- Entry decisions
- Change of status decisions
• Deportation decisions
• Miscellaneous decisions
• Decisions under related migration legislation.

The brief description presented here is supplemented by more detailed information contained in Appendix 1. In particular, Table 1 of that Appendix identifies the statutory decision-making powers with which this report is principally concerned. Reference may also be made to Report No. 13 of the Human Rights Commission which contains a great deal of factual and descriptive material concerning the operation and administration of migration legislation.

ENTRY DECISIONS
Visas, entry permits and exempt persons

33. Before looking in more detail at the legislative provisions and policy framework, it will be helpful to distinguish between two kinds of decisions which have to be made by the immigration authorities in relation to persons seeking permission to travel to and enter Australia. Non-citizens who seek to travel to Australia, for whatever purpose, must first obtain a visa with respect to that travel (which if granted may relate to travel on a single occasion only, or on a number of occasions not exceeding a specified number, or on any number of occasions) which remains in force until the expiration of any date or period specified in it (see s.11A of the Act). The Minister or delegate may cancel a visa at any time by writing under the Minister’s or delegate’s hand (s.11B). It is also provided that certain carriers who bring to Australia non-citizens, who are without visas (or return endorsements - see para. 38) and are not exempted from the need for such documents, are guilty of an offence (s.11C).

34. Whether or not a person arriving in Australia has a visa, that person, unless exempt (see below), cannot legally enter Australia without obtaining an entry permit, which may be either a temporary entry permit or one unrestricted as to time (that is, permitting permanent residence). Sub-section 6(1) of the Act provides that a non-citizen who is not the holder of an entry permit which is in force and who enters Australia becomes a prohibited non-citizen, while sub-section 6(2) provides that an officer may grant an entry permit. Under the two-stage system, involving both visas for travel and entry permits, it is possible for arrivals who have valid visas to be refused entry permits. (This occurs infrequently: see figures in Appendix 6.) Temporary entry permits may be cancelled by the Minister (see para. 39) but not entry permits authorising permanent residence. Sub-section 6(5) provides that an entry permit may be granted to a non-citizen either upon arrival in Australia or, subject to section 6A, after entering Australia.

35. The Migration Act (s.8) exempts certain classes of persons from the requirement to obtain an entry permit, and provides that such persons may be removed from an exempted category by the making of a written statement by the Minister which declares them to be persons whose entry to, or continued presence in, Australia is undesirable. Exempted persons may also cease to be exempt on the occurrence of certain other events. Exempted categories of persons include members of the Armed Forces of the Crown; diplomatic and consular representatives; member of the complement of vessels of the regular armed forces of governments recognised by the Commonwealth; crews of vessels; inhabitants of protected zones in certain circumstances; and classes of persons exempted by instrument under the hand of the Minister. Of most significance in the last category are New Zealand citizens.

Migrant entry

36. Migrant entry decisions (that is, decisions authorising permanent residence) are made in accordance with government policy at the time. There are no specific statutory provisions relating to migrant entry, and policy is administered by means of decisions concerning the
issue of travel visas and unrestricted entry permits. Current migrant entry policy is contained in a May 1983 ministerial statement (see House of Representatives, Parliamentary Debates, 18 May 1983, pp. 662 ff.), and the terms of the statement are summarised in Appendix 1. The statement sets out general principles, and identifies five categories of migrant entry: the Family Migration category; the Refugee and Special Humanitarian category; the Labour Shortage and Business Migration category; the Independent Migration category; and the Special Eligibility category.

37. Decisions to authorise migrant entry take into account a number of factors, including the person’s ability to meet selection criteria, which in some cases include an assessment by points designed to measure an applicant’s prospects of earning a living and supporting the applicant’s family in Australia (see Appendix 1). Other factors include general health and character requirements and the requirement of sponsorship for those falling within the Family Migration category. The Migration Regulations also specify that an assurance of support (formerly termed a maintenance guarantee) may be required where a de facto wife or an aged or retiring parent is seeking to settle in Australia, and the provisions are capable of being applied more widely (see Appendix 1 for further details).

Resident re-entry decisions
38. Residents who are non-citizens and who plan to be, or have been, temporarily overseas are required to obtain a visa or endorsement authorising travel to Australia for the purpose of re-entry after that absence: such visas are known as resident return visas and return endorsements (see Appendix 1 for details concerning each of these). They are designed in part to prevent persons who do not genuinely intend to settle permanently in Australia from obtaining and maintaining resident status simply by making brief visits to Australia. As with other visas, it remains necessary for a holder of a resident return visa or return endorsement to obtain an entry permit before that person can legally enter Australia. Section 11A of the Act concerns the issue of return endorsements as well as visas generally, and section 11B authorises the cancellation of a visa or return endorsement.

Temporary entry decisions
39. The Act provides for the grant of temporary entry permits, which authorise a person to remain in Australia for specified periods only (sub-s.6(2) and (6)). The Act also provides that such permits may be granted subject to conditions, and provides specifically for the imposition of conditions with respect to the work which a holder may perform while in Australia (sub-s.6(6A)). The Minister has an absolute discretion to cancel a temporary entry permit at any time by writing under his hand (sub-s.7(1)), and a temporary entry permit may be extended for a further period of stay (sub-s.7(2)). A person who was the holder of a temporary entry permit becomes a prohibited non-citizen if that temporary entry permit expires or is cancelled without a further such permit coming into force (sub-s.7(3)).

40. Three sub-policies make up the temporary entry policy: they relate to visitor entry (for holiday purposes), entry for temporary residence (usually for employment purposes), and student entry (for study or training purposes). (See Appendix 1 for further detail.) All three are characterised by the common principle that persons entering Australia on a temporary basis should not subsequently, other than in the circumstances specified in section 6A of the Act (see paras 41-4), be permitted to remain permanently.

CHANGE OF STATUS DECISIONS
41. Change of status can refer to either a change of status from one category of temporary entrant to another (for example, from visitor to temporary resident) or from temporary entrant (including those granted political asylum or refugee status) to permanent resident. In the
former case, the policy is that no advantage should be conferred on an applicant in Australia over an applicant from overseas seeking entry in the same category. The Department has informed the Council that, except in special circumstances, applicants seeking a change of temporary entry status are refused. The Council has noted that the Migration Act does not impose any express restriction on the power to grant a temporary entry permit after a person has entered the country (see sub-ss.6(2), (5) and 7(2)), which may be compared to the criteria concerning change of status to permanent resident after entry. The criteria for change of status from temporary entrant to permanent resident are specified in the provisions of section 6A of the Act. Under those provisions a person is eligible to be considered for such a change of status only if that person:

- has been granted territorial asylum in Australia;
- is the spouse, child or aged parent of an Australian citizen or permanent resident;
- has the status of refugee and is the holder of a current temporary entry permit;
- is the holder of a current temporary entry permit and is authorised to work Australia provided the person is not a prescribed non-citizen; or
- is the holder of a current temporary entry permit and there are strong compassionate or humanitarian grounds for the grant of permanent residence.

42. The Council has been informed by the Department that, in the case of a citizen without a temporary entry permit who seeks permanent entry to Australia under the last three of the above provisions, the Department normally considered concurrently whether or not to grant a temporary entry permit and whether or no grant a change of status under section 6A. Where the Department or the Minister decides that there is no case for a change of status, no temporary entry permit granted. The Council notes that this practice is not in conformity with the legislation which appears to require a two-stage decision-making process, and the Council proposals later in this report provide for review on the merits in appropriate cases the assumption that a two-stage process is followed (see also the discussion Minister for Immigration and Ethnic Affairs v. Kemal Akbas (Full Court of the Federal Court, (1985) 8 ALN N26). If it is considered that the Department’s current practice is more convenient and practical way of dealing with change of status applications, the Council believes that the relevant provisions of the Migration Act should be amended accordingly to authorise the continuation of that practice.

43. The Government’s recently announced ‘Policy on Illegal Immigrants’, tabled the Minister in the House of Representatives on 17 October 1985, sets out a number of circumstances which, if they exist, will count heavily against prohibited non-citizen seeking a change of status (these are set out in detail in Appendix 1 para. 26). According to the Minister’s statement, such persons will not readily be given permanent residence while they remain in Australia, and their breaches immigration law and requirements will weigh heavily against them. They will expected or required to leave Australia, and subsequent applications for permanent or temporary residence in Australia will in general be subject to time limitations before they are readmitted to Australia.

44. Appendix 1 (paras 20-6) contains details of the Government’s policy on change of status.

DEPORTATION DECISIONS

44A. The following categories of person are liable to deportation:
- Prohibited non-citizens (s.18) (see paras 27-30 above)
- Non-citizens who have been convicted of certain criminal offences and who at t time of the commission of the relevant offences had been permanent residents less than ten years’ standing (s.12)
• Non-citizens who are permanent residents of less than 10 years' standing as whom it appears to the Minister that their conduct constitutes, or has constituted a threat to the security of the Commonwealth or of a State or Territory (sub-s.14(1))
• Non-citizens convicted in Australia of certain offences under the Crimes Act 1914 (Cwlth) (relating largely to matters of a security nature), or prescribed laws of a State or Territory, who at the time of the commission of the offences were not Australian citizens (sub-s.14(2)).

45. The broad criteria on which judgments are made as to whether deportation appropriate in cases where the person has been convicted of certain criminal offence are set out in Appendix 1. The policy provides for each case to be considered on merits, and it has undergone much development, in part as a consequence of review by the AAT of decisions in this area. The Minister’s recent policy statement on ‘illegal immigrants’ (referred to in para. 43) also includes criteria relevant to the deportation of such persons. Here also, as in the case of changes of status, the policy is to effect that prohibited non-citizens’ breaches of immigration law and requirements weigh heavily against them (see Appendix 1 for details). There is no formal policy statement applying to deportations on security grounds.

46. There is provision in the Act that, where the Minister orders the deportation of a person, the Minister has a discretion, at the request of the spouse of that person, to order the deportation of the spouse, or the spouse and a dependent child or children of that person (s.19). Deportation orders may be revoked by the Minister (sub-s.20(1)).

MISCELLANEOUS DECISIONS
47. The Act provides that the Minister or a delegate may require a person who is a prohibited non-citizen to leave Australia within a specified time and that the person shall comply with that requirement except in certain circumstances. There is a penalty of $1000 or imprisonment for six months for failure to comply with such a requirement (s.31A).

48. There is also provision in the Act for the requiring and taking of securities for compliance with the provisions of the Act or Regulations or any conditions imposed under that legislation (s.54).

49. The powers conferred by the Migration Act concerning entry and the prevention of entry to Australia, and the removal from Australia of non-citizens, are supplemented by the Migration Regulations, the provisions of which are summarised in Appendix 2.

RELATED MIGRATION LEGISLATION
50. The Overseas Students Charge Act 1979 imposes a charge on certain overseas students enrolling in specified tertiary education courses in Australia. The Overseas Students Charge Regulations specify the charge which is to be levied and the circumstances in which a transfer from one prescribed course to another is to be regarded as a continuation of the one prescribed course. The Overseas Students Charge Collection Act 1979 provides for the collection of fees owing by an overseas student in respect of a prescribed course, provides that any unpaid charge is a debt due to the Commonwealth (s.8), and prohibits the grant of a temporary entry permit to a person proposing to undertake a prescribed course of study (sub-s.6(1)) unless the fees have been paid or liability is discharged by virtue of an arrangement between the Minister for Foreign Affairs and the government of another country, or the person has been awarded a scholarship (s.7).

51. The Overseas Students Charge Collection Regulations deal with matters such as to whom payment of a charge should be made, exemptions from the duty to pay a charge, and refunds and remissions of charges.
52. The Council has identified the following decisions taken in pursuance of Overseas Students Charge legislation which have the capacity to affect individual rights and interests:

- A decision that a person is liable to pay a charge imposed by the Overseas Student Charge Act
- A decision made under the Overseas Students Charge Regulations determining the rate of such a charge
- A decision under the Overseas Students Charge Collection Act to refuse a temporary entry permit to an overseas student
- A decision under the Overseas Students Charge Collection Regulations (reg. 4) that a student is exempt from the charge
- A decision under the Overseas Students Charge Regulations (reg. 5) that a student is entitled to a refund of a charge
- A decision under the Overseas Students Charge Collection Regulations (reg. 8) that a student is entitled to a remission of a charge.

It is recognised that decisions in this area involve a number of sub-decisions on a variety of matters, such as whether a person is an ‘overseas student’ and is enrolled in a ‘prescribed course’, but these decisions are incidental or preliminary to the ultimate decisions identified above. The Council considers below whether any of these ultimate decisions should be subject to review on the merits (see paras 418-20).

The primary decision-making process

53. The process of primary decision making is dealt with in more detail in Appendix 1 but there are several points the Council wishes to highlight at this stage.

54. As has been noted already (para. 22), the migration legislation contains wide discretions the implementation of which is controlled by policy statements, instructions and guidelines. As might be expected in view of the high volume of decisions and the decentralised location of the decision makers, first instance decisions generally reflect the application of these instructions and guidelines. Established practice and policy may be departed from where strong grounds exist to support such a course of action, but decisions of this nature would normally be made at the more senior levels of the Department or at ministerial level. Even at these levels there is reluctance to create precedents which may have the effect of undermining the basic principles of the various immigration policies.

55. There is a high annual volume of decisions in the migration area, the Department estimating that it makes over a million decisions a year. Decision making is largely decentralised, both within Australia and at overseas posts, except where there are instructions to refer particular categories of decisions to central office or a case involves complex or sensitive issues, or a review of a decision is being sought. There is also informal provision for internal review of decisions at progressively more senior levels of the Department.

Internal reconsideration

56. Internal reconsideration currently plays an important part in the Department’s response to the lodging of appeals to the Immigration Review Panels (IRPs) and to the utilisation of avenues of external review. This is apparent, for example, from the number of appeals to the IRPs in 1984-85 which were resolved by the Department without reference to the IRP (approximately 58%: see Table I and paras 63-6).
57. It will be a question for the Department to determine what system of internal reconsideration or review it will adopt in relation to the introduction of a system of determinative external review on the merits such as the Council proposes in this report. The Council notes, however, that an efficient system of internal review in such a high volume jurisdiction is desirable if a system of external review is to function effectively, especially in view of the proportion of appeals to IRPs currently being conceded by the Department without reference to the panels.

Special rights of review in the migration jurisdiction

58. Decisions in the migration area are at present subject to review of various kinds by such means as complaints to the Ombudsman and the Human Rights Commission (the Commission); by judicial review; and, in the case of adverse security assessments provided by the Australian Security Intelligence Organisation (ASIO), by the Security Appeals Tribunal. The Ombudsman deals with a large number of complaints in the migration area, and the Human Rights Commission, while handling fewer complaints than the Ombudsman, has devoted a substantial amount of its inquiry and conciliation resources to migration matters (see Tables II and IV in Appendix 5). The Commission has published several reports concerning individual cases and wider issues, and the number of migration complaints to the Commission has been increasing (see para. 85). There has also been a steady flow of applications to the Federal Court in migration matters (see Table I in Appendix 5). These avenues of review are generally well known, and it is not intended to describe them in detail. However, there is a brief description of the role of the Human Rights Commission in this field (paras 83-6), and a short discussion of the relationship between Ombudsman review and review on the merits in relation to migration decisions (paras 87-9).

59. In addition to those more general review bodies mentioned above there are some avenues of review specific to the migration area, and these are discussed below. The Council’s intention in examining these review mechanisms at this stage of the report is to assess their adequacy in providing review of migration decisions. Before examining these specific avenues for review in the migration field, it should be said that the Council discusses below the impact on the existing avenues of review of introducing a system of external determinative review, and has reached the conclusion that the result would be a considerable rationalisation and simplification of the avenues for review of migration decisions (paras 122-33). The avenues of review which are now examined are:

- Immigration Review Panels
- The DORS Committee
- Review by a Commissioner of section 14 deportation decisions
- AAT: present migration jurisdiction
- Ministerial/departmental representations
- Human Rights Commission
- The Ombudsman.

Immigration Review Panels

60. Immigration Review Panels are non-statutory bodies which have the function of reviewing on the merits certain classes of migration decisions made at departmental level and of making recommendations to the Minister as to the final determination of the individual cases coming before them. In summary, the IRPs at present review decisions of the following kinds:

- Refusal of a migration sponsorship or an application by a sponsored relative for migrant entry
- Refusal of permanent resident status to persons lawfully in Australia
• Refusal to issue a return endorsement to a permanent resident of Australia or cancellation of a return endorsement
• Grant of temporary residence instead of permanent residence to a person arriving in Australia with a migrant visa
• Refusal of a further temporary entry permit to a person legally in Australia or cancellation of a temporary entry permit.

61. Following the decision of the Full Court of the Federal Court in the case of Minister for Immigration and Ethnic Affairs v. Kemal Akbas (see para. 42 above), rights of review by the IRPs in relation to prohibited non-citizens were curtailed. In that case the Court decided that a prohibited non-citizen, who by definition did not hold a current temporary entry permit, could not be described as a person eligible for consideration under the provisions of paragraph 6A(1)(e) of the Act which concerns the grant of an unrestricted entry permit on compassionate or humanitarian grounds. The Minister announced on 17 October 1985 that the Immigration Review Panels would no longer review decisions refusing ‘illegal immigrants’ temporary or permanent residence. In the words of the ‘Policy on Illegal Immigrants’: ‘Any eligibility for review by the Immigration Review Panel lapses immediately a person becomes an illegal immigrant, or is ordered deported under the Migration Act.’ This takes one step further the former policy provision that any previous review right (in relation to the IRPs) lapses ‘immediately a person is apprehended as a prohibited immigrant or is ordered deported under the Migration Act.’

62. The first of the IRPs was established in January 1982 by ministerial decision with the expressed objective of providing a simple review process which would carry with it the guarantee of ministerial consideration of an unfavourable departmental decision. The Council has been informed by the Department that this guarantee no longer operates since, although cases in which the IRPs have recommended some change to the departmental decisions are submitted to the Minister for final decision, those cases in which it is recommended that the original departmental decisions be affirmed are remitted not to the Minister but to the senior officer in charge of the Review Branch of the Department. Only if that officer considers that some change should be made to the original departmental decision is the case submitted to the Minister. Otherwise the IRPs recommendation is accepted and a decision conveyed to the applicant.

63. The flow of cases through the IRP appeals system may be seen from the following tables, based on information provided by the Department.

| Table 1 Applications for Review by Immigration Review Panels 1981-82 to 1983-84 |
|---------------------------------|-------------------------------|-------------------------------|---------------|
|                                 | 1981-82                      | 1982-83                      | 1983-84        |
|                                 | (from 12.1.82)               |                               |               |
| 1. Applications received        | 463                          | 4227                         | 3729           |
| 2. Eligible applications¹       | 372                          | 4027                         | 3588           |
| 3. Resolved without referral to IRP² | 91                          | 845                          | 2502           |
| 4. Considered and recommended by IRP |                             |                              |               |
| (a) maintain decision           | n/a                          | 1223                         | 1488           |
| (b) vary decision               | n/a                          | 341                          | 248            |
| 5. Number finalised (total 3 and 4) | 170                          | 2409                         | 4238           |
| 6. Number not finalised at 30 June | 202                          | 2020                         | 1511           |
Source: Department of Immigration and Ethnic Affairs

1 The Department states that the revised and broadened family reunion migration category, introduced in April 1982, led to increased sponsorship applications and increased appeals.

2 The Department states that the substantial increase in cases resolved without reference to IRPs mainly resulted from policy and procedural changes in 1983-84 relating to family reunion migration, together with appeals being upheld because of changes in the circumstances of the individuals concerned.
For 1984-85 the Department has provided the following detailed breakdown of those cases resolved in 1984-85:

### Table II(a) Applications Resolved 1984-85

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Without referral to IRP</strong></td>
<td>1582</td>
</tr>
<tr>
<td>Primary decision varied (appeal upheld)</td>
<td>877</td>
</tr>
<tr>
<td>Otherwise resolved (ineligible, withdrawn, outstanding requirements met or identified and appellants advised and appeal not proceeded with etc.)</td>
<td>705</td>
</tr>
<tr>
<td><strong>Referred to IRP</strong></td>
<td>1162</td>
</tr>
<tr>
<td>IRP unanimously recommended primary decision be maintained</td>
<td>891</td>
</tr>
<tr>
<td>(IRP recommendation accepted by Minister’s delegate)</td>
<td></td>
</tr>
<tr>
<td>IRP recommended primary decision varied or there was a split recommendation</td>
<td>271</td>
</tr>
<tr>
<td><strong>Referred to Minister</strong></td>
<td></td>
</tr>
<tr>
<td>Applications referred to the Minister (because of IRP recommendation to vary primary decision or there was a split recommendation)</td>
<td>263</td>
</tr>
<tr>
<td>IRP recommended (unanimously or majority) that appeal be upheld - accepted by Minister</td>
<td>147</td>
</tr>
<tr>
<td>(102)</td>
<td></td>
</tr>
<tr>
<td>IRP recommended (majority) that primary decision be maintained - accepted by Minister</td>
<td>116</td>
</tr>
<tr>
<td>(93)</td>
<td></td>
</tr>
<tr>
<td>Appeals upheld by Minister</td>
<td>125</td>
</tr>
<tr>
<td>Appeals rejected by Minister</td>
<td>138</td>
</tr>
<tr>
<td>(ie primary decision maintained)</td>
<td></td>
</tr>
</tbody>
</table>

**Source:** Department of Immigration and Ethnic Affairs

1 Eight appeals were resolved or withdrawn between the IRP proceedings and considerations by the Minister.

The figures for Table II may also be expressed in the following form:

### Table II(b) Applications Resolved 1984-85

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
<th>% of applications received</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applications conceded by Department</td>
<td>877</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>36.5</td>
</tr>
<tr>
<td>Applications upheld by IRPs and only the Minister alone</td>
<td>125</td>
<td></td>
</tr>
<tr>
<td>Primary decisions maintained</td>
<td>1029</td>
<td>37.5</td>
</tr>
<tr>
<td>Otherwise resolved</td>
<td>713</td>
<td>26.0</td>
</tr>
<tr>
<td>Totals</td>
<td>2744</td>
<td>100</td>
</tr>
</tbody>
</table>

**Source:** Department of Immigration and Ethnic Affairs

1 Of these, 250 were ineligible applications, and in some other cases the applicants accepted the primary decisions, sometimes in the expectation of further reconsideration.

64. In relation to the 877 applications upheld by the Department without reference to the IRPs, the Department states that the reasons were as follows:

<table>
<thead>
<tr>
<th>Reason</th>
<th>percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Change in circumstances</td>
<td>27.3</td>
</tr>
<tr>
<td>Variation in policy or procedures</td>
<td>19.4</td>
</tr>
<tr>
<td>Different weight given at review stage to facts and circumstances</td>
<td>31.9</td>
</tr>
<tr>
<td>Application of policy incorrect</td>
<td>5.0</td>
</tr>
<tr>
<td>Multiple or other reasons</td>
<td>16.4</td>
</tr>
</tbody>
</table>
65. From the above figures it may be seen that quite a large percentage of appeals to the IRPs has been resolved as a result of action being taken by the Department in advance of an IRP hearing (some 58% of those applications resolved in 1984-85), and in quite a large proportion of those cases the original decision has been varied in favour of the appellant (in 1984-85, some 32% of applications resolved were conceded by the Department). Of those applications in relation to which the IRPs themselves made recommendations, some 88% of the recommendations were in favour of the Department. This last figure has to be seen, however, in the light of the large number of applications being conceded at the departmental level.

66. The figures supplied by the Department concerning the distribution of applications to IRPs during 1984-85 according to the review rights being claimed are as follows:

<table>
<thead>
<tr>
<th>Application Type</th>
<th>Applications Received (2899) per cent</th>
<th>Applications Finalised (2744) per cent</th>
<th>Not Finalised as at 30 June 1985 (1666) per cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refused sponsorship or sponsored migrant entry</td>
<td>59.0</td>
<td>59.00</td>
<td>64.5</td>
</tr>
<tr>
<td>Refused resident status</td>
<td>15.6</td>
<td>17.75</td>
<td>23.6</td>
</tr>
<tr>
<td>Refused further temporary entry permit</td>
<td>10.9</td>
<td>11.60</td>
<td>4.3</td>
</tr>
<tr>
<td>Other</td>
<td>14.5</td>
<td>11.65</td>
<td>7.6</td>
</tr>
<tr>
<td>Totals</td>
<td>100.0</td>
<td>100.00</td>
<td>100.00</td>
</tr>
</tbody>
</table>

67. Currently three IRPs operate, one each in Sydney, Melbourne and Canberra. Each panel is constituted by three members, consisting of a Chairman (a former departmental officer in each case) and two other members (chosen from a field of 29 persons who have been appointed as part-time members). The IRPs are serviced by a secretariat provided by the Department and staffed by departmental officers.

68. It is uncommon for the IRPs, in reviewing a case, to interview the applicant or for the applicant or a representative (or the respondent Department) to appear before them. Telephone hearings are sometimes conducted but generally the review proceeds on the basis of written information provided by the Department and the applicant. The former normally provides the IRP with a statement of the relevant immigration policy and the reasons for its decision in the particular case. The latter is required to submit a detailed request for review on a form provided by the IRPs which must be completed in typed form and in English.

69. The Council has been informed by the Department that it routinely advises persons affected by adverse decisions of the availability of IRP review where the matter in question falls within the IRP's jurisdiction. In addition, written instructions are available from the IRPs on how an applicant should prepare a case. A statement of reasons for the original decision is provided to the applicant by the Department, but the quality of these statements varies. The applicant is not routinely given access to the information the Department provides to the IRPs, or to the departmental file.

70. Discussions which the Council's Director of Research has had with two of the Chairmen of the IRPs and some other members suggested that they are generally satisfied with the way the system is operating and believe that there is considerable confidence in the review process amongst the ethnic community. Some features of that process were, however, suggested as requiring further examination. Thus reference was made to the desirability of ensuring the independence of the review process; the need for greater assistance to be given to applicants in presenting their cases; the need for the Department to provide adequate statements of reasons...
for primary decisions and, in that context, the need for the Department to rely less on standard
form letters to communicate decisions and the reasons for them; the possibility that applicants
for review perceive the review process as a means of prolonging their stay in Australia
(although this was regarded as a possibility in only a handful of cases); the lengthy delays in
finalising review applications (attributed to the Department’s investigation and reconsideration
of a case subsequent to a review application being lodged); the desirability of the Department
supplying the IRPs with a general statement of policy for each category of review rather than
repeating that policy in each case; the possibility of widening the membership of the IRPs; and
the possibility that establishing the IRPs on a statutory basis would give them more
independence but could add to the formality of IRP proceedings or make it more difficult for
their members to contact departmental officers directly about matters needing clarification.

71. Representatives of the ethnic communities who provided information and comment to
the Council expressed the following views concerning the operation of the IRP system:
• it is, in effect, simply another form of internal review since it does not operate
independently of the Department (that is, the Department services the IRPs and appoints
members and Chairmen, the latter of whom have had close links with it);
• the membership of the IRPs is inappropriate, members having little apparent expertise in
migration matters and being unrepresentative of the ethnic community;
• it is inappropriate for the IRPs to operate in only Sydney and Melbourne (and now in
Canberra) since this diminishes their accessibility;
• there are lengthy delays in finalising cases, a problem which is exacerbated by the fact that
the IRPs exercise a recommendatory power only;
• the Department has not abided by its undertaking to provide training sessions for ethnic
community representatives to enable them to fulfil the role it intended for them in respect
of counselling and assisting applicants;
• the quality of the Department’s statements of reasons is poor;
• the IRPs have not disseminated information to ethnic community representatives about the
basis for their recommendations and those representatives consequently have no
knowledge of the considerations which the panel regards as important in determining
particular categories of cases (for example, the IRPs have not publicly enunciated the
criteria they apply in deciding whether strong compassionate or humanitarian grounds
exist in cases where change of status from temporary to permanent resident is sought under
paragraph 6A(1)(e) of the Migration Act).

Clearly, from the viewpoint of ethnic community representatives, the IRP system is not
satisfactory. Its impact has nevertheless been significant as is demonstrated by the number of
cases which the Department has conceded before panel review takes place, and the number of
Departmental decisions which have been altered as a result of panel review (see para. 63,
Tables II(a) and (b)).

72. In the Council’s view the IRPs have performed a useful function, but it considers
nevertheless that they exhibit a number of deficiencies. These may be summarised as a lack of
independence from the primary decision making authority (brought about primarily by the
close association which the Chairmen have had with the Department and by the extent to
which the Department is involved in the review process itself); the inaccessibility of the panels,
in terms of their physical location; the paucity of information which is made available on the
existence and operation of the panels; the sometimes poor quality of the departmental
statements giving reasons for decisions, and the lack of information made available to
applicants about the case against them; the fact that the review process is conducted in private
without the applicant necessarily being present; the lack of a statutory foundation for the
panels; and the fact that the panels exercise only a recommendatory power, thus adding to the
delay in finalising applications for review and reinforcing the perception that the panels operate as part of the Department’s internal review process.

73. In the light of the above deficiencies the Council is of the opinion that the review provided by the IRPs is not of the kind required of a final authority reviewing decisions on the merits (which in effect the IRPs constitute in respect of a major proportion of migration decisions). In the Council’s view, a review authority functioning in fact as both the first and second level of external review must be constituted and must operate in such a manner as to ensure review of a high standard. (By contrast, in a jurisdiction containing separate bodies providing first and second levels of review, the second-level review authority is expected to provide a more rigorous standard of review suitable to more complex cases while the first level review body is designed in the interests of providing speedy, economical and informal review which is acceptable to the majority of appellants.)

THE DORS COMMITTEE
74. The DORS Committee is an interdepartmental committee consisting of representatives of the Departments of Immigration and Ethnic Affairs, Prime Minister and Cabinet, Foreign Affairs and the Attorney-General’s Department (at meetings of which the Australian representative of the UN High Commissioner on Refugees acts as an observer). The Committee makes primary recommendations to the Minister concerning the grant of refugee status. Its rules of procedure do not provide any formal right of appeal but do contain provision for the Minister to refer a case back to it for reconsideration and for the person concerned to seek reconsideration. The Committee, therefore, has a limited review function in relation to its own recommendations. Notification to the applicant of the primary decision includes advice about the availability of this limited review, although it is made clear that it is only worthwhile requesting this if an applicant is able to produce additional material not previously before the Minister.

75. Requests for reconsideration are rare (in 1984-85 only 21 requests for reconsideration were considered by the Committee, in only three of which the Committee varied its recommendation), but where one is received the procedures for examining the case are the same as those followed in the initial consideration of it. Thus the interviewing and consideration processes are similar, although some members of the Committee indicated to the Council’s Director of Research that a real and genuine effort was made to look at the case afresh. Nevertheless, the reconsideration process, involving as it does procedures similar to those employed in the original consideration process does not, in the Council’s view, represent a satisfactory means of effectively reviewing refugee cases on the merits. In this respect it is noteworthy that, as a review authority, the Committee lacks independence from the primary decision-making process, since it also functions as part of that process, and that its procedures remain the same irrespective of which role it is fulfilling. Thus when reviewing claims it does not see applicants in person, nor does it provide persons seeking reconsideration with information about the case which they must answer or access to all evidence on which the Committee relies in reaching a decision. Moreover, as is the case when the Committee is operating as part of the primary decision-making process, it exercises only a recommendatory power when it is reconsidering claims.

REVIEW BY A COMMISSIONER OF SECTION 14 DEPORTATION DECISIONS
76. Section 14 of the Act designates certain conditions under which non-citizens may become liable to deportation (they concern threats to security and the commission of certain offences, especially under the Crimes Act: see para. 44A). Section 14 requires, however, that the Minister give the person notice of his intention before ordering deportation on these grounds and provides that, if the person so requests within 30 days of receipt of the notice, an
independent Commissioner shall be appointed to consider his case. The Council is informed by the Department that section 14 has been invoked on only 10 occasions since the Migration Act came into force on 1 June 1959 and that on no occasion was a question of national security involved. (The section was previously wider than it now is: while the present section 14 is concerned primarily with security matters, the term ‘conduct’ was, prior to the passage of the Migration Amendment Act 1983, capable of more general application than is now the case.)

77. A Commissioner appointed pursuant to section 14 is required to make a thorough investigation of the case and to report to the Minister on whether it is considered that the grounds for deportation are substantiated. The Commissioner is not required to adhere to legal forms in undertaking the investigation and is not bound by the rules of evidence but may inform himself/herself on any relevant matter in such manner as the Commissioner thinks fit. (See also Migration Regulations, regs 9-18, for procedures of Commissioners).

78. The qualifications required of a Commissioner are similar to those required for appointment as a presidential member of the AAT. On the other hand, there are significant differences between the form of review provided by a Commissioner and that provided by the AAT. For example, there is no legislative provision enabling persons to present their cases in person to a Commissioner, to cross-examine witnesses, to examine documents on which the Commissioner proposes to rely or to be given reasons for the Commissioner’s ultimate recommendation to the Minister. In these respects the manner of conducting Commissioner review exhibits similar procedural deficiencies to those which the Council identified in relation to the form of review on the merits provided by Immigration Review Panels. For the same reasons, therefore, the Council is of the view that Commissioner review does not constitute an effective form of final review on the merits.

AAT: PRESENT IMMIGRATION JURISDICTION

79. At present, the AAT has only a limited jurisdiction to review migration decisions, being confined by section 66E of the Migration Act to the review of deportation decisions made pursuant to section 12 of the Act, and directions given by the Minister to a person in accordance with section 48 not to act as a migration agent on the ground that the person is not a fit and proper person so to act. Unless the AAT agrees with and affirms the original decision, it is restricted to the exercise of a recommendatory power: that is, in cases where it disagrees with the original decision, the AAT may recommend to the Minister that the decision be varied or set aside, but it cannot itself vary the decision or set it aside and substitute its own decision. Nevertheless, the effectiveness of the AAT, in terms of the review of individual cases, is demonstrated by the fact that, of the decisions which the AAT has to date remitted to the Minister for reconsideration on the grounds that it has been of the view that deportation should not proceed, the Minister has accepted its recommendations in all but two cases. Owing to subsequent events, deportations were not actually effected in those two cases. Following a recommendation by the Council (ARC Fourth Annual Report 1980, paras 169-70), the Minister now adopts the practice of reporting to Parliament a decision (and the reasons for it) made contrary to a recommendation of the AAT. Detailed statistics in respect of the number of review applications received by the AAT since conferral of this jurisdiction are set out in Table III of Appendix 5. It should be noted that no appeals have been lodged with the AAT in respect of decisions made pursuant to section 48 of the Migration Act.

80. The AAT’s effectiveness in its Migration Act jurisdiction, even although it exercises only a recommendatory power and only two classes of migration decisions are currently subject to review, is in the Council’s view indicative of the value of providing for effective review on the merits of administrative decisions. The Council has noted that in its submission to the Human Rights Commission the Department has commented that ‘the decisions of the Tribunal have
been of great assistance in initially improving and subsequently maintaining the standard of decision making'. Current criminal deportation policy reflects many of the considerations to which the AAT addressed itself in hearing early appeals from decisions made pursuant to section 12 of the Migration Act. The Council considers that similar benefits, in the form of improved primary decision making and a high level of individual justice, would result from expanding the scope of such review in the migration area.

MINISTERIAL/DEPARTMENTAL REPRESENTATIONS

81. In common with other areas of administration, decisions in the migration field are the subject of representations from Members of Parliament and others seeking ministerial or departmental review of those decisions. Their number is very high in the Immigration and Ethnic Affairs portfolio (see para. 120). They may, and often do, occasion the review of decisions on the merits, but the process exhibits certain procedural weaknesses which, in the Council’s opinion, render the process a less than effective means of review on the merits. Chief among these are that the review is not independent of the original decision maker; it takes place wholly in private; and affected persons have no entitlement to present a case in person (or through a representative) or to be given details of the Department’s case.

82. The Council believes that the system of ministerial and departmental representations has played a valuable role over many years as an internal review mechanism, but that it is not fully effective as a means of reviewing migration decisions on the merits. It therefore considers that it is not acceptable as the only or final means of obtaining review of this nature in the migration area. (See also paras 120-1 for a discussion of this matter in the context of ministerial responsibility.)

HUMAN RIGHTS COMMISSION

83. As mentioned above (para. 58), the Human Rights Commission (the Commission) has had a significant involvement in the migration area both in terms of making reports to the Minister containing general recommendations (as in its Report No. 13, Human Rights and the Migration Act 1958 (AGPS, 1985)) and in its earlier Reports No. 4, Human Rights and the Deportation of Convicted Aliens and Immigrants (AGPS, 1983) and No. 6, The Observance of Human Rights at the Villawood Immigration Detention Centre (AGPS, 1983), and in its role in relation to individual complaints of breaches of human rights. The Commission has made several reports to the Minister arising out of such individual complaints of breaches of human rights, involving in particular deportation and the family and the human rights of Australian-born children (Reports Nos 8, 10 and 15).

84. So far as individual complaints are concerned, it is a function of the Commission under the Human Rights Commission Act 1981 (para. 9(1)(b)) to inquire into acts or practices that may be inconsistent with or contrary to any human right and, where appropriate, to endeavour to effect a settlement of the relevant matters. Where the Commission does not consider it appropriate to endeavour to effect a settlement, or it has been unsuccessful in such an endeavour, it may report to the Minister the results of its inquiry and its endeavours to effect a settlement.

85. As mentioned above, the number of complaints to the Commission in the migration area has been increasing, as the following figures show:

<table>
<thead>
<tr>
<th>Year</th>
<th>1981-82</th>
<th>1983-84</th>
<th>1984-85</th>
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<tbody>
<tr>
<td>Total</td>
<td>17</td>
<td>41</td>
<td>51</td>
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</tbody>
</table>

Source: Human Rights Commission, Annual Reports
86. The Council acknowledges the value of the work of the Human Rights Commission in the field of migration, but does not see it as a substitute for the provision of external review on the merits. Only a small proportion of migration cases raise issues of a human rights character, and the Commission itself is rarely concerned with all the issues which ordinarily arise in merits review. The Council discusses below the impact on existing avenues of review, including that of complaints to the Commission, of the introduction of a general system of review on the merits in the migration area (paras 122-33).

THE OMBUDSMAN

87. The Ombudsman has played a substantial role in investigating administrative actions in the field of migration, and over the past three years the office has finalised the following numbers of complaints in this area:

<table>
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<tr>
<th></th>
<th>1982-83</th>
<th>1983-84</th>
<th>1984-85</th>
</tr>
</thead>
<tbody>
<tr>
<td>Written complaints</td>
<td>161</td>
<td>251</td>
<td>223</td>
</tr>
<tr>
<td>Oral complaints</td>
<td>447</td>
<td>642</td>
<td>797</td>
</tr>
</tbody>
</table>

Source: Commonwealth Ombudsman, Annual Reports (See Table IV Appendix 5 for further details)

The Ombudsman’s role in this area has been a significant one, but the Council believes on general principle that the existence of Ombudsman review does not preclude the introduction of external review on the merits where the nature of the interests affected and other circumstances make this appropriate. In its Report No. 22, The Relationship Between the Ombudsman and the Administrative Appeals Tribunal (AGPS, 1985), the Council concluded that one form of review was not a substitute for the other (see especially paras 45-52).

88. Furthermore, the Council recognised in that report that there are certain factors which, where they exist in a particular case, point to one or other of the two review bodies being the more appropriate review forum (see paras 54-5). In the Council’s view, in individual migration cases some of the factors which it considers may point in the direction of the AAT (or, in this case, two-tier external review on the merits) being the more appropriate review forum are as follows:

- where difficult questions of law or disputed facts are involved which are suited to an adjudicative process;
- where it is preferable that the matter be resolved in a public hearing, e.g. for reasons of public confidence and accountability;
- where the applicant wishes to have the benefit of the particular skill and expertise of the Immigration Adjudicators and/or members of the AAT;
- where decisions are made by the Minister and cannot be directly reviewed by the Ombudsman (such decisions would, under the Council’s proposals, be reviewable directly by the AAT);
- where a determinative finding is required as to what is the ‘correct and preferable decision’.

It may also be noted that the Council recommends below (para. 217) that the Immigration Adjudicators, as the first tier in external review on the merits, should have the power to stay the implementation of particular decisions (the AAT already has that power). The Ombudsman, on the other hand is dependent on the Department’s co-operation in postponing deportation in appropriate cases (see Commonwealth Ombudsman and Defence Force Ombudsman Annual Reports 1984-85, pp.64-5).

89. For the foregoing reasons, the Council believes that the existence of Ombudsman review should not preclude the introduction of external review on the merits where that is
justified on general principles. It notes, however, that even in those classes of decision in relation to which the Council does not recommend the introduction of review on the merits, or recommends that standing to seek such review be limited to Australian citizens or permanent residents, persons affected by such decisions may complain to the Ombudsman concerning defective administration.
CHAPTER 2

KEY CONSIDERATIONS RELEVANT TO REFORM

90. This part of the report brings together several major considerations which are relevant to the provision of review on the merits and which have been taken into account by the Council in making its recommendations for reform (see Chapter 3). In the order in which they are discussed these considerations are as follows:

- The need for review on the merits of migration decisions
- Nature of the interests affected by migration decisions
- National sovereignty, human rights and community confidence
- Ministerial responsibility
- Rationalisation of review rights
- The delay factor.

The need for review on the merits of migration decisions

91. The Council is strongly of the opinion that there is a need for a system of external review on the merits in the field of migration. It is clear from the nature of the interests affected by migration decisions, discussed below (paras 97-101), that very significant personal interests may be affected by migration decisions and that such decisions may be of concern not only to persons seeking to enter or remain in Australia on a permanent or temporary basis, but also to Australian citizens and permanent residents who may have interests of a family, personal, or business nature which are affected by particular migration decisions.

92. Moreover, there are considerable advantages in providing specifically for review on the merits in an area in which there is a high volume of decision making (see the figures in Appendix 6) and in which it is evident that those affected by the decisions may often have a strong desire to challenge the outcome of unfavourable decisions. The desire for review of migration decisions may be seen by the large number of representations made to the Minister or the Department (see para. 120), together with the number of appeals to Immigration Review Panels, complaints to the Ombudsman and the Human Rights Commission, applications for judicial review, and applications to the AAT in its current jurisdiction in relation to section 12 of the Migration Act (see Appendix 5 for statistics). As the Council indicates below (paras 122-33), it believes that extension of merits review to a wider range of migration decisions than is currently available will rationalise and simplify the review system. It believes also that unless such merits review is provided, there will continue to be a growth in the utilisation of other avenues of review which have either been designed for different or more specific purposes, as in the case of the Ombudsman, the Human Rights Commission, and judicial review, or which are inherently limited in their powers and procedures, such as the Immigration Review Panels and the DORS Committee.

93. A central theme in the administrative law reforms which have occurred over the past ten years in Australia is the desirability of extending the rule of law to appropriate areas of decision making. In major high volume areas such as repatriation and social security reform has been in the direction of establishing legally prescribed rights and entitlements which are subject not only to judicial review on questions of law but also to review on the merits, both internal and external, which includes but is not confined to questions of law. In the Council’s view, the greater extension of the rule of law into the field of migration decisions by means of formal and detailed structuring of discretionary powers (see paras 138-57), and the provision of economical and effective review on the merits of decisions made under those powers, would
represent a significant development in the reform of administrative law and practice in Australia.

94. Further evidence of the need for an effective system of external review on the merits is apparent in the statistics concerning the total number of applications for review being conceded by the Department and upheld by the Minister following review by the Immigration Review Panels (see paras 63-5). The proportion of such cases is quite high and demonstrates the need for an effective system of external review to remedy incorrect primary decisions.

95. The Council considers that the provision of external review of those migration decisions identified in Chapter 3 as being suitable for review will go a long way to meet the concerns of those who have expressed the desire that migration decisions should be made fairly and on the basis of existing fact (see, for example, para. 107). It is the Council’s view that the procedures and powers which it proposes in this report as appropriate to the external review authorities will provide the high degree of substantive and procedural fairness which is desirable in relation to migration decisions with their high volume and their potentiality to affect personal interests and generate strong feelings. In the Council’s view, the availability of such review would be further evidence of Australia’s commitment to protect human rights (see paras 102-8), and would significantly improve the fairness of migration decision making.

96. The Council has already commented on the value of external merits review in relation to the AAT’s current recommendatory migration jurisdiction, especially in relation to criminal deportation decisions taken under section 12 of the Migration Act (see paras 79-80). In the Council’s view the role which it envisages for the AAT in the proposed system of review (see paras 173-5 and 246-9) would have the effect of improving primary decision making, and, through the normative effect of the AAT’s decisions, would ensure a high level of first-tier review by Immigration Adjudicators.

The nature of the interests affected by migration decisions

97. In the Council’s view, an important consideration in determining whether administrative decisions should be subject to external review on the merits is whether they affect significant individual rights or interests (see ARC Eighth Annual Report 1983-84, para. 39). Decisions relating to entry to, and stay in, Australia are clearly capable of affecting significant interests of the persons in respect of whom they are made. An adverse decision may, for example, impinge upon the individual’s capacity to maintain family or other close relationships with persons living in Australia and may prevent, or interfere with, the pursuit of important personal goals relating to such matters as employment or education. Moreover, the refusal of entry to, or permission to remain in, Australia may affect significant interests of members of the Australian community with whom the person directly affected by the decision has close ties of a family, personal, business or employment nature.

98. The Council considers that decisions which are capable of affecting individual interests of the kind described above are, prima facie, no less vital to the persons concerned than decisions made in other areas of government administration (relating, for example, to social welfare or repatriation benefit payments) which are currently subject to external review on the merits. At the same time the Council considers that, in establishing any system of review, it is important to achieve a sensible balance between the desirability of providing individual justice and other considerations which need to be taken into account. Among those considerations in the migration area which may point to the need to qualify the provision of review on the merits are the following:

- the costs of review;
• the volume of decisions of a particular class;
• the need to avoid excessive delay in implementing decisions, especially deportation decisions;
• whether those affected by particular classes of decision are located within Australia or overseas; and
• whether those affected by particular classes of decisions have engaged in unlawful conduct.

These considerations are taken into account in the discussion of whether particular classes of decisions should be subject to review on the merits (Chapter 3).

99. The general discussion in Chapter 3 concerning the nature of the interests affected by migration decisions considers the matter under two headings (paras 272-8):
• the potential impact on individual interests of particular classes of migration decisions; and
• other factors favouring the provision of review.

100. As to the first heading, the Council notes that migration decisions have an impact on significant individual interests which depends on the personal circumstances of those affected by them. Moreover, in its proposals for reform in Chapter 3 the Council does not always take the view that the fact that significant personal interests may be affected by a particular class of decision is sufficient to lead to the conclusions that there should be (a) a right of review, and (b) standing to exercise such a right on the part of the person subject to the decision. In relation to some classes of decision the Council has concluded, on one or more of the grounds set out in paragraphs 278 and 280, either that it would be inappropriate to provide for review at all or that review rights should be conferred only on a limited class of persons. The question to be answered in such cases is: to whom should the Australian community be prepared, as a matter of justice and fairness, to extend rights of review of particular classes of migration decision? Thus the Council notes that, in addition to persons the subject of migration decisions, other persons such as family members may be significantly affected by many such decisions, and, from the point of view of determining which interests the Australian government should be prepared to assist by means of the provision of review procedures, an interest may be seen as more worthy of protection in that way where it relates at least in part to an Australian citizen or permanent resident. The Council is of the opinion that where the interests of such persons are affected by migration decisions, those decisions should in particular be subject to effective review on the merits (see para. 274).

101. Another factor which, in the Council’s view, favours the provision of review on the merits occurs where a person forms a reasonable expectation that a decision favourable to that person will be made, but in fact the subsequent decision differs from that expectation. Such expectations may reasonably arise, for example, from prior decisions, on which it is reasonable, and often necessary, for a person to rely (see paras 275-6). Classes of decision which either do or may involve such reliance include cases where a migrant visa is granted but a permanent entry permit is refused; where a temporary visa is granted but no entry permit at all is granted; and where a temporary entry permit is cancelled.

National sovereignty, human rights, and community confidence

102. The Council notes that one principle stated in the government’s migrant entry policy on 18 May 1983 (see Appendix 1) is that ‘the Australian Government alone decides who can enter Australia’. The Council recognises that it is an attribute of national sovereignty that a nation has the power to determine who is admitted to that country and what the composition of its population should be. But the Council does not consider that this power is incompatible with the existence and availability of remedies to ensure that administrative decisions taken in the
exercise of such a power are lawful and correct within the context of the legislative and policy framework in which they are made. The enactment of the *Migration Act 1958*, which confers specified powers on the Executive with respect to migration, is itself a recognition by the Parliament that powers with regard to migration are not absolute or unlimited but are subject to legal limits. The rule of law requires that courts should be able to enforce those limits and it is significant that judicial review is currently available for this purpose in the migration context.

103. It is apparent, moreover, that the Parliament considers that judicial review alone is not an adequate remedy to guard against arbitrary or defective administrative action in the migration field. Migration decisions generally are amenable at present to external review by the Ombudsman and the Human Rights Commission and the AAT has a limited jurisdiction in this area with regard to criminal deportation orders (see paras 87-9, 83-6 and 79-80 respectively).

104. The Council also notes that, by adopting the provisions of the International Covenant on Civil and Political Rights (ICCPR), the Executive Government has accepted that its power to deport aliens who are lawfully in Australia is not unfettered and should be subject to external review. Article 13 of the Covenant provides:

> 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.

The conferral of jurisdiction on the AAT to review criminal deportation orders is, in broad terms, consistent with the requirements of this Article. The Council has noted the doubts raised by the Human Rights Commission in its Report No. 4 on *Human Rights and the Deportation of Convicted Aliens and Immigrants* (AGPS, 1983) (paras 19-22) on the question whether the AAT’s jurisdiction amounts to a total compliance with Article 13 because the AAT has only a recommendatory power of decision making. The Council considers that it is unnecessary for it to express a concluded opinion on this question but it is proposed later in this report that the AAT’s powers of decision making, both in its current and proposed migration jurisdiction, should be determinative and not merely recommendatory (see paras 265-6).

105. Irrespective of whether the AAT’s current jurisdiction with regard to criminal deportation orders is a total compliance with the requirements of Article 13, the Council considers that it is significant that, in conferring jurisdiction on the AAT, the Parliament has implicitly recognised that judicial review does not provide a complete remedy for obtaining full review of the factual bases of administrative decisions. In the Council’s view, it is desirable that both the legal and factual bases of such decisions should be subject to effective external review on the merits by a body such as the AAT. The Council considers that such review should be available not only in relation to criminal deportation decisions as now exists, but in principle also in relation to other migration decisions which have a significant effect on individual rights and interests.

106. It is apparent from the discussion above of Article 13 of the ICCPR (para. 104) that human rights and Australia’s obligations under international law may be relevant considerations in determining the system of external review of migration decisions which ought in principle to be established in Australia. The Council recognises that human rights
considerations may arise not only under the ICCPR but also under such other instruments as the Declaration of the Rights of the Child, the Declaration of the Rights of Disabled Persons and the Racial Discrimination Act 1975 and the International Convention on the Elimination of All Forms of Racial Discrimination. In view of the recent publication of Report No. 13 of the Human Rights Commission, Human Rights and the Migration Act 1958 (especially Chapter 3 on human rights and the Migration Act), the Council sees no need for it to analyse these matters at length. It notes that in that Report (para. 206) the Commission reached the general conclusion that the adequate protection of human rights in the migration area requires a review of decisions that is ‘external and independent, rather than internal’, and that it recommended both the provision of statutory criteria for the exercise of discretionary powers and the ‘review on the merits of most decisions . . . based on those criteria’.

107. The Council has also noted the words of Mr Justice Smithers in Barbaro v. Minister for Immigration and Ethnic Affairs (1982) 46 ALR 123 (at 127-8) that there is a presumption that a nation with respect for human rights would intend that a sanction so fearsome as deportation ‘would only be imposed on a basis of fairness and by reference to existing fact’. The Council agrees with that view and believes that, in principle, it applies to many migration decisions which have the potential significantly to affect the rights and interests of individuals. The Council considers that the establishment of an effective system of review on the merits in the migration area generally is desirable in order to provide a means of ensuring that decisions are made fairly and on the basis of existing fact. Its availability in the migration area would also, in the Council’s opinion, be further evidence of Australia’s respect for, and willingness to protect human rights.

108. The Council also notes that the Government may be concerned with the desirability of fostering community confidence in the fair and just application of Australia’s immigration policy. Such confidence may be influenced by whether those affected by adverse decisions are able to seek their review by properly constituted, independent review bodies able to consider all relevant aspects of the case in question. The importance of this matter was alluded to by many of the persons and organisations consulted by the Council in the course of this project.

Ministerial responsibility and external review of decisions

109. One major issue the Council considers it necessary to address is that of the relationship between ministerial responsibility and external review on the merits, since it has implications that are pertinent to the fundamental question whether such review should be provided in the migration area and, if so, what forms it should take.

110. The question of ministerial responsibility in the migration area has several elements of which the following are the most important:

- general ministerial responsibility;
- ministerial responsibility for overall government policy relating to such matters as levels and kinds of migration at any time;
- ministerial responsibility for formulating intermediate policies of a kind necessary for the implementation of wide discretionary powers which are not themselves structured by statutory criteria;
- ministerial responsibility in relation to decision making in individual cases which may arise in several ways, for example by means of:
  - ministerial consideration of representations made by members of the public or Members of Parliament;
personal ministerial involvement in particular decisions, including, under present review provisions, ministerial consideration of certain decisions of the Immigration Review Panels.

In addition, the Department has raised the question of the status of any review body which may be called upon to review decisions made by the Minister. This last matter is dealt with below (para. 203), while the other four are discussed in turn in the following paragraphs.
GENERAL MINISTERIAL RESPONSIBILITY

111. In framing its recommendations the Council has been conscious that the area of migration is one involving considerable political sensitivity and that external review of such decisions may appear to call in question ministerial responsibility in relation to those decisions. The Council notes that governments and ministers have traditionally wished to maintain flexibility in the field of migration, a matter stressed by the Department in its comment that the reasons for desiring such flexibility have been partly in order to encompass fairly rapid changes in policy and partly to accommodate the circumstances of particular cases. The Council recognises that one result of the implementation of its recommendation as to structuring of discretionary powers (Recommendation 1 and paras 138-57) will be to reduce flexibility in both the above respects. It believes, nonetheless, that the attainment of greater consistency and certainty will be of benefit alike to ministers, administrators and the overwhelming majority of those who are affected by their decisions (see para. 144).

112. In the Council’s opinion the principle of ministerial responsibility is safe-guarded by the ultimate power of government to change, or to introduce legislation to change, the legislative and other criteria suggested below for the structuring of discretions (paras 138-57), as well as by the Council’s proposals for the issue of ministerial certificates excluding review in relation to particular decisions, on grounds such as national security, international relations or defence considerations, which the Minister considers should, in the public interest, remain the final responsibility of the government (para. 267 and Recommendation 25). As a general consequence, the Council considers that these powers provide an adequate basis for reconciling administrative review and matters of genuine ministerial responsibility.

RESPONSIBILITY FOR OVERALL MIGRATION POLICY

113. As far as responsibility for overall migration policy is concerned, the Council does not believe that the introduction of external review on the merits will have any substantial impact on the government’s ultimate responsibility for determining migration policy. However, the Department has expressed a concern that there may be some areas where the introduction of further review procedures could prove incompatible with government policy, for example in areas where the Government has announced projected figures for the forthcoming financial year, either by country of origin (as in the case of student entry and refugees) or as an aggregate figure for a year’s gross migration intake. The Department’s concern is with whether it might be difficult to accommodate the application of such numerical limits in the context of a system of determinative review ‘where precedent-setting cases by the AAT could lead to a significant volume of consequent appeals’ (the Department’s words).

114. The Department has informed the Council that each financial year the Government announces the projected size and composition of the migration program for that year. The intake is estimated by reference to the numbers of migrants which Australia is likely to attract given the characteristics of the Government’s immigration policy (which is formulated on the basis of political and other considerations including, for example, the prevailing economic conditions, Australia’s international commitments, perceived obligations to Australia residents who may wish to bring members of their families to Australia, and long term population objectives). The formulation of the policy thus precedes the calculation of the estimated migration intake for the year.

115. The Department has emphasised that the projected migrant intake figure is neither a quota nor a target, but merely an estimate of the number of persons likely to be accepted for settlement during the course of the year. It has indicated that if the estimate that is made at the beginning of the year proves to be substantially in error the Government either announces
revised figures (if the intake is running below the original estimate) or (if the intake is running significantly above the original estimate) determines whether it is prepared to accept an increased intake for the year or whether a change in immigration policy is necessary.

116. On the basis that migrant intake figures are simply flexible estimates of the likely number of arrivals for the year, the Council considers that the results of external determinative review could readily be accommodated by government policy. There is a possibility that an external review authority may interpret or apply the legislative or other criteria as to a particular class of migration decisions in such a way as to lead to an apprehension that such interpretation or application would favour the admission of more persons of a particular category than contemplated in the migrant intake. In such a case, the Government could, if it considered that the results of such an interpretation would significantly alter the expected intake in a particular category, either accept that change or seek to counter the interpretation or application by means of varying the criteria (whether legislative or otherwise) by the appropriate means. In the Council’s view, external review on the merits in relation to migration decisions both preserves the application of the rule of law and is compatible with ministerial responsibility and government administrative practice in relation to the specification of migrant intake figures.

INTERMEDIATE POLICIES DESIGNED TO GUIDE THE EXERCISE OF DISCRETIONARY POWERS
117. It has been emphasised in this report that, while the discretionary powers conferred on decision makers by the Migration Act and Migration Regulations are of considerable breadth, decision making in practice is largely structured by the various immigration policies and by Departmental instructions and manuals which outline the manner in which those policies are to be applied. As has been said, ‘the consistent exercise of discretionary power in the absence of legislative guidelines will, in itself, almost inevitably lead to the formulation of some general policy or rules relating to the exercise of the relevant power’ (per Chief Judge Bowen and Mr Justice Deane in *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, at 69). The value of such policies was put well by Mr Justice Brennan in the AAT in a passage which made these points:

- a guiding policy serves to focus attention on the purpose which the exercise of a discretion is calculated to achieve;
- the Minister and others are thereby assisted to see the desirability of exercising the power in one way or another;
- decision making is facilitated by such a policy;
- the integrity of decision making in particular cases is assured by decisions being tested against the policy;
- such a policy can diminish the importance of individual predilection and reduce inconsistencies; and
- the result is to enhance satisfaction with the fairness and continuity of the administrative process.

(See *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634, at 640.)

118. The Council proposes later in this report that the principles and criteria applicable to migration decisions should, as far as possible, be included in the relevant legislation, or, where this is not practicable, should be clearly specified in a form such as rules tabled by the Minister in the Parliament setting out criteria and principles relating to the exercise of powers under migration legislation (see paras 138-57). The former will, of course, bind bodies charged with conducting external review, while the latter will be taken into account by them in determining decisions in individual cases. In practice the AAT, for instance, has adhered closely to
government policy, and the Council believes that government policies which have been exposed to Parliamentary scrutiny will be accorded great weight by the second level review body, and that there is no threat to ministerial responsibility in this respect.

119. It would be anomalous in a two-tier system of external review to oblige the first-tier review body to act not inconsistently with government or department policy which has not been reduced to legislative form, if the second-tier review body is able to depart from such policies in appropriate circumstances. Such a system would give rise to inconsistencies between decisions at the two levels of review, would encourage appeals to the second tier, and would severely limit the normative effect of the second-tier review body’s decisions. The Council would expect, however, that the first-level review body would be at least as circumspect as the second level review body about departing, as a result of its own deliberations, from any non-binding government or departmental policy.

MINISTERIAL DECISIONS IN INDIVIDUAL CASES

120. The Department, in its response to the Council’s draft report, stressed that the field of immigration decisions is one in which the Minister currently exercises personal decision making powers probably more frequently than in most other fields of Commonwealth administration. In this respect the Council notes the amendment in 1983 of the Migration Act to provide that any power which may be exercised by an authorised officer under the Act may also be exercised by the Minister (s.5(1AA)). The personal role of the Minister has resulted in representations by Parliamentarians to the Minister operating in effect as an additional tier of review, and the Council has been informed by the Department that such representations are of the order of 10,000 a year, of which last year 1,674 were referred to the Review Branch, together with 600 representations directed to the Department. The Department further commented that if the new review system recommended in the Council’s draft report was implemented, ‘the avenue of parliamentary representations would seem to become largely redundant’.

121. The Council readily acknowledges the valuable role which ministerial representations have played, and continue to play, in the system of responsible government as it has evolved in Australia. Nonetheless the introduction and extension of administrative law reforms in the past ten years or so has clearly been based on the view that the existence of such a channel is not an adequate reason for restricting other means of external review where personal or business interests are affected. It implies no disregard for the traditional remedy of representations by parliamentarians to the Minister to believe, as the Council does, that there needs also to be a more formal structure for review which is independent of the primary decision-making machinery and provides a form of review which overcomes some of the deficiencies of ministerial review in relation to such matters as fact finding and open adjudication (see paras 81-2). The Council believes that the large number of ministerial representations is to a considerable extent the result of there being no effective external review mechanism in relation to most migration decisions, and that the number of ministerial decisions would diminish very considerably following the introduction of external determinative review. The Council notes the Department’s expectation that most ministerial representations would be treated as appeals for review on the merits following the introduction of a system of external merits review such as that proposed by the Council.

Rationalisation of review rights

122. In paragraphs 58-89 the Council has referred to the existence of a range of review avenues and has examined in some detail those which are specific to the migration field. It may appear at first sight that the existing means of review are adequate and that it is unnecessary to add to them in any way. On the contrary, the Council believes that the existing
remedies suffer from several deficiencies. Moreover the Council believes that to provide a system of external determinative review, as proposed below in Chapter 3, will not only overcome those deficiencies but will also lead to a rationalisation and simplification of the avenues for review of migration decisions. The proposed system of review involves the replacement of the Immigration Review Panels by Immigration Adjudicators and the abolition of the office of Commissioner under section 14 of the Act on the extension of the jurisdiction of the AAT to act as the final tier of review on the merits within the proposed external and determinative review system. These changes would in themselves constitute a considerable rationalisation of the review of migration decisions. In addition, the existence of external determinative review can be expected to have an impact on the exercise of the discretions possessed by some of the review bodies, as outlined in this section.

123. The Council considers that the current pattern of appeals to existing bodies is likely, at least in part, to be a reflection of the absence of full determinative review such as now exists in many other areas of Commonwealth administration. For example, it appears probable to the Council that the reasonably high level of applications to the Federal Court under the AD(JR) Act in migration matters (see Table I, Appendix 5) is a result of the absence of determinative review on the merits and could be expected to diminish with the introduction of review of the kind proposed in this report.

124. The Council has noted in this regard that the Federal Court has a discretion not to grant an application where there is an adequate alternative remedy available. Sub-paragraph 10(2)(b)(ii) of the AD(JR) Act gives the Federal Court a discretion to refuse to grant an application for review of ‘a decision, conduct engaged in for the purpose of making a decision, or a failure to make a decision’, for the reason:

that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the Court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure.

Since the matter is one for the Court’s discretion, the Council cannot forecast that the Court will always refuse to entertain an application for judicial review made under the AD(JR) Act in circumstances where the applicant has either exercised or failed to exercise any rights of review on the merits which are available. The Council would expect, however, that following recent decisions of the Federal Court in cases such as Woss v. Jacobsen (decision of the Full Court of the Federal Court, (1985) 60ALR 313, at 323 and 334), and Perry v. Director of Public Prosecutions (decision of Mr Justice Fisher, noted (1985) 8ALN N76), the Court would be mindful of the need to avoid duplication in administrative law remedies. The Council has also noted that in both the above mentioned decisions, the Federal Court held that it was appropriate for it to consider whether to exercise its discretion under sub-paragraph 10(2)(b)(ii) at the outset of proceedings rather than only at the conclusion of the hearing of the substantive issues in the case. Any question of duplication of remedies can, therefore, be dealt with as a preliminary matter.

125. In the Council’s view, the Federal Court’s discretion is sufficiently wide to enable it to refuse to grant an application for judicial review in a case where the AAT has refused to grant leave to an applicant to appeal to the AAT from an adverse decision of the first-tier review body. If the Council is incorrect in this view, it would favour an amendment to section 10 of the AD(JR) Act to achieve the desired result.

126. The Council is also of the opinion that adequate provision exists at present to enable courts exercising traditional powers of judicial review of administrative action to refuse relief where an adequate alternative remedy exists. If action is taken in the High Court or the Federal
Court under the provisions of section 75 of the Constitution or section 398 of the Judiciary Act respectively, seeking a prerogative writ or an injunction against an officer of the Commonwealth, those Courts have a discretion to refuse to grant the remedy sought in the light of the existence of other adequate remedies.

127. In the case of representations to the Minister by Members of Parliament and others, it will be important that Ministers let it be known that they will not ordinarily consider representations as to matters which have already been considered by means of the established review mechanisms.

128. The Council notes that the Ombudsman has already taken the view that, where there are rights of review by an Immigration Review Panel and there is nothing to suggest that the decision in question is anything else than a fair and accurate application of the law and of current government migration policies, the Ombudsman is likely to use the discretion not to investigate conferred by sub-section 6(4) of the Ombudsman Act (which deals with the existence of alternative administrative practices) (Commonwealth Ombudsman, Sixth Annual Report 1982-83, p. 74). Further, the provisions of sub-sections 6(2) and (3) of that Act would be relevant to complaints lodged with the Ombudsman following the introduction of a system of determinative external review in migration cases. (The exercise of the discretions contained in these sub-sections is discussed in the Council’s Report No. 22, The Relationship Between the Ombudsman and the Administrative Appeals Tribunal (AGPS, 1985) at paras 38-9 and 61-6.) Under the provisions of those sub-sections the Ombudsman may decline to investigate a complaint where an alternative avenue of review is provided by a court or a tribunal and either:

- the complainant has exercised, or is exercising that right of review, unless the Ombudsman is of the opinion that there are special reasons justifying the investigation or further investigation of the action; or
- the complainant has not exercised that right of review and the Ombudsman is of the opinion that, in all the circumstances of the case, it would be reasonable for the complainant to exercise, or would have been reasonable for the complainant to have exercised that right.

In the absence of special circumstances, such as those referred to in the Ombudsman’s Fourth Annual Report 1981-82 which are summarised below, it seems likely to the Council that the Ombudsman would exercise the discretion not to investigate where the complaint was one which could be reviewed under the review system recommended below. The factors which the Ombudsman has outlined in his Fourth Annual Report (at pp. 12-14) are as follows:

- the costs involved in pursuing the alternative avenue of redress;
- personal factors such as age or state of health which affect a complainant’s ability to demonstrate his or her entitlements to relief;
- whether the facts might better be established by utilising the fact-finding procedures provided for under the Ombudsman Act; and
- whether the remedies which the alternative review body is capable of providing are adequate or appropriate.

129. The position of the Human Rights Commission also requires comment. Sub-section 10(4) of the Human Rights Commission Act 1981 confers a discretion on the Commission not to hold an inquiry as the result of a complaint if:

(d) some other remedy in relation to the subject-matter of the complaint is reasonably available to the complainant.

The Council has been informed by the Commission that it has so far had little occasion to use this provision. The Commission does not, for example, consider the availability of judicial review to be the equivalent of inquiry by the Commission, given that the International
Covenant on Civil and Political Rights and other covenants and declarations to which the Human Rights Act refers are not treated by the courts as part of Australia’s domestic law. Again, in migration matters the Commission liaises closely with the Ombudsman’s office where appropriate, and duplication of effort is minimised. Even where the Commission has not endeavoured to effect a settlement of a matter, or its endeavours have been unsuccessful, it may still report the results of its inquiry to the Minister in relation to any act or practice, and it would presumably do so where breaches of human rights had occurred and had not otherwise been resolved.

130. The introduction of a system of external determinative review on the merits would not affect the responsibility of the Commission to report concerning breaches of human rights, but the availability of such review or the existence of a decision by a review body could be expected to be of significance to the Commission in the exercise of that responsibility. It might be, also, that the Commission would regard the availability of review on the merits as proposed by the Council in this report as constituting some other remedy to the complaint which is reasonably available to the complainant for the purposes of sub-section 10(4) of the Commission’s enabling Act, which might lead it to decline to investigate complaints in relation to matters which could be reviewed under the proposed external merits review structure.

131. For the reasons just stated, the Council believes that the Commission would continue to play a valuable role following the introduction of external determinative review, while at the same time there would be no unnecessary duplication between the two avenues of review. The Council has not considered at this stage whether other problems of duplication could arise in the event of the Bill of Rights becoming part of Commonwealth law.

132. The Council notes further that there could be some overlap between the proposed migration review system and the Security Appeals Tribunal in cases arising under section 14 of the Migration Act (see paras 76-8). However, it seems probable to the Council that such overlap would not occasion any great delay, and in view of the small number of cases likely to be involved the Council has not considered it necessary to make recommendations concerning any possible overlap. The Council could look at this matter again if problems should develop.

133. In formulating its recommendations the Council has been conscious of the existing burden on the Department in relation to the number of differing methods of review, together with associated Freedom of Information requests. On the basis of the above considerations, the Council reiterates its view that the introduction of two-tier determinative external review as proposed in Chapter 3 will lead to a rationalisation and simplification of the operation of the various means of review of migration decisions.

The delay factor

134. One of the factors of particular significance in relation to review of migration decisions is that, in certain classes of decisions, delay in implementing an adverse decision may work to the advantage of the person concerned and there are likely to be some people who will seek to use the review system for no other purpose than to delay a final decision. The Department has commented on this matter in its response to the Council’s draft report in these terms:

> . . . delays in implementing many immigration decisions strengthen applicants’ claims for reversing decisions. With time, ties are strengthened, families grow and the pressure mounts for people to be allowed to stay, for example, where deportation decisions are delayed.
The Council has borne this important factor in mind in determining what further provisions need to be made for review of migration decisions, but it does not think that the risk of delay is in itself a sufficient reason for not providing for review of specific classes of migration decisions. Rather, it is but one of the factors to be taken into account in determining the suitability of classes of decisions for external review on the merits (see paras 98 and 278), and in determining the most appropriate procedures for such review (see Chapter 3 generally). The Council recognises also that delay does not always benefit applicants; for example, it does not do so in the area of migrant entry applications.

135. Moreover, the Council has been informed that the present average period before an appropriate decision is reviewed by the Immigration Review Panels is seven months, and believes the proposed system of Immigration Adjudicators will be able to operate more expeditiously as long as appropriate resources are made available.

136. Again, it is the Council’s impression that those matters in which the greatest periods of delay have occurred under the current provision for review have been those in which application has been made to the Federal Court and/or the High Court seeking judicial review of migration decisions either under the provisions of the AD(JR) Act or otherwise. It is not desirable to seek to exclude such review, nor is it possible to exclude it altogether by legislation alone, because of the provisions of section 75 of the Constitution as to the High Court’s original jurisdiction in all matters where a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. However, as the Council has argued above (paras 124-6), the availability of review on the merits in relation to many migration decisions would in all likelihood be taken into account by the courts in exercising their discretionary powers not to entertain applications for judicial review where other avenues of review are available, and this could lead to a reduction in delays, and consequent costs, in this respect also. Finally, the Council has made several recommendations in Chapter 3 which are designed to minimise the problem of delay associated with providing review of migration decisions, in particular the provision of a leave requirement for appeals to the AAT in relation to many classes of migration decisions (paras 181-8 and Recommendation 5).
CHAPTER 3

PROPOSALS FOR REFORM

Some aspects of primary decision making and the system of review

137. This section deals with the Council’s proposals for structuring discretionary powers; with the giving of reasons and notification of review rights; and with the structure of the proposed system of review. The Council believes that the recommendations set out below achieve a proper balance between the need for fair and just decision making on the one hand and the need for expedition and cost-effectiveness on the other hand.

Structuring discretionary powers

138. In paragraphs 138 to 157 the Council discusses considerations concerning the structuring of discretionary powers conferred by migration legislation. By ‘structuring’ the Council means the specification of principles and criteria relevant to the exercise of such powers so that their exercise is not open-ended and without guidance. Reference has already been made (in para. 22) to the breadth of the discretionary powers conferred on decision makers by the Migration Act and the Migration Regulations, and also to the fact that decision making is in part structured by the various immigration policies and by departmental instructions and manuals which outline the manner in which those policies are to be applied. The value of such policies and guidelines in assisting administrators to make decisions has been remarked on (para. 117), and it is clear that a need is felt by the Department to structure at the administrative level the broad discretionary powers conferred by the legislation.

139. The Council has started from the basic question posed long ago by Professor K.C. Davis in his book Discretionary Justice: A Preliminary Inquiry (Louisiana State University Press, Baton Rouge, 1969, p. 97):

How can administrators structure the exercise of their discretionary power, that is, how can they regularise it, organise it, produce order in it, so that their decisions affecting individual parties will achieve a higher quality of justice?

A significant point made by commentators on this matter is the need for criteria and principles which structure discretionary powers to ‘mature’ and develop in the light of experience and criticism before being codified in less flexible forms. The Council notes with interest that this appears to have been occurring in the area of criminal deportation, in part as a result of the interaction of administrative practice and review by the AAT. In the Council’s opinion experience in this area has shown that a body such as the AAT may, by subjecting a policy to impartial analysis, assist the development of a clearer, more coherent and better structured policy.

140. The Council accepts that not all areas of government activity are equally suited to the stipulation of detailed rules designed to guide the exercise of discretionary powers in primary decision making. It has considered the specific characteristics of migration decisions and, in the light of past administrative experience in the area and for the following reasons, it concludes that administration in the field of migration requires the formulation of a range of criteria and principles which need to be of a clear and detailed character. The Council has formed this view in the light of the following factors affecting the exercise of migration powers and as part of the total approach which it is recommending in this report.
141. First, the Council is firmly of the opinion that as a matter of individual right and justice those who are affected by decisions made in the exercise of discretionary powers in the area of migration should be able to ascertain readily the considerations relevant to the exercise of those powers. This accords with the trend in other major areas such as social security and repatriation where in relation to powers affecting individual rights detailed criteria for their exercise have been spelled out in legislation. In those areas there has been a movement away from unfettered discretion to the specification of enforceable rights and entitlements. At present it is difficult for members of the public to determine the content of relevant migration guidelines, and to distinguish in some cases between the fundamental or basic policy guidelines and the less fundamental rules for implementation.

142. A second, related factor tending in favour of the more detailed and formal structuring of migration powers is that compliance with rules and procedures relating to migration can be expected to become more widespread where their content is accessible and, it is hoped, relatively easily comprehended.

143. It is true that departmental instructions and guidelines are now publicly available in accordance with Freedom of Information legislation, but considerable time, effort and expense may be involved in determining from these sources all the factors which apply to the making of particular classes of decisions. From time to time, also, the manuals used by the Department become out of date or unavailable. The Council would prefer the production of concise authoritative publications which set out the rules and guidelines relating to particular migration powers. The Council notes in particular that the UK Immigration Rules are set out in a succinct publication and are drafted in non-legislative language. The Council prefers a format of that kind to statements of policy expressed in very general and rather lengthy terms, as is the case at present with ministerial statements of policy with regard, for example, to ‘illegal immigrants’ and the deportation of criminals.

144. A third factor persuading the Council to favour the structuring of migration powers is the need for consistency and fairness in the administration of the large number of decisions made in the migration field. Achievement of these objectives requires the formulation of policies and guidelines, as the Department’s experience shows, and in the Council’s view such policies and guidelines would be more likely to be applied consistently and fairly by primary decision makers if they were embodied in legislation or included in rules tabled in the Parliament (see paras 149-54).

145. A fourth factor is the need, in the Council’s view, to give the greatest possible guidance to the review bodies in which it is proposed to vest the power to review migration decisions. Having regard to the disparate nature of migration decisions and the number of applications for review likely to come before any new authority operating in the jurisdiction, the Council considers that the review task is likely to be clarified and simplified if the criteria applicable to the making of all classes of migration decisions are prescribed either in legislation or in formal rules for which the Minister takes political responsibility. Here, too, the more detailed and formal structuring of discretionary powers can be expected to lead to greater consistency and fairness in the review process. Such structuring will ensure that external review bodies give proper weight to the principles which govern the exercise of particular powers and can thus establish with some confidence what is the ‘correct or preferable’ decision in particular cases. Any criteria which are embodied in legislation will, of course, be binding on the review bodies as well as on the primary decision makers.

146. The Council notes that one consequence of adopting its recommendation as to structuring administrative discretions will be that some individuals who may currently seek to
benefit from uncertainty in the application of legislation will no longer be able to do so as they will not fall within the specified criteria. People affected in this way will at least have the benefit of knowing more clearly where they stand. Where the criteria, whether in legislative form or otherwise, lead to injustice in individual cases it will be open to review bodies to draw this to the attention of the government, and, where the criteria are not in legislative form, those bodies may depart from them on occasions where in the circumstances of the particular case their application would tend to produce an unjust decision (see Mr Justice Brennan, *Re Drake and Minister for Immigration and Ethnic Affairs* (No. 2) (1979) 2 ALD 634, at 645).

147. The Council has taken into account the views of the Department on these matters. In its submission to the Human Rights Commission in 1984 the Department referred to the traditional view of governments in favour of broad discretions, rather than the specification of detailed criteria, in order to avoid a rigid and inflexible system resulting in inequities to individuals. It remarked, however, that this was a question on which the Government and not the Department should present views. Since then the Department has observed in its comments on the Council’s draft report that a continuation of the existing degree of flexibility in the administration of the immigration legislation would be ‘inconsistent with the current development of administrative law’, stating that it agrees ‘that the discretions conferred by the Migration Act and Migration Regulations could be specified to a significant degree by prescribed criteria the parameters of which could be defined by legislative instrument - either Regulations or Orders’. The Department comments that it does not consider that the prescription of criteria should necessarily be achieved solely by amendment of the Migration Act and the Regulations.

148. The Council notes that its views as to the need for legislative structuring of discretionary powers in this area are supported by the recommendation of the Human Rights Commission in its Report No. 13 that ‘criteria for the exercise of discretions under the Act, be either incorporated in the Act or embodied in other legislative instrument’ (Recommendation 96 and para. 304).

149. The Council notes that the aim of structuring more precisely and formally the exercise of discretionary powers, by means of the specification of detailed criteria and principles, may be achieved in a variety of ways of which the following are among the most significant in the context of migration decisions:

- inclusion in the relevant statute;
- inclusion in the regulations made under the provisions of the relevant statute, and subject to the tabling and disallowance provisions of the *Acts Interpretation Act 1901* (ss.48, 49 and 50);
- inclusion in a variety of instruments having the force of law such as orders and determinations, which are made subject to the tabling and disallowance procedures specified in the Acts Interpretation Act;
- inclusion in statements by the Minister, which may or may not be required by legislation to be tabled in the Parliament;
- inclusion in other administrative documents designed to guide the exercise of discretionary powers such as departmental manuals and instructions.

150. Another variant suggested by the Department is the making of Orders by the Minister which could make provision for the application of departmental manuals or instructions in force at the time. The Council does not favour this variant, taking the view that it does not fulfil the needs which the Council has in mind in recommending the structuring of discretions in this area (see paras 141-5).
151. In the Council’s opinion the most appropriate form in which to embody more formal specifications of the criteria and principles which apply to migration decisions is in the migration legislation itself, whether in the Migration Act or in the Regulations. The Council believes that this will best promote accessibility and accountability.

152. The Council recognises, however, that there may continue for some time to be areas of migration policy where, for one reason or another, it is not desirable or practicable to incorporate such criteria or principles in legislative form, perhaps because of rapid change in the area or the need for policy to mature before it is stated in that form. In these circumstances, and in the interim period before the inclusion of criteria and principles concerning particular classes of migration decisions in the Act or Regulations, the Council favours tabling by the Minister in Parliament of rules setting out criteria and principles relating to decisions taken under migration legislation, similar to those which exist in the United Kingdom in the form of Immigration Rules.

153. The Council notes that the more formal and precise structuring of discretionary powers in legislative form or by means of rules presented to the Parliament will result in a greater accountability of the executive government to the Parliament and to the electorate in relation to broad policy considerations and the general principles applicable to the making of the various classes of migration decisions.

154. The Council also notes that one effect of including statements of criteria and principles in the migration legislation will be to give such criteria and principles the force of law in relation to decisions made by primary decision makers, including the Minister, and in relation to the authorities conducting external review on the merits. The Council notes that it would be technically possible for the legislation to empower the Minister to exempt particular decisions from the operation of the legislative criteria and principles, but it does not favour the making of such a provision. In the Council’s view public confidence in the operation of the system of review would be weakened if it were possible for particular decisions to be exempted from the applicable criteria and principles. In the case of rules containing such criteria and principles which are tabled by the Minister in the Parliament, they would not be binding as such on the Minister or on review authorities, although they would doubtless normally be followed by primary decision makers. The Council notes, moreover, that review authorities can be expected to give rules tabled by the Minister weight appropriate to their place in the ‘chain of responsibility from Minister to government to parliament’, especially where they have been scrutinised by Parliament (see Mr Justice Brennan in Re Drake and Minister for Immigration and Ethnic Affairs (No. 2) (1979) 2 ALD 634, at 644). The AAT, for example, has in practice adhered closely to government policy, especially where that policy has been laid before Parliament. It may be noted that where the government is certain it wishes to make policies binding on external review bodies, the Council believes that embodiment in the Act or Regulations is the most appropriate form by which to achieve that aim.

155. In addition to those criteria and principles which the Council envisages will be incorporated in a legislative form or in the form of rules tabled by the Minister in the Parliament, the Council expects that there will continue to exist a variety of departmental instructions designed to deal with the detailed applications of the criteria and principles set out in legislative form or in rules tabled by the Minister.

156. What the Council proposes in this section is the principle of greater formalisation of the structuring of discretionary powers, to be achieved wherever possible through incorporation in the Act or Regulations. While the Council considers that the question which powers should be structured in appropriate legislative form clearly requires detailed investigation and
examination, it does not itself have adequate resources to undertake this study, and in any event it is concerned not to delay any further the finalisation of this report. The Council believes that the Government should be principally responsible for determining the details of such structuring.

157. In the Council’s view, it is desirable that appropriate legislative and other more formal structuring of discretions conferred by the Migration Act and Regulations should proceed expeditiously, but that the implementation of proposals for the review of migration decisions should not be dependent upon the speed of progress in that regard. The Council believes that, pending the embodiment in legislative form wherever appropriate of the principles and criteria applicable to the making of various classes of migration decisions, the Minister should table in the Parliament as soon as possible a set of rules setting out the principles and criteria relating to discretionary powers arising under migration legislation.

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

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

Provision of reasons for primary decisions
158. The principle that persons affected by decisions are entitled to be given reasons for them is embodied in the AAT Act and the AD(JR) Act (ss.28 and 13 respectively). In both cases, however, the obligation to provide a statement of reasons is dependent on receipt of a request and there is no general obligation to provide such reasons as part of the ordinary primary decision-making process. There is also provision in sub-section 15(1) of the Ombudsman Act for the Ombudsman to find that an action is defective on the grounds that reasons should have been, but were not, given for a decision.

159. In the migration area, the provisions of both the AAT and the AD(JR) Acts relating to the requirement to provide reasons have only limited application since the AAT currently has jurisdiction to review only two classes of migration decisions (and that concerning ministerial directions to migration agents (s.48) does not have any direct effect on migrants), and Schedule 2 of the AD(JR) Act exempts certain classes of migration decisions from the requirement to give reasons. Of course, if the jurisdiction of the AAT is expanded as proposed in this report, the obligation to give reasons pursuant to section 28 of the AAT Act will be expanded to the same extent. The content of the Schedules to the AD(JR) Act is one of the matters to be considered in the Council’s current review of the operation of that Act.

160. The Council considers that reasons should be given as a matter of sound public administration for all migration decisions of a substantive nature except where exceptional circumstances exist to justify their being withheld in a particular case (for example, where national security considerations are involved). Furthermore, it is of the view that decision makers should not rely on the fact that there is no legal obligation upon them to provide reasons as a basis for not doing so in the generality of cases.

161. The Council is not suggesting that a statement of reasons which is as detailed as that required by section 28 of the AAT Act and section 13 of the AD(JR) Act is normally required
(unless, of course, an entitlement exists under those provisions and a request is made pursuant to them). Such detail would be impracticable at the primary decision level if it was to apply to all decisions taken irrespective of whether an applicant requested such a statement. The Council believes, however, that as a general principle notice of an adverse decision which affects an individual’s rights or interests should be accompanied by an outline of reasons sufficient to give the person concerned a general appreciation of the grounds upon which the decision has been taken. The provision of an adequate outline of reasons is also a necessary corollary to the creation of review rights since such an outline can assist the person who is the subject of the decision to judge whether it has been properly made according to the relevant facts and circumstances. It may also have a bearing on whether an appeal is pursued since, if it is clear to the person concerned that the decision is soundly based, that person is more likely to accept it. If, on the other hand, the person remains dissatisfied, the provision of adequate reasons provides a proper information base on which to challenge the decision. The provision of brief reasons by a primary decision maker at the time of the decision or shortly thereafter will be a major factor in reducing the period of time within which migration appeals can be determined (see paras 215-6 and 218 on time limits for lodging applications, and other material, for review by the first level review authority).

162. It may be that experience gained will make it feasible at some time in the future to require as a matter of law the provision of fuller reasons other than under the provisions of the AAT and AD(JR) Acts, but the Council does not consider it practicable at this stage to impose such a burden.

163. The Council envisages that outlines of reasons for migration decisions might range from simple statements of the grounds for a decision to fuller outlines approaching the requirements of section 13 of the AD(JR) Act, depending on all the circumstances of the particular case. Without seeking to be exhaustive, the Council would expect outlines of reasons for migration decisions to be specific, rather than being expressed in generalities; to be expressed as nearly as possible in ordinary language, not formal or legalistic language; and over time the department should work towards outlines written in the particular national language of the person affected by the decision where appropriate and practicable. It should be possible for persons affected by migration decisions to be able to say that, even though they may not agree with a decision, they understand in general terms why the decision went against them. Where the person legally notified is entitled to obtain a more detailed statement of reasons, this right should be clearly stated in the notification of the terms of the decision. As far as possible the most crucial facts, and the process of reasoning which has been followed, should be evident from the outline, even if the full factual basis of the decision and the process of reasoning are not as detailed as they would be in a reasons statement required under either section 13 of the AD(JR) Act or section 28 of the AAT Act. That is, there should be a clear statement of the ‘ultimate’ facts which bring a matter within the provisions of legislative or other criteria, and of the process of reasoning by which they have been arrived at, even though all the ‘primary’ facts leading to the ‘ultimate’ facts may not be fully spelled out. Where reliance is placed on the provisions or terms of Acts, regulations, or policies, or the contents of manuals or instructions, references should be given to key sections together with details of how to locate copies of the relevant passages. The Council expects that such outlines of reasons will normally be relatively short but it is not possible to be dogmatic on this point. As Mr Justice Woodward has said in a different context, in relation to a statement of reasons under section 13 of the AD(JR) Act, the length will depend on ‘considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement’ (Ansett Transport Industries v. Wraith (1983) 48 ALR 500 at 507).
164. The Council recognises that both the length and the character of outlines will depend on such matters as ‘the nature and importance of the decision’, and on the circumstances in which that class of decisions is made. The Council is conscious that with regard to certain classes of decisions, such as those made at overseas posts concerning the grant or refusal of a migrant visa or a visitor’s visa, it might not be practicable to expect much detail in an outline of reasons. In other cases, such as decisions to refuse a change of status from temporary to permanent resident, or to deport a person, much fuller and more detailed reasons could reasonably be expected to be given. The Council believes that it should be possible for the Department to develop appropriate outlines of reasons for different classes of decisions.

165. The Council does not recommend that provision for advice as to the reasons for a decision should be included in legislation, as it is unlikely that any legislative rule could be sufficiently flexible to deal with the variety of situations which are likely to arise. It believes that the matter can more satisfactorily be dealt with administratively provided that the Minister and the Department adopt appropriate administrative policies.

166. During the course of the project the Council received comments by the Department and some members of the immigration Review Panels to the effect that the quality of the outlines of reasons provided in relation to migration decisions varied. More recently the Department has provided examples of improved outlines of reasons, and expressed its commitment to continuing to make such improvements.

167. The Council’s proposals as to the provision by primary decision makers in the migration field of brief outlines of reasons is not meant to affect the operation of section 28 of the AAT Act or section 13 of the AD(JR) Act.

168. The Council believes that, wherever practicable, notice of an adverse decision should be conveyed in writing and should include or be accompanied by an outline of reasons where practicable. It appreciates, however, that it may not always be feasible to notify the terms of a decision in writing immediately the decision is made, as, for example, in the case of a person who is refused an entry permit at a point of entry and who is liable to be removed from Australia within a very short time of arrival. In such cases the Council believes that the decision and the reasons for it should be given orally (preferably in the language of the person the subject of the decision), and the person informed that a written statement of the terms of the decision accompanied by a written outline of reasons will be furnished as soon as practicable. In addition, notification of review rights in accordance with the Council’s proposals (paras 169-71) should accompany the written statement of the terms of the decision, whether or not it has been possible at that stage to formulate a written outline of reasons. The Council considers that the early notification of reasons for primary decisions will help avoid the lodgment of applications designed only to secure an opportunity to appeal (see paras 215-6 on time limits for lodgment of applications).

Recommendation 2: Outlines of reasons
The Department should formulate procedures which provide that:
(a) a written outline of reasons is to be furnished to a person who is the subject of a migration decision which affects that person’s interests adversely, unless that is precluded by such considerations as national security, international relations and defence;
(b) such an outline of reasons shall refer briefly to the grounds on which the decision has been made in terms of the relevant legislative and policy considerations, the person’s particular circumstances, and the reasoning processes followed; and the outline should preferably be expressed in ordinary rather than legal language;
(c) if the terms of a decision are furnished orally, the person to whom they are furnished is to be advised that that person will, as soon as practicable, be notified in writing of the terms of the decision and will be given an outline of the reasons upon which the decision is based; such material shall be furnished accordingly; and

(d) where the person notified of the terms of a decision is or may be entitled to a statement of the reasons for the decision pursuant to section 13 of the Administrative Decisions (Judicial Review) Act and/or section 28 of the Administrative Appeals Tribunal Act, the notification is to include advice of that fact.

Notification of rights of review
169. In addition to advising affected persons of the reasons for adverse decisions it is, in the Council’s opinion, necessary to ensure that they are notified of any rights of review on the merits which may be open to them. Clearly a failure to advise a person of available rights of review may have the effect of depriving that person of those rights. The Council has been informed by the Department that normally it advises persons who are the subject of adverse decisions of their right to request review by the Immigration Review Panels where the matter is one which falls within the Panels’ jurisdiction, and of their right to apply for review by the Administrative Appeals Tribunal if that Tribunal has jurisdiction. The Council endorses this approach.

170. The Council is currently conducting a major project as Stage One of its Access program dealing with Notification of Rights of Review, involving decisions ultimately reviewable by the AAT. It is expected that this project will be finalised in the near future. The Council is likely to make certain recommendations regarding notification of review rights which will be relevant to the review system proposed in this report. However, without prejudging the general recommendations which may emerge from that project, the Council wishes to make some observations concerning notification of review rights in relation to primary decisions in the migration field. The Council proposes that a written notification to a person subject to a migration decision of the terms of that decision should also contain a brief explanation as to the merits review processes, which is designed to overcome the inhibitions of persons affected by decisions which might prevent them from utilising those processes, and to enable them to make the best use of their review rights. Among those matters which the Council considers could usefully be included in such explanation are: an explanation as to whether any charge is made for reviews; whether travel and accommodation expenses may be payable in special circumstances; whether the review will be conducted on a relatively informal basis rather than as a formal court hearing; that the review is likely to be completed within a specified time but that it may be possible to have it completed more quickly upon request; and an indication of possible sources of advice and assistance (both within and outside the Department), or at least of means by which such sources may be identified (e.g. through obtaining a specified departmental brochure, ringing a specified inquiry or ‘hotline’ number, checking certain entries in the telephone book etc.).

171. Finally, such explanations should be accompanied by information, in those languages that are reasonably common amongst immigrants to Australia, about means by which they may obtain a translation or explanation of the notification.

Recommendation 3: Notification of review rights
Legislation should provide that:

(a) In order to inform persons about the availability of rights of merits review of migration decisions, a written notification to a person of the terms of a migration decision which may affect that person’s interests adversely shall also contain a brief explanation of the
review processes and information regarding the availability of advice and assistance from sources such as the proposed immigration advisory service (see Recommendation 19);

(b) such a notification shall also be accompanied by information, in those languages that are reasonably common amongst immigrants to Australia, about means by which they may obtain a translation or explanation of the notification; and

(c) where a decision is directly reviewable by the Administrative Appeals Tribunal, and not by the Immigration Adjudicators (see Recommendations 5 and 28(3)), a person subject to such a decision shall be informed of that fact.

The proposed review structure

172. This section discusses the arguments for and against the establishment of a two-tier system of external review on the merits, concluding that such a system is necessary in a high volume jurisdiction such as migration. However, the Council recognises that there are specific features of the migration field which require certain modifications to the kind of two-tier system which the Council has recommended in previous reports on repatriation and social security (Report No. 20, *Review of Pension Rights under Repatriation Legislation* (ALPS, 1983), and Report No. 21, *The Structure and Form of Social Security Appeals* (AGPS, 1984)). In particular, the Council recommends the introduction of a leave requirement to operate between the first and second levels of external review in relation to particular classes of decision. The section continues by considering the kind of body which should provide the first level of review, and the Council recommends the appointment of Immigration Adjudicators who the Council considers should preferably act singly as the first-level external review body. The procedures which the Council considers to be appropriate to the jurisdiction of the Immigration Adjudicators are also discussed in detail. The section then considers the second level of review which the Council concludes should be the AAT, and discusses some specific matters of procedure in relation to an expanded migration jurisdiction for the AAT. The subsequent sections take up the following issues which require separate consideration:

- public interest considerations and ministerial certificates;
- accrual and exercise of review rights.

A TWO-TIER REVIEW STRUCTURE

173. In considering the provision of new or additional rights of review in high volume jurisdictions, such as social security and repatriation, the Council has taken the view previously that the effective and efficient processing of review applications is facilitated by a two-tier review structure comprising first and final review authorities (see Report No. 20, especially paras 192-3, and Report No. 21, especially paras 103-110). As in the case of social security appeals, the Council does not believe that in the review of the expected high volume of migration decisions a single level of review would be able to provide an accessible, speedy, informal and economical form of review as well as achieving an adequate standard of justice in all cases.

174. A structure which is not capable of providing both an adequate standard of individual justice, and a forum for the enunciation and clarification of principles applicable to the making of the various classes of decisions within the jurisdiction, will not have the desired effect of improving the overall standard of primary decision making. While an adjudicative body of a high calibre will have the expertise required to perform both functions, its capacity to do so will be diminished where it is required to handle a high volume of review applications. Conversely, a review body providing a lesser standard of review, but capable of handling a large number of cases, is not able to give the detailed consideration to particular issues which is necessary for it to provide normative guidance to primary decision makers.
175. It is the Council’s opinion that, while the first-level review authority should be organised to operate speedily and informally and to deal satisfactorily with most cases coming before it, the second-level review authority should provide review of a high standard in those cases which require detailed consideration, especially in relation to complex questions of fact and law. Where there is only one level of review in a high volume jurisdiction, there is a danger of the review body becoming overburdened, in part because of the responsibility to try to do justice in the more complicated cases and to develop principles of general application relating to complex legal and factual situations. If there is available a higher-level review body which can confidently be expected to determine authoritatively more complex cases and to enunciate general principles, the first-level review body can operate with much greater expedition in a high volume jurisdiction. Quick and informal decision making inevitably involves some mistakes, and it is imperative to provide those who believe they have been affected by a wrong decision with an opportunity to have the matter further reviewed on the merits. If that course is not open to such persons, the Council considers that there is a strong likelihood that applicants will turn in greater number to judicial review to obtain independent scrutiny of migration decisions.

176. It has been suggested by the Department that the provision of a two-tier review structure could encourage the lodging of automatic and unmeritorious applications for review following unfavourable decisions at the first level.

177. The Council appreciates that there are special problems inherent in the migration jurisdiction (see para. 98), and has considered whether those problems are such as to indicate the need for either a one-tier system of review or some special relationship between the levels in a two-tier system. As to the first, the Council can see no alternative to a two-tier system, for reasons stated above (paras 173-5). Experience has shown that the enunciation of general principles by the second-level review body results in a later decline in the number of applications for second-level review, as has happened, for example, in the field of social security. This, in turn, is likely to lead to a reduction in the costs of review as against those that would result from a single-tier review system. The AAT’s social security jurisdiction was conferred in 1981 (by section 90 of the Statute Law Revision Act 1981, which inserted section 15A in the Social Services Act 1947) and the statistics for applications received in this jurisdiction are as follows:

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(See ARC Eighth Annual Report 1983-84, p. 92, and (1985) 5 Admin Review, p. 48.)

178. There has also been a decline in the number of applications for review coming before the AAT in the criminal deportation area of the migration jurisdiction, and in the view of the Department one of the reasons for this is the clarification of understanding of the application of the law in this area by a series of Tribunal decisions dating back to 1977 (Review 84, ALPS, 1984, p. 53). Naturally, the Council recognises that whether this pattern occurs in an expanded migration jurisdiction remains to be tested by experience. It may be that such an expanded migration jurisdiction will not duplicate precisely the experience of social security and the limited criminal deportation jurisdictions, as there may be special features which will encourage more applicants to proceed to the second level of review, for example a desire to delay implementation of a decision. The Council nonetheless believes that its proposals as to the need to obtain leave to proceed to the second level of review will render that course relatively unattractive to applicants (paras 181-7).
179. The Council has considered whether there should be a special relationship between the levels in a two-tier system of review of migration decisions. One aspect of this matter is dealt with below in the discussion of the proposal that there be a leave requirement for further review of some classes of first-level review decisions by the second-level review body (paras 181-7). Another aspect of this question is whether there could be a two-tier system of review located within the structure of the AAT, with the first tier constituting a separate Division of the AAT. The Council rejects the latter possibility on a number of grounds. First, the Council believes that it would be highly undesirable administratively to have within the AAT a separate Division which was applying standards of adjudication different from those being applied by the AAT generally. A second, related, point is that it is not expected that most members of the first-level review body proposed in this report would have qualifications as high as are currently required for membership of the AAT (see s.7 of the AAT Act), in which case they could not be expected to participate in the work of the other jurisdictions of the AAT, nor could their decisions be expected to carry any greater weight than if they were established as a separate panel to provide first-level adjudication in migration matters. Thirdly, the Council has previously expressed a strong view that, in order to preserve and promote the AAT’s character as a general administrative appeals tribunal, additional Divisions should not be created unless there are special reasons justifying such a course of action (see ARC Ninth Annual Report 1984-85, paras 93-5 for a discussion of this matter in relation to the establishment of the Veterans’ Appeals Division). The Council considers that no such special reasons exist in relation to migration. Moreover, the Council believes that the status of the AAT as a general administrative tribunal would be damaged rather than preserved or promoted by the establishment of a separate Division designed to operate with maximum expedition, economy and informality in a high volume jurisdiction. In particular, the Council is concerned that:

- the assignment of members of the AAT exclusively to such a Division would detract from the current flexibility in constituting the AAT and the advantages which flow from that flexibility;
- overspecialisation of the AAT’s functions and the assignment of members exclusively to separate Divisions may discourage persons of high calibre from accepting appointment to the AAT; and
- the appointment to a separate migration Division of members with qualifications very different from those of other AAT members would also diminish the status of the AAT.

180. The Council has given consideration to a suggestion which arose in discussions with the Department that there would be value in the appointment of a Chief Adjudicator who was already a member of the AAT, or who could be appointed to that tribunal. In the Council’s view it would be wrong, as a matter of principle, for the Chief Adjudicator, who is intended to act as the co-ordinating member of the first level of review (see para. 209), also to be a member of the second-level review authority. The Council believes that there would be a potential for a conflict of interest in such a dual appointment and that the public perception of the independence of both levels of review would be seriously harmed. The Council appreciates that the Department was concerned that the first-level review authority should, in its deliberations and decisions, receive strong guidance from the second-level authority. However, the Council notes that such guidance normally operates by means of the authoritative nature of AAT decisions, a factor which would operate as strongly in the migration jurisdiction as in any other. The Council believes that the Adjudicators will keep abreast of the implications of developing AAT jurisprudence in this area through the Chief Adjudicator’s co-ordinating role and by such means as regular meetings of Adjudicators, circulars from the Chief Adjudicator, and so on.

**Recommendation 4: Establishment of two-tier system of review**
A two-tier review structure should be established for the review on the merits of decisions in the field of migration.

**Requirement of Leave**

181. It is the Council’s view, for the reasons stated below, that in relation to selected classes of migration decisions, a leave requirement should operate between the first and second levels of review. The particular classes of decision in relation to which the Council recommends that there should be such a leave requirement are set out in Recommendation 5(a). In proposing such a leave requirement the Council has in mind that the migration jurisdiction, like those concerning social security and repatriation, is expected to involve a high volume of applications for review. In such jurisdictions the Council has taken the view in the past that the first-level review authority ought to be capable of dealing with a mass volume of appeals to the satisfaction of most applicants for review (see especially Report No. 20, para. 192 and Report No. 21, para. 107). However, in the migration jurisdiction there is the additional factor that some applicants for review may be seeking to delay the implementation of decisions concerning them, such as deportation decisions or adverse decisions on cancellation or extension of temporary entry permits, in circumstances where there is no substantial ground for appeal (see para. 134). In these circumstances the Council believes that the adoption of a procedural ‘filter’, limiting access to the second-level review authority by providing for the grant of leave to seek such review, would do much to reduce potential abuse of the two-tier system, as well as ensuring that the second-level review authority is not overburdened with appeals to the detriment of its functions.

**Classes of decision where leave required**

182. In determining which classes of migration decisions (of those which it recommends later should be subject to review by the Immigration Adjudicators and then by the AAT (Recommendation 28(1)) would appropriately be subject to the proposed leave requirement, the Council has had particular regard to the following factors which tend to indicate the need for such a requirement: the likely volume of reviewable decisions; the potential for unwarranted delay; and the potential for the abuse of the review process. Where one or more of these factors could operate strongly in relation to a particular class of decision, the Council recommends that that class of decision should be subject to the proposed leave requirement. On this basis the Council recommends that the classes of decision set out in Recommendation 5(a) be subject to a requirement that leave be obtained from the second-level review body for review by that body.

**Considerations in granting leave**

183. The Council proposes that considerations should be specified in legislation which will be of assistance to the second-level review tribunal in determining whether or not to grant leave in particular cases. The Council is unable to predict with precision what effect the application of these considerations by the second-level review tribunal would have on the number of appeals proceeding to a full review by that tribunal. It could be expected, however, that more applications for leave to appeal might be granted in the initial period of operation of the new system of review, when the second-level tribunal would wish to establish norms in the interpretation of the legislative and other criteria applicable to migration decisions. The Council also notes that it would be for the second-level tribunal to determine for itself the exercise of its discretion to grant or withhold leave to seek further review in the light of the suggested considerations, subject, of course, to judicial review in appropriate cases. It could therefore be expected that, if the standard of review being provided by the Adjudicators should not at any time be of the level which the second-level tribunal considered appropriate, leave to seek further review would be granted in proportionately more cases. Where the Adjudicators are adequately performing their adjudicative function, leave to appeal could be expected to be
granted in fewer instances. It will thus be of critical importance to the effective operation of the system of two-tier review that the Adjudicators be of such a calibre that their decisions generally command the respect of the second-level tribunal.

184. In order to ensure that unmeritorious applications are not taken to the second level of review, and that the risk of unnecessary delays in implementing migration decisions is minimised, the Council proposes that the grant or refusal of leave by the second-level review authority should be based on the following considerations to be specified in the legislation:

(a) the significance of the issues (both to the applicant and otherwise) involved in the decision sought to be reviewed. (The Council would expect that where legal issues arise on which it would be desirable for the second-level review authority to state a view, or where a fact situation of some complexity and/or general significance is in question, the second-level review authority would be favourably inclined to grant leave);

(b) any error of law or fact appearing in the decision sought to be reviewed;

(c) any significant evidence not reasonably available to either the applicant or the respondent at the time of the decision sought to be reviewed. (The Council discusses elsewhere the Department’s views on the evidence which an applicant may present in an appeal (para. 221). However, in an application for leave to appeal it believes that the second-level tribunal should give consideration to whether or not any new evidence, which it is claimed should be taken into account, was reasonably available at the time of the initial decision with a view to refusing leave where it was so available and was not presented);

(d) the desirability and the practicality of there being a hearing of the issues in dispute;

(e) the availability or otherwise of assistance to the applicant before the first-level review authority; and

(f) any other matters which the second-level review authority considers it appropriate to take into account.

185. The Council would expect the second-level review body to act swiftly to determine applications for leave, and it recommends that that body should be given a discretion to dispose of applications seeking leave for further review on the basis of the written documents alone without holding an oral hearing. Moreover, the Council considers that an applicant should be required, perhaps by way of a practice note, to state prior to the hearing the basis of the application, the facts on which the application is based, a summary of the information and evidence intended to be adduced at the hearing if leave is granted, and such other representations as the applicant deems relevant to the application. If the AAT is to be the second-tier review authority as the Council later recommends, and the applicant seeks leave from the AAT, it also considers that the respondent (who will in such cases be the Minister or Secretary of the Department of Immigration and Ethnic Affairs: para. 250) should provide the AAT with the original or copies of all documents which are in the respondent’s possession which are relevant to the application for leave, including, where available, a copy of the Adjudicator’s written statement of reasons for decision.

186. It is the Council’s view that both the applicant and the respondent should have the right to seek review of unfavourable decisions of Immigration Adjudicators. Given that the first-level review body will be providing expeditious and relatively informal review on the merits, it would be undesirable not to permit the Department or the Minister to seek further review in appropriate cases. In the Council’s opinion, however, the Minister or Department, as well as the applicant, should be subject to the requirement that leave be obtained to seek further review of a decision. The Council believes that it is appropriate that this requirement be
imposed on both parties in the interests of avoiding any possibility that the review system will be perceived as being weighted in favour of the Minister or Department.

187. A major concern will be the speed in handling applications for leave to apply for review by the AAT, and the speed of finally determining such applications. It is envisaged that applications for leave would normally be considered by a single member of the AAT, but the constitution of the AAT would be a matter for the President’s discretion as is currently provided in the AAT Act. The Council has noted the Department’s suggestion that leave applications should be considered by the Chief Adjudicator or a Senior Adjudicator, but believes that the second-level review body is the appropriate one to determine such questions. The principal reasons for this view are that it is undesirable in principle to have a first-level review authority, or members of that authority, determining whether or not there should be further review of decisions made by it. Secondly, the considerations which the Council has recommended should be taken into account in determining leave applications require formation of an opinion as to the kinds of cases in which the AAT should provide further review and the Council considers that members of the AAT are in a better position to determine such matters.

188. The Council notes that its recommendations concerning the detention in custody of persons applying for review, including the power to release such persons on conditions, will apply both before and after the hearing of an application for leave (see paras 311-3).

**REFERRAL OF CASES**

189. The Council considers that, in the light of the projected roles of the two review authorities, the first-level review authority should be able to refer a case, either of its own motion, or at the request of either of the parties, directly to the second-level review authority for determination.

**PREREQUISITE TO REVIEW**

190. Having regard to the respective roles and functions of the first- and second-level review authorities, the Council has concluded that review by the former should be a prerequisite to the lodging of an application for leave to appeal to the latter except where a direct right of appeal to the second-level review authority is conferred. The Council considers that this procedure will ensure that, as a whole, the proposed review system operates effectively and efficiently.

*(Note: The list of classes of decisions in the following recommendation, which it is proposed should be subject to a leave requirement before an appeal may be taken to the second-level review authority, assumes the acceptance of the proposals in Recommendation 28(1) as to the classes of decisions which should be reviewable by the Immigration Adjudicators and subsequently by the AAT.)*

* Attention is drawn to the dissenting views of Mr Julian Disney on aspects of the recommendation immediately below: these are set out in Chapter 5.

**Recommendation 5: Requirement of leave for certain appeals, prerequisites to second-level review, and referral of cases**

Legislation should provide that:

(a) review by the second-level review authority of decisions of the first-level review authority is subject to the granting of leave by the second-level authority in the following classes of decision:

(i) a decision to refuse a migrant entry or temporary entry visa;
(ii) a decision to refuse entry to a person who has a visa, or a return endorsement, or who is exempt from the requirement to possess an entry permit under the Migration Act;

(iii) a decision to refuse an application for a change of status from temporary to permanent resident made in accordance with section 6A of the Migration Act;

(iv) a decision to declare, pursuant to sub-section 8(2) of the Migration Act, that the continued presence in Australia of a person who is a member of an exempt class of persons under paragraph 8(1)(d), (e) or (f) is undesirable;

(v) a decision to refuse change of status from one category of temporary entrant to another;

(vi) a decision to cancel a temporary entry permit;

(vii) a decision to refuse to extend a temporary entry permit;

(viii) a decision under sub-section 6(2), 6(5) or 7(2) of the Migration Act to refuse to grant a temporary entry permit to a prohibited non-citizen;

(ix) a decision to require voluntary departure made pursuant to section 31A of the Migration Act; and

(x) a decision to deport a prohibited non-citizen pursuant to section 18 of the Migration Act;

(b) in determining the grant or refusal of leave the second-level review authority is required to take account of the following considerations:

(i) the significance to the applicant and otherwise of the issues involved in the decision sought to be reviewed;

(ii) any error of law or fact appearing in the decision sought to be reviewed;

(iii) any significant evidence not reasonably available to either the applicant or the respondent at the time of the decision sought to be reviewed;

(iv) the desirability and the practicality of there being a hearing of the issues in dispute;

(v) the availability or otherwise of assistance to the applicant before the first-level review authority; and

(vi) any other matters which the second-level review authority considers it appropriate to take into account;

(c) the second-level review authority has a discretion to determine applications for leave on the basis of the written documents alone without conducting an oral hearing;

(d) subject to paragraph (e) of this recommendation, and to Recommendations 8 and 28(3), review by the first-level review authority is a prerequisite to review by the second-level authority; and

(e) the first-level review authority, either of its own motion or at the request of either of the parties, is empowered to refer a case directly to the second-level review authority for determination.

FIRST LEVEL OF EXTERNAL REVIEW

191. The primary objective of first-level review is to provide an accessible, informal, speedy and economical form of review which will dispose of the majority of appeals. To ensure that the final-level review authority is not so overburdened that it is unable to give proper consideration to more complex cases, it is important that the first-level review authority deal with appeals in a manner which is satisfactory to most review applicants, consistently with the overall primary objective outlined in this paragraph. This requires that it provide an adequate standard of review in terms of the calibre of its membership, its practices and its procedures.

Options for first level review

192. In the Council’s view three matters require discussion in assessing the options for first-level review:
• whether it would be possible to utilise the Immigration Review Panels as they currently 
operate, or in a revised form;
• whether the first-level review body should have a single-member or multi-member 
constitution; and
• whether the new system should be established on a legislative basis.

Utilisation or revision of current Immigration Review Panels
193. The following major deficiencies were identified in Chapter 1 as affecting the 
Immigration Review Panels (IRPs) as they currently operate (see para. 72):
• a lack of independence from the Department;
• a failure to provide applicants with information about the case against them and about the 
factors which the IRPs consider relevant to the consideration of an applicant’s case;
• inaccessibility because of the practice of holding meetings only in Sydney, Melbourne and 
Canberra;
• the practice of rarely interviewing applicants in person; and
• their non-statutory foundation.

In the Council’s opinion, the first-level authority for review of migration decisions should be 
designed to avoid these deficiencies. Further, the primary function of the IRPs is to bring to 
bear fundamental notions of commonsense and fairness in making recommendations as to how 
particular cases should be finally determined. While this has been a very useful function for 
the IRPs to perform, the Council notes that their procedures and membership have not been 
formulated with an adjudicative function in mind, and differ in this respect from the type of 
review authority which the Council believes should be established as the first level of review. 
The Council has noted the criticisms which some representatives of various ethnic community 
groups have made about the operations of the IRPs which suggest that the IRPs, if retained in 
their present form, would not be acceptable to at least some sections of the community which 
represent those most likely to be affected by migration decisions. Moreover, given the essential 
nature of the IRPs as advisory to the Minister, it does not seem necessary to discuss whether 
revisions could be made to their constitution and procedures which would enable them to 
function satisfactorily as external review authorities. As bodies advisory to the Minister the 
IRPs are not designed to provide independent external review by means of adjudicative 
procedures. The Council has therefore thought it better to start from first principles in seeking 
to determine the most appropriate form which should be taken by the body to carry out the 
role envisaged by the Council.

Single-member or multi-member review authority
194. The Council has considered whether the first-level review authority would be best 
constituted by single members or by multi-member panels. There are strong arguments in 
favour of each of these but, for the reasons stated below, the Council has a preference for a 
single-member constitution; it recognises, however, that a multi-member body could perform 
the functions envisaged by the Council.

195. The advantages of multi-member bodies include the opportunity which is afforded by 
the membership of such bodies for a breadth of community presence, and a range of members’ 
qualifications, which might be less easy to secure if only single members were to function as 
review authorities. For example, members of ethnic organisations in Australia with particular 
interests in migration matters might be prepared to serve on multi-member bodies which could 
include lawyers, former public servants, and other persons with appropriate expertise. Such 
persons might be less willing to serve on such bodies if they were themselves required to 
function as the sole decision maker in review matters. Moreover, membership of a multi-
member body may provide a gradual introduction to the operations of the review body, as well
as provide a stimulating environment within which to work because of the diversity of members of the body.

196. On the other hand, the costs of establishing and operating multi-member bodies would be greater than the costs of setting up and servicing single-member bodies. Further, review by a multi-member tribunal, no matter how speedily carried out, could be expected to take more time than review by a single-member authority, because of the need to gather the members of such a tribunal together and for the members to consult on the outcome of the proceedings. The Council also envisages an authority to which ready access may be had by appellants throughout Australia, including at the principal points of migrant entry to Australia, and if a review authority is to be accessible it needs to be able to convene in a variety of locations and, on occasions, at very short notice. The availability of single-member panels could be more conducive to meeting those aims than a multi-member panel, although, even if the latter were in general use, it would be possible to provide for single-member tribunals for the review of decisions where speed is most important, in respect, for example, of point of entry decisions.

197. The Council is conscious that in its previous reports on repatriation and social security appeals (Reports Nos 20 and 21), both high volume jurisdictions, it recommended the desirability of providing multi-member tribunals as the first-level review authority. It did so because the pattern of multi-member adjudication was well-established; public confidence in their role was thereby enhanced; and multi-member tribunals provided for the diversity of qualifications, knowledge and experience desirable in those jurisdictions (see, for example, Report No. 21, para. 122).

198. The Council favours the provision of single-member authorities to conduct the first level of external review on the merits, and proposes that the members of these authorities should be known as ‘Immigration Adjudicators’. The Council’s preference for single-member authorities is primarily because of the additional costs which would be involved in establishing new multi-member authorities to review migration decisions, but also because of the speed with which it is desirable that such bodies should be able to consider and determine applications for review. However, the Council acknowledges that there could be a concern on the part of some community organisations to see the establishment of multi-member review panels at the first level of review. The Council would have no fundamental objection to the establishment of multi-member bodies in this jurisdiction if the Government believed that there were advantages in doing so, but in that case it would suggest that there may be some classes of decision (such as point of entry decisions) where a single-member authority would be more appropriate than a multi-member one for reasons primarily of speed of review.

Legislative basis for new system

199. The Council has considered the means by which the first-level system of review should be established. On the basis of the role which the Council proposes for the Immigration Adjudicators, it believes that it would be inappropriate to create the first-level review authority on anything but a statutory basis. It is important that a first-level review authority be, and be seen to be, both divorced from the primary decision-making process and a permanent, continuing feature of the review structure. The best means of achieving this is to establish such an authority by statute.

* Attention is drawn to the dissenting views of Mr Julian Disney on aspects of the recommendation immediately below: these are set out in full in Chapter 5.

**Recommendation 6: First-level review authority: Immigration Adjudicators**
Legislation should provide for the establishment of a first-level review authority to consist of Immigration Adjudicators who should sit as single-person authorities to hear, subject to Recommendation 8, appeals on the merits from decisions specified in Recommendation 28(1).

**Power to Make a Binding Decision**

200. The Council discusses below (paras 265-6) whether the second-level review authority should have the power to make a binding decision, and concludes that it should. The Council also considers that there are strong reasons why the first level of review, the Immigration Adjudicators, should have a similar power of determinative review. First, if they were to have only a recommendatory power, the Council believes that their decisions would not be seen as being independent or of any great force. It is emphasised in the report that the Council expects that, in the majority of cases, review by Immigration Adjudicators will be the only form of merits review utilised by most applicants. In order that that should be so, it seems to the Council necessary that that review be determinative. If such review were merely recommendatory, the Council doubts whether the primary objective of controlling the number of appeals would be achieved. Applicants for review are more likely to accept as final a determinative decision made by an independent tribunal as opposed to a recommendatory decision made by a tribunal which would appear to be part of a Department’s internal decision-making machinery (see Report No. 21, para. 76). In the absence of determinative first-level review there would also be more resort to judicial review than would be the case if Adjudicators could determine appeals. Moreover, to invest the Adjudicators with recommendatory powers only would be calculated to increase the delay involved in obtaining determinations of review applications, since it would be necessary to await the outcome of its recommendations.

201. The Council notes that Immigration Review Panels currently exercise a recommendatory power of decision making, but it emphasises that the proposed role of Immigration Adjudicators is different to that performed at present by the IRPs. A determinative power of decision making would be entirely consistent with the adjudicative role envisaged for Adjudicators. The Adjudicators’ primary function will be to ascertain the facts and to apply the relevant law to those facts. The task of establishing what are the correct legal principles applying to a particular case will be considerably simplified under the Council’s proposal that migration discretions and powers be structured (see paras 138-57). If the applicant or the Department considers that an Adjudicator’s determination is incorrect, either party will have the right to seek leave to appeal to the AAT (see para. 186).

202. The Council therefore considers that, having regard to the nature of migration decisions and its proposals concerning the structuring of the discretions conferred by the Migration Act and Migration Regulations, the first-level review authority should exercise a determinative power.

**Recommendation 7: Review by Immigration Adjudicators to be determinative**

Legislation should provide that Immigration Adjudicators exercise a power of determinative, rather than recommendatory, decision making.

**Review of Decisions of Ministers**

203. The Council has considered whether Immigration Adjudicators should be empowered to review decisions taken personally by the Minister for Immigration and Ethnic Affairs. The Council does not consider that such review would be consistent with the relative status of the Minister and the Adjudicators, or with the envisaged role of the Adjudicators as an expeditious and relatively informal review authority. It therefore proposes that decisions, of a kind which it recommends should be subject to review on the merits, and which are made personally by
the Minister, should not be reviewed by the Adjudicators but should be reviewed directly by the AAT.

**Recommendation 8: No review by Immigration Adjudicators of ministerial decisions**
Legislation should provide that decisions of a kind which are recommended for review on the merits, and which are made personally by the Minister, shall not be reviewed by Immigration Adjudicators but shall be reviewed directly by the second-level review authority.

**Constitution and membership**

204. The Council believes that among the primary considerations to be taken into account in appointing Immigration Adjudicators should be that the persons concerned should have a capacity for objective assessment and sound judgment, actual or potential ability to conduct review proceedings, and a general understanding of the perspectives of public administration and of immigrants and ethnic communities.

205. Serving departmental officers should not, in the Council’s view, be appointed as Adjudicators since, while their knowledge of immigration policies and procedure could be an advantage, this is likely to be outweighed by the fact that their appointment might well be perceived as reflecting adversely on the independence of the first-level review authority. It has been suggested by the Department that serving public servants could be appointed as Immigration Adjudicators if they were to be placed on the unattached list, but the Council does not favour this in view of the need for the Adjudicators to be perceived as independent of the administration. Both the appearance and the reality of independence will be of critical importance given that the first-level review authority will be making the final decision in a majority of applications for review.

206. Somewhat different questions arise in relation to the possibility of the appointment as Adjudicators of former officers of the Department of Immigration and Ethnic Affairs. While the Council does not oppose the appointment of some such persons as Adjudicators if they have the necessary qualities and qualifications, it believes that it is important that, in considering whether to appoint former departmental officers to such positions, regard be paid to the desirability of limiting the number of such appointments to avoid jeopardising the community’s perception of the Adjudicators’ independence.

207. In its Report No. 21, *The Structure and Form of Social Security Appeals*, the Council recommended that both serving and former public servants (including officers of the Department of Social Security) should be eligible for appointment to the proposed first level of external appeal in the social security jurisdiction. The Council emphasises, however, that this recommendation was made in the context of an accompanying proposal that the first-level review authority be a multi-member panel (the other members being from outside the public service).

208. The Council proposes that Immigration Adjudicators should be appointed by the Governor-General in Council after wide consultation with appropriate community organisations. The number of Adjudicators appointed will, of course, be dependent upon workload, but the Council proposes that a sufficient number be appointed to hear appeals in each State and Territory. The Council believes that Adjudicators should be appointed in both full-time and part-time categories since this is likely to increase the availability of persons with the required skills and experience. It has been suggested by the Department that the number necessary could be of the order of 11 full-time Adjudicators, including the Chief Adjudicator, and 19 part-time Adjudicators, although these numbers are dependent on a number of assumptions (see para. 431).
The Council proposes that the first-level review authority be organised and co-ordinated on an Australia-wide basis. To achieve this, a full-time Adjudicator should be appointed as Chief Adjudicator while one full-time or part-time Adjudicator (depending on the volume of work) should be appointed for each State and Territory as a Senior Adjudicator. In general terms, the benefits of having a Chief Adjudicator would be similar to those envisaged in the field of social security where the Council recommended that a National Chairman be appointed (see *ARC Ninth Annual Report 1984-85*, paras 88-9). Those benefits include the provision of a national focus as a means of achieving the following aims:

- the promotion of consistency of decisions;
- the promotion of uniformity of practices and procedures;
- the allocation of cases by the Chief Adjudicator;
- the Chief Adjudicator’s role in monitoring the overall operation of members of the review body, and arranging training and continuing education programs;
- the role of the Chief Adjudicator in acting as a spokesman and a focal point for contact with other bodies;
- the effect of the appointment of a Chief Adjudicator in facilitating co-ordination and communication between tribunals and fostering a sense of unity and loyalty to a corporate identity; and
- the Chief Adjudicator’s ability to give advice on the appointment of tribunal members and support staff and to oversee the preparation of the annual report on the tribunal’s operations.

It is not necessary, of course, that a Chief Adjudicator should be based in Canberra. That would be a matter for decision in the light of the needs of the jurisdiction and the wishes of persons selected for appointment.

**Recommendation 9: Appointment of Immigration Adjudicators**

1. Legislation should provide for:
   - (a) Immigration Adjudicators to be appointed by the Governor-General in Council, in both full-time and part-time categories;
   - (b) persons appointed to the position of Immigration Adjudicator to be persons who have a capacity for objective assessment and sound judgment, actual or potential ability to conduct review proceedings, and a general understanding of the perspectives of public administration and of immigrants and ethnic communities;
   - (c) a Chief Adjudicator to be appointed to co-ordinate the operations of Immigration Adjudicators on a national basis;
   - (d) a Senior Adjudicator to be appointed for each State and Territory;
   - (e) Senior Adjudicators to be appointed on a full-time basis except where the volume of work justifies a part-time appointment only;
   - (f) the Chief Adjudicator to be empowered to delegate any of his or her powers to a Senior Adjudicator and, where appropriate, to other Adjudicators, other than the power of delegation itself.

2. In the appointment of persons to be Immigration Adjudicators regard should be had to the principle that, if any former officers of the Department of Immigration and Ethnic Affairs are appointed to the office, the number of such appointments should not be so high that community perception of the Adjudicators’ independence would be put at risk.

**Tenure**

In order to emphasise the independence of the first-level review authority from the primary decision-making process it is, in the Council’s view, necessary to provide for
appropriate conditions of appointment. The Council believes that the length of tenure should be of sufficient duration to prove attractive to persons of the requisite calibre and that provision should be made for reappointment. The Chief Adjudicator should be appointed for a period of five years. Adjudicators other than the Chief Adjudicator, including Senior Adjudicators, might normally be appointed for terms of three years, although the legislation should provide for appointments of up to five years; special circumstances might arise which would require that some appointments be made for shorter periods. All Immigration Adjudicators, including the Chief Adjudicator and Senior Adjudicators, should be eligible for reappointment.

Recommendation 10: Terms of office of Immigration Adjudicators
Legislation should provide that Immigration Adjudicators, including the Chief Adjudicator, are appointed for terms not exceeding five years, although in the case of Senior Adjudicators and Adjudicators appointments might normally be for three years. All Adjudicators, including the Chief Adjudicator, should be eligible for re-appointment.

Procedures
211. The Council considers that it is also desirable to prescribe the procedures of the first-level review authority to facilitate the proper conduct of the review process, to enhance the independence of the authority, and to ensure that it operates in a manner appropriate to the provision of an adequate standard of justice. The Council does not believe that the prescribing of procedures will detract from the capacity of Adjudicators to provide informal, economical and expeditious review provided that the parties to the appeal and the Adjudicators have a clear appreciation of the role that the first-level review authority is expected to perform.

212. The Council is of the view that the following procedures are appropriate to the first-level review body operating in the migration jurisdiction.

Appeal applications
213. The Council has noted that persons seeking review by the Immigration Review Panels are currently required to complete a relatively lengthy request for review in typed form, using the English language. While it is clear that the latter requirement is a desirable one if undue delay is not to occur, the Council considers that it diminishes the accessibility of the Immigration Review Panels in an area where language is likely to be a barrier to the pursuit of appeal rights. Similarly, the amount of information which an applicant is required to provide and the need to supply this in written form could well discourage some applicants from pursuing an appeal.

214. In any case, the procedures of the IRPs, which operate largely on the basis of written information provided by the parties, are not conducive to the provision of the kind of review which the Council envisages Immigration Adjudicators will provide. In the light of the Council’s recommendations on other procedural matters, it is not expected that there will be any need for the completion of lengthy application forms. In fact, having regard to the particular features of the migration jurisdiction, the social and cultural backgrounds of many of the likely applicants, and the problems of language which may be encountered, the Council considers that it would be inappropriate to require persons to lodge appeal applications on a pre-determined form, but simple application forms could be provided by the first-level review authority and could be made available at all Departmental offices for the purpose of lodging an appeal. Applicants for review should be encouraged to use such forms where appropriate, but their use should not be a prerequisite to obtaining review. Applicants should also be encouraged, after lodgment of an application, to give the Adjudicators a statement concerning
the facts and circumstances on which they intend to rely in their applications, but such statements should not be a prerequisite to review.

*Time limits*

215. The Council also considers that it is desirable that a time limit be fixed for the lodgment of appeal applications or requests (written or oral) to facilitate the expeditious hearing of cases and to prevent the abuse of the review system. In the Council’s view an appropriate time limit is a period of 28 days from the date of the furnishing of a written outline of the reasons for a decision to the person subject to the decision, although provision should be made for extensions of time where necessary or appropriate, for example where an applicant is overseas. Persons subject to decisions should be informed not only of their rights to seek review of those decisions (paras 169-71), but also of the possibility, in appropriate circumstances, of extensions of time being granted. A provision that the time limits run from the time of the furnishing of an outline of the reasons for a decision will help avoid the lodging of unnecessary appeals, before receipt of such an outline, in order to safeguard rights of appeal.

216. In cases of decisions refusing entry at the point of disembarkation the affected person may, depending upon the timing of that person’s removal from Australia, be given the opportunity immediately to indicate whether the person wishes to pursue any available appeal rights (but without prejudice to the right to make a later application within the prescribed time even though the person may then be outside Australia: and see next paragraph). A degree of flexibility should be provided in relation to the application of time limits. In this respect Adjudicators should have a discretion to grant extensions of time in appropriate cases.
Stay orders

217. As the implementation of certain decisions (for example, a decision to deport a person) may effectively prevent proper consideration of a review application and may pre-empt the outcome of an appeal, the Council has considered whether, in these cases, such decisions should automatically be stayed. The Council considers that there may be some persons who, while present in Australia, will seek to use the review system simply to gain extra time in Australia, and has concluded that it would be undesirable to facilitate such delay by providing that the implementation of a decision affecting a person within Australia be automatically stayed on appeal. It envisages, on the other hand, that there will be cases in which it is appropriate that the implementation of a reviewable decision be stayed where an appeal has been lodged. The Council believes accordingly that provision should be made for the stay of a decision in appropriate cases where it would be just and reasonable to grant such a stay, but in view of the importance of such decisions the Council proposes that stay decisions should only be made by the Chief Adjudicator or a Senior Adjudicator acting on a request from an applicant for review. For obvious reasons it would be necessary for such requests to be dealt with expeditiously. Decisions granting or refusing a stay of the primary decision should be subject to review by the AAT subject to the granting of leave by that Tribunal. The Council notes that where a stay order is not granted and the person concerned has left the country, that person can still pursue his or her rights of review from abroad, although there may be practical difficulties in doing so.

Documentation

218. The speedy hearing of appeals will obviously require the Department to supply Immigration Adjudicators, as soon as possible, with any documents held by it upon which it proposes to rely and any other documents necessary to a proper understanding of the primary decision. In the migration jurisdiction such documents may often have to be obtained from overseas or interstate and their availability will clearly be a factor in determining how quickly an appeal may be heard. The Council has concluded that relevant material should generally be provided to an Adjudicator within 14 days of the Department receiving notification of an appeal, but that Adjudicators should have a discretion to vary the time limit where necessary or appropriate.

219. In considering the above matters concerning time limits and the power to grant stay orders, the Council has taken into account the view expressed by the Department in its comments on the Council’s draft report. The Department expressed the fear that to allow 28 days to appeal against an adverse decision and 28 days to lodge documents (subject to any extension granted by an Adjudicator) could contribute unduly to delay, and suggested that the Adjudicators be permitted only to grant stays for periods of up to 14 days. The Council considers that it is unnecessary to limit the powers of Adjudicators to stay decisions as suggested by the Department, since in unmeritorious cases Adjudicators can be expected not to grant a stay at all, and in cases which on their face have some merit it would be unfair to limit the time for which an Adjudicator can order a stay, as proposed by the Department.

Recommendation 11: Time limits, stay orders and documentation

Legislation should provide that:

(a) an appeal to the Immigration Adjudicators shall be generally lodged in writing but in exceptional cases, such as point of entry appeals, an application for review may be made orally; appeals shall be lodged within a period of 28 days from the date of the furnishing of a written outline of the reasons for a decision to the person subject to that decision, or within such further time as is permitted by an Adjudicator; a decision by an
Adjudicator granting or refusing an extension of time shall be subject to review by the Administrative Appeals Tribunal if the Tribunal gives leave to apply for such review; the Chief Adjudicator, or a Senior Adjudicator, is empowered to grant a stay in respect of the implementation of a reviewable decision where the Chief Adjudicator or Senior Adjudicator considers that this would, in all the circumstances, be just and reasonable; decisions granting or refusing a stay of the implementation of a primary decision are subject to review by the Administrative Appeals Tribunal if the Tribunal gives leave to apply for such review; and

c) the Department is required to provide the Immigration Adjudicators with any documents held by it upon which it proposes to rely, and any other documents necessary to a proper understanding of the primary decision, within 14 days of the Department receiving notification of an appeal, subject to the discretion of the Adjudicators to vary the time limit where necessary or appropriate.

Applicants' access to material

220. An important factor influencing the capacity of applicants to present their cases is the extent of their knowledge of the information upon which the primary decision maker has relied in making a decision or upon which the Department intends to rely at the hearing of an appeal. In the Council’s view, applicants should be given access to this information wherever practicable in advance of the hearing to enable them adequately to prepare their cases. The Council recognises that, in some circumstances, it may not be possible to provide an applicant with all relevant information where considerations of confidentiality or national security, international relations or defence arise. It therefore proposes that the applicant be given access to all documentary material or information on which the Department intends to rely, subject to limitations modelled on sections 35 and 36 of the AAT Act.

221. In its comments on the draft report the Department stated that it agreed with the recommendation in so far as it dealt with access to information, and stated that the recommendation was consistent with its view that there should be one comprehensive package of documentation for each decision, consisting of a standard application form and decision forms, and application for review forms, which should be made available to the Adjudicator, except where there are national security considerations which prevent it. The Council does not, however, accept the Department’s view that there ‘should be a positive requirement in law that applicants put all relevant facts to the Department at the primary decision stage . . . (and) should not be able to rely on facts that existed at the time of the primary decision without a sound excuse’. The Council’s reason for taking this view is that the Department’s suggestion is inconsistent with the general principle concerning external review on the merits that it is the responsibility of the review body to reach the ‘correct or preferable’ decision on the basis of all the evidence available at the time of the review. (However, see para. 184, para. (c) on the relevant consideration in the granting or refusal of leave.)

Recommendation 12: Access to documentary evidence
Legislation should provide that an applicant for review shall be given access to all information and documentary evidence on which the Department intends to rely, subject to limitations modelled on sections 35 and 36 of the Administrative Appeals Tribunal Act.

False documents or testimony

222. The Council has noted the Department’s concern with the difficulties of guarding against fraudulent or misleading documents or testimony, particularly in relation to documents which may have been obtained improperly overseas. The Department is concerned that the onus of proof as to the genuineness or otherwise of such evidentiary material should not fall on the Department. It sees this as another reason for confining standing to persons who are in
Australia (see para. 282), although it recognises that this would not solve the problem completely. The Council sympathises with the Department on this matter, but does not wish to make any specific recommendations at this stage, as it believes that the developing practice of the Adjudicators, and the AAT in its extended migration jurisdiction, will prove capable of coping with this problem. It may be noted in this regard that in Recommendation 13 the Council proposes that Adjudicators should have the power to require the production of documentary evidence and summon witnesses, and to require where appropriate that evidence be given on oath or affirmation.

Hearings
223. Unlike the Immigration Review Panels, the Adjudicators should provide the option of an oral hearing in all matters before them, subject to dispensing with them in certain circumstances (see paras 224-5). The Council has emphasised in this report that it is essential that the first-level review authority function in an informal, economical and expeditious manner. To this end proceedings should be conducted with as little formality and as much expedition as the requirements of all relevant legislation and a proper consideration of all matters before the Adjudicator permits. Adjudicators should not be bound by the rules of evidence.

224. While applicants should, in the Council’s view, be encouraged to attend hearings in person, this may not be feasible in some cases because they are outside Australia or reside a considerable distance from the centres at which provision exists for the conduct of hearings. Other applicants may be reluctant to attend because of apprehension about the review process. In the former case the applicant should, at the discretion of the Adjudicator, be offered the opportunity of participating in a telephone conference hearing.

225. The Department should also be given the opportunity adequately to present its case. Parties to the proceedings should be able to present written submissions whether or not they are present at a hearing. Where the parties are mutually agreed, or if an applicant is unable or unwilling to participate in a hearing, directly or through a representative, the Adjudicator should be entitled to determine the appeal without holding an oral hearing, but not otherwise.

226. Adjudicators should have powers adequate to ensure that the relevant facts are established and that appropriate material is made available to them. Thus, they should have the power, in appropriate cases, to require the production of documentary evidence and to summon witnesses, powers which the Council envisages will be exercised with restraint in order to avoid any increase in formality in the hearing of appeals.

227. The Council has also considered whether to recommend that Adjudicators should have power to require that evidence be given on oath or affirmation and has concluded that Adjudicators should have such a power, which the Council would expect to be exercised with restraint. As in the case of review of social security decisions (see Report No. 21, paras 141-2) there is a need to avoid proceedings becoming unduly formal and adversarial in nature and to encourage reviews to be conducted as expeditiously as possible. However, the importance of the issues, and the possibility that false testimony and evidence may be given or tendered, are such that Adjudicators should have the power to require evidence on oath where that appears desirable in the course of adjudication. Moreover, the Council has thought it proper to provide for power to require the attendance of witnesses, given the importance and finality of many of the decisions involved, especially those having the consequence that people are required to leave the country.
228. In its comments on the Council’s draft report, the Department agreed that proceedings conducted by an Adjudicator should involve few or no legal formalities and Adjudicators should be encouraged to take an active part in the proceedings.
**Recommendation 13: Hearings provisions**
Legislation should provide that:

(a) Immigration Adjudicators are required to conduct an oral hearing subject to a discretion to dispense with such a hearing where the parties so agree or the applicant is unable or unwilling to participate personally or through a representative;

(b) Immigration Adjudicators are empowered to require the production of documentary evidence and summon witnesses, and, where it appears desirable in the course of adjudication, to require that evidence be given on oath or affirmation subject to a penalty for giving false evidence;

(c) Immigration Adjudicators are not bound by the rules of evidence, and proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of all relevant legislation, and a proper consideration of the matters at issue, permit.

**Representation**

229. The Council noted in Report No. 21 (para. 146) that in practice appellants in social security appeals are permitted representation by a person of their choosing and that this has not affected the informality of proceedings. The Council considers that provision for an applicant to be represented is a desirable feature of any review process. In the migration jurisdiction this is particularly so since many applicants may be reluctant to pursue their cases without assistance, given possible language problems and other cultural and social factors which may operate to discourage them from pursuing an appeal on their own. The logical presentation of a case which a representative may be able to provide is also likely to prove valuable in assisting an Adjudicator to determine an appeal since it will enable the Adjudicator to identify the issues more clearly and without undue delay.

230. The Council expects that in most cases where the Department is represented it will be represented by an officer of the Department. The Council has some reservations about whether or not it is appropriate for provision to be made for the Department to engage outside legal representatives to represent it at hearings since there is a risk both that proceedings will become adversarial if both parties are represented and also that the applicant will be disadvantaged if the Department is legally represented and the applicant is not. On balance, however, the Council has concluded that the public interest would be best served, in terms of a proper presentation of both sides of the question and a sound decision upon review, if both parties are given the right to representation. It considers, however, that the Department should exercise this option with some care, and that Adjudicators should conduct proceedings so as to minimise any disadvantage which might be suffered by an unrepresented applicant. The Council also envisages that, where the Department is represented, its representative will perform his or her function in such a way as not to disadvantage an unrepresented applicant and so as to assist the Adjudicator in reaching the correct or preferable decision.

231. The Council has also considered what provision should be made for the assistance of an applicant who is not legally represented. In the Council’s view there is much to be said for a system, similar to that operating in the United Kingdom, under which applicants for review of immigration decisions could call upon the services of a specialised immigration advisory service (independent of the Department), and this matter is discussed further below (paras 241-2).

**Recommendation 14: Representation of parties**
Legislation should provide that a party to a review proceeding may be represented, if the party so wishes, by a person of his or her own choosing (whether legally qualified or not).
The Council recognises that the giving of detailed reasons can be a painstaking and time-consuming process, and that it may add to the delay involved in appeal procedures. However, the advantages for all parties concerned appear to the Council to outweigh the disadvantages. As with primary decision making, the provision of reasons by a first-level review authority may assist an applicant in deciding whether to pursue his or her case further (that is, by way of seeking leave to appeal to the final review authority). Moreover, the practice of giving reasons may prove to be of assistance to the primary decision maker in establishing the considerations which were taken into account by a review body in determining an appeal and which may be applicable to other cases. The Council does not consider, however, that the reasons provided by a first-level review authority need be as detailed as those given by a final-level review authority. Although it is considered that the terms of a decision should always be reduced to writing, the reasons for a decision might be given orally or in writing, at the discretion of the Adjudicator. If one of the parties so requests, however, an Adjudicator should be obliged to provide in writing as soon as practicable or within 14 days of such a request being received, in order to give the applicant sufficient time to decide whether or not to seek leave to appeal to the second-level review authority. However, failure to provide reasons within the specified time should not operate to invalidate the decision.

Under the provisions of section 25D of the Acts Interpretation Act 1901, unless otherwise exempted, Adjudicators would, when giving written reasons for their decisions, be required also to set out their findings on material questions of fact and to refer to the evidence or other material on which those findings are based. In the Council’s view the provisions of section 25D should apply to the statements of reasons to be given by the Immigration Adjudicators. The Adjudicators will provide the final review authority for the vast bulk of applications for review and, if there is to be confidence in the review system, applicants for review should receive statements of reasons which (while they may be less detailed than the reasons given by a higher review authority) contain the essential elements required by section 25D. Moreover, it will be necessary for the AAT, in considering whether or not to grant leave to seek further review of a decision, to look carefully at the statements of reasons given by an Adjudicator. If the Tribunal is to apply the criteria set out above (Recommendation 5 and para. 184) it will need the detailed reasons of the Adjudicator in order to do so. The Council’s expectation is that the Adjudicators will be of such a calibre that the provision of reasons of the standard required by section 25D will not be unduly onerous.

Recommendation 15: Decisions and statements of reasons

Legislation should provide that:

(a) Immigration Adjudicators are required to give a decision in writing and provide a statement of the reasons for a decision;
(b) such a statement may be given orally, but, where requested by either of the parties, a written statement of reasons for a decision shall be provided as soon as practicable but within 14 days of such a request being received; and
(c) failure to provide a statement of reasons within the time specified does not operate to invalidate the decision. (However, see Recommendation 21 as to the effect on time limits relating to applications for leave to seek review by the Administrative Appeals Tribunal.)

Private or public adjudication hearings

The Council has considered whether oral hearings conducted by Adjudicators should generally be held in public. One of the deficiencies it has identified in the procedures of the Immigration Review Panels is that proceedings are conducted in private and normally without
the appellant being present (see para. 72). Criticism of that approach by representatives of the ethnic communities stemmed largely from the fact that no information is publicly available about the manner in which the IRPs determine cases or the criteria which they consider should be applicable to the exercise of particular decision-making powers. The recommendations which the Council has made in this report concerning the structuring of appropriate discretions and the provision of written notification of a decision and the reasons for that decision by both primary decision makers and Immigration Adjudicators would largely overcome this problem. It is the Council’s view, nevertheless, that adjudication hearings should generally be held in public unless special circumstances require otherwise, for example in the interests of factors such as national security, international relations, defence and individual privacy.

235. In its Report No. 21 (paras 150-2) the Council recommended, by majority, that hearings at the first level of review in that jurisdiction should generally be conducted in private subject to the discretion of the presiding member to admit any person. In making that recommendation, the Council referred to the essentially personal nature of social security claims and disputes. It was felt that social security claimants would be less intimidated about lodging appeals to the proposed Social Security Appeals Tribunal and about participating in the appeals process if hearings were generally conducted in private.

236. The Council is of the opinion that prospective applicants for review of migration decisions are unlikely to be discouraged from lodging an appeal and participating in an appeal process where hearings are generally held in public. The Council has thus concluded that it is desirable that hearings-in the migration jurisdiction should generally be conducted in public, but that there should be provision for private hearings in cases where an Adjudicator so directs. An appellant should be informed at the outset of a hearing of the right to request that it be held in private, and it is envisaged that such a request would be granted unless the Adjudicator is of the opinion that, in the particular circumstances, the public interest requires otherwise. The Council believes that this provision would be sufficient to meet the Department’s concern that, as the private lives of people are being scrutinised, they are more likely to have confidence in putting their cases if the proceedings are held in private.

Recommendation 16: Hearings in public
Legislation should provide that hearings by Adjudicators shall be held in public unless an Adjudicator directs otherwise.

Protection of Adjudicators, representatives and witnesses
237. The Council considers that the proper functioning of the adjudication system would be promoted if Adjudicators, representatives and witnesses were protected in the performance of their duties to the same extent as is provided for in respect of the operation of other review authorities such as the AAT, and as was recommended by the Council in relation to proceedings of the proposed Social Security Appeals Tribunal (Report No. 21, para. 153).

Recommendation 17: Protection of Adjudicators, representatives and witnesses
There should be provision similar to section 60 of the Administrative Appeals Tribunal Act for the protection of Immigration Adjudicators, representatives and witnesses appearing in review proceedings.

Accommodation and support services
238. The Council considers that the following support services need to be made available to ensure the effective and efficient functioning of the first-level review authority.
**Venue**

239. To promote accessibility, Immigration Adjudicators should operate from the capital city of each State and Territory, but provision should be made for visits to other localities where this is deemed necessary. Suitable accommodation, by way of hearing rooms and office space physically independent of departmental accommodation, should also be provided in each capital city.

**Staff**

240. Clerical staff required to service the proposed first-level review authority should be provided by the Department of Immigration and Ethnic Affairs. The Council recognises that this may tend to link Adjudicators with the Department, but considers that, for reasons of cost, it is desirable to avoid the creation of yet another branch of bureaucracy. It is noted that the Department would prefer the creation of a separate independent statutory authority, with its own administrative structure and staff. While the Council has no objection in principle to such an arrangement and recognises its merits, it is also conscious of the costs involved. It considers that the independence of the Adjudicators would be sufficiently safeguarded if they, their staff and their hearing rooms were physically separate from the Department (preferably in a separate building) and the staff were responsible in their day to day operations to the Chief Adjudicator or a Senior Adjudicator.

**Other support services: specialist immigration advisory service**

241. The Council has noted that, in setting up the Immigration Review Panels, the intention was that the Department would assist migrant welfare groups to provide counselling and advice to applicants on how to present their cases before the Panels. This has not eventuated and the Council understands that, at present, most migration welfare groups have neither the expertise nor the financial capacity to provide such a service. The Council believes that a specialist immigration advisory service should be created, independent of the Department, similar to that now operating in the United Kingdom. The information available to the Council is that the UK service operates economically and effectively in assisting people with immigration appeals, including representing appellants at hearings, and because of its experience of the likely outcome of proceedings it has served to save both applicants and the appeal process from the expense of unnecessary proceedings. The Council’s view is that the costs of such a service would be well justified both in terms of the provision of assistance to those who are likely to be unaware of the rights and procedures open to them and to have cultural and language difficulties in pursuing them, and in terms of the more effective use of the review mechanisms. Legal aid may not be available to such people because of means tests provisions, and in any case the services of a specialist body aware of the problems of the migration area are preferable in an area where it is likely that many applicants will require assistance.

242. Since there maybe some delay before such a specialist body is created, it is the Council’s view that there should be immediate government funding for migration welfare groups. Provision should be made for appropriate training and funds to be made available to migrant welfare groups, and to other legal advice services, to enable them to assist applicants for review and to counsel persons affected by adverse decisions about whether it is appropriate to pursue an appeal. As with the specialist advisory service, the costs of such assistance would be offset by a more effective and efficient review process. Moreover, the Department should assist those requiring such services to contact migrant welfare groups by such means as the provision of a ‘hotline’ from major points of entry. The provision of funds to migrant welfare groups would enable them to counsel persons affected by adverse decisions about whether it is appropriate to pursue an appeal. This proposal might perhaps increase the costs of review in the short term,
but in the longer term these costs should be offset by a more effective and efficient review process.

Translation and interpreter services

243. For the review system to operate properly it is, of course, necessary to ensure the provision of adequate translation and interpreter services. The Council considers that the existing services should be expanded if necessary to provide such services at adjudication hearings where this is requested by the applicant or deemed appropriate by the Adjudicator, and at points of entry.

Expenses of applicants

244. Accommodation and travel expenses are currently paid in certain circumstances by the Department of Social Security in respect of appeals to the Social Security Appeals Tribunal. In principle, the Council believes that this is a desirable arrangement. It acknowledges, however, that in the migration jurisdiction there are particular considerations which suggest the need for some modification. The potential for abuse of the review system, primarily to delay the implementation of adverse decisions, is one such consideration. The Council expects that some cases of abuse will occur despite the safeguards which are proposed elsewhere in this report. It is not possible to identify such cases in advance. However, the Council does not expect that the problem of abuse will be widespread, but because of the potential problem the Council considers that it would be imprudent to have a general rule that the expenses of all appellants will be paid. Instead, the Council considers that there should be a discretion to order payment of expenses in appropriate cases. Accordingly, the Council proposes that an Adjudicator should be empowered to order payment of an applicant’s accommodation and travel expenses where it appears to the Adjudicator to be just and reasonable to do so. The Council would expect the Adjudicator to have regard in particular to whether the financial circumstances of the applicant are such as to preclude the applicant from appearing before an Adjudicator in circumstances where a personal appearance is desirable in order to facilitate the making of a sound decision upon review. Where witnesses are summoned by the Adjudicator their costs should be paid, but not otherwise. Funds should be provided in the Department’s estimates for this purpose.

245. The Council’s recommendations on expenses of applicants are directed only to accommodation and travel expenses and their relevance to the need or otherwise for an applicant’s presence at a review hearing. They are not intended to affect in any way the rights which an applicant may have to legal aid, including any entitlement to assistance under section 69 of the AAT Act.

Recommendation 18: Accommodation and support services

For the purposes of the operation of the first-level review authority, provision should be made for:

(a) suitable accommodation for Immigration Adjudicators, their staffs and hearing rooms and other support services, in locations separate from the Department in the capital city of each State and Territory;

(b) the conduct, where necessary, of hearings in locations other than capital cities;

(c) the servicing of the first-level review authority by staff employed by the Department but responsible, in their day-to-day duties, to the Chief Adjudicator or a Senior Adjudicator;

(d) the provision of adequate translation and interpreter services for adjudication hearings from the Department’s existing translation and interpreter service;

(e) the allocation of funds for the purpose of meeting travel and accommodation expenses of applicants where an Adjudicator so orders on the grounds that it is just and
Reasonable in the circumstances, and of meeting the costs of any witnesses summoned by an Adjudicator; and

(f) the creation of a ‘hotline’ advisory service to give basic information directing enquirers to sources of advice and assistance.

Recommendation 19: Specialist immigration advisory service and assistance to migrant welfare groups

Provision should be made for:

(a) the creation of a specialist immigration advisory service independent of the Department to assist applicants for review both in deciding whether or not to seek review of decisions affecting them and in preparing and conducting their cases; and

(b) the training of members of appropriate migrant welfare groups to enable them to provide advice and assistance to persons affected by adverse decisions and the allocation to such groups of funds to enable them to provide such advice and assistance as a continuing service.

Second Level of External Review

The appropriate review body

246. The Council considers that effective second-level review on the merits is typified by review of the kind provided by the AAT. In previous reports concerned with providing a high standard of review on the merits at the second level of a two-tiered structure (in social security and repatriation jurisdictions) the Council has favoured the AAT as the second level of merits review (see Report No. 21, paras 165-70, and Report No. 20, paras 232-71 respectively). The immediate question which arises here is whether that Tribunal also provides a suitable forum for the second-level review of migration decisions.

247. The Council has previously expressed the view that ‘in the absence of special reasons to the contrary, a review jurisdiction in an area of Commonwealth administration should normally be vested in the AAT rather than in a specialist tribunal’ (Report No. 20, para. 261). The Council has considered whether there are special reasons justifying the creation of a specialist review body on this occasion, but has concluded that no such special reasons exist. In reaching this conclusion the Council has been mindful of the characteristics of decision making in the migration area which may give rise to difficulties in reviewing particular classes of migration decisions. These difficulties are, however, largely associated with delay and would apply to some extent to any review process. As already stated, the Council considers that the review structure it has proposed and the operational procedures it has recommended will do much to overcome possible problems associated with delay. In addition, the apparent complexity of migration decision making, brought about by the large number of policies and practices which are applied to the decision-making process, is capable of being substantially reduced. This can be expected to occur if the discretionary powers contained in the Migration Act and the Migration Regulations are, as the Council has recommended, appropriately structured by a combination of legislative means and the tabling in the Parliament of rules containing the applicable principles and criteria.

248. The AAT has shown itself capable of dealing with a wide range of matters of varying complexity. In relation to migration matters, it has already proved its value as a review authority in relation to criminal deportation decisions and the Council believes that a similar outcome will be achieved in an expanded migration jurisdiction.

249. The Council has concluded, in the light of the above considerations, that the AAT is the appropriate body to provide second-level review of migration decisions. In the Council’s view, in order to avoid as far as possible undue delay at the second review level, adequate provision
will have to be made for additional resources where the workload of the Tribunal indicates that this is required. This may necessitate the appointment of more members, the provision of further support staff and the provision of additional hearing facilities (see also paras 433-4).

250. The appropriate respondent in applications for leave to seek further review by the AAT following an application to the Adjudicators, or in applications for review by the AAT either following the granting of leave or as a matter of direct application to the AAT in certain cases, will depend on the circumstances in each case. In cases where the original applicant seeks leave or review, the Minister or the Secretary to the Department will be the respondent. In cases where the Minister or the Secretary seeks leave or review, the original applicant will be the respondent.

**Recommendation 20: Second level of review: Administrative Appeals Tribunal**

(1) Legislation should provide that the second level of merits review in the migration jurisdiction is provided by the Administrative Appeals Tribunal.

(2) Legislation should also provide that: when review by the Immigration Adjudicators is a prerequisite to review by the Administrative Appeals Tribunal, the Tribunal shall review the original decision, as affirmed or varied by the Immigration Adjudicators; where the applicant appeals, the respondent is the Minister or the Secretary of the Department; and where the Minister or Secretary of the Department appeals, the respondent is the original applicant.

**Time limits for lodging applications for leave to seek review and applications for review**

251. As noted in para. 181 above, it is envisaged that access to the AAT, as the second-level review authority, will generally be by the grant of leave, but that, in the case of certain specified classes of decisions, a right of appeal will lie direct to the Tribunal (see Recommendation 28(3)(i). As with first-level review, it is clearly desirable that time limits for the lodging of applications in both categories be established.

252. Consistently with the Council’s recommendations as to time limits for lodging appeals to the Adjudicators, it proposes that a time limit of 28 days from the furnishing of a written statement of reasons by an Adjudicator should apply in the case of an application for leave to seek further review. As this time limit is consistent with section 29 of the AAT Act, which deals with time limits for lodging applications for review, it will be unnecessary to make any special provision in this respect.

253. The Council proposes that in relation to direct appeals to the AAT there should be a time limit of 28 days to run from the date on which the primary decision maker furnishes a written outline of reasons for the decision. The person subject to the decision would still be entitled to seek a statement of reasons under section 28 of the AAT Act, in which case the normal provisions of section 29 would apply with respect to time limits. However, where the applicant is content to rely on the reasons given by the primary decision maker, it will be necessary to modify the provisions of section 29 of the AAT Act.

254. In both cases discussed in the preceding paragraph the Council believes there should be a discretion on the part of the Tribunal to extend the time limit, as there is in sub-section 29(7) of the AAT Act.

255. The Department has suggested that the AAT should be required to hear and determine applications for leave within a short specified time such as 14 days. The Council does not at this stage consider that it is necessary to make legislative provision for such a time limit, since it expects that the Tribunal will be very conscious of the need for expedition in this area.
Moreover, it is the Council’s view that whether or not such expedition is achieved will depend more on the resources made available to the AAT to fulfil its role of considering leave applications than on any legislative time limit.

**Recommendation 21: Time limits for lodging applications**

(1) Legislation should provide that:

(a) applications for leave of the Administrative Appeals Tribunal to seek further review of a primary decision which has been reviewed by the Immigration Adjudicators shall be lodged within 28 days of the furnishing of a written statement of reasons by an Adjudicator;

(b) applications for direct review by the Administrative Appeals Tribunal of primary decisions, as provided for in Recommendation 28(3), shall be lodged within 28 days of the furnishing by a primary decision maker of a written outline of reasons for the decision; and

(c) the Tribunal is empowered to extend the time limit for lodging applications in particular cases.

(2) Section 29 of the Administrative Appeals Tribunal Act should be modified accordingly.

**Time limits for lodging a statement of reasons and other relevant material with the AAT**

256. The AAT Act (sub-s.37(1)) specifies that a decision maker must lodge with the AAT within 28 days of receiving notice of an application for review of a decision, a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision. The Act also states that every other relevant document must also be lodged with the AAT within this period. Section 37 provides for the shortening of the time limit but not for its extension.

257. While it is obviously desirable that relevant material be presented to the Tribunal as quickly as possible, migration decisions which are reviewed at this level may necessitate obtaining information and documents from overseas or interstate. In these circumstances, the Council considers that the operation of section 37 of the AAT Act in the migration jurisdiction should be modified to provide for the time limit for the production of a statement of reasons and other relevant material to be either shortened or extended where the AAT considers this appropriate. The Council will, as part of any later consideration it may give to the operation of the AAT Act as a whole, consider whether there is a need for any amendment of section 37 to apply more generally than to the migration jurisdiction alone.

**Recommendation 22: Time limits for lodgment of documents**

Legislation should provide that where a decision is subject to review by the Administrative Appeals Tribunal (either directly or after the grant of leave), the time limit for lodgment of a statement of reasons and other relevant material by the Department is 28 days from the date of receiving notice of an application for review or grant of leave to appeal, except where the Tribunal directs otherwise, and that section 37 of the Administrative Appeals Tribunal Act is amended accordingly.

**Constitution of the Administrative Appeals Tribunal**

258. The Council considers that as a matter of general principle the normal provisions of the AAT Act relating to the constitution of the AAT should apply so that the President of the AAT is able to make full use of the available resources. The President should, accordingly, be entitled to appoint the most appropriate tribunal to hear a particular application, having regard to such matters as the office and position of the person whose decision is being reviewed. This would permit due account to be taken of the extent of the Minister’s involvement in the making of a particular decision.
259. As noted earlier in this report (para. 9), the Council, in its *Interim Report on the Constitution of the Administrative Appeals Tribunal* (Report No. 19, para. 30), recommended that the AAT be constituted in criminal deportation cases by any Presidential Member sitting alone, and legislation to this effect has been passed. This means that, unlike the situation which obtained previously (where the term Presidential Member in sub-section 66E(4) of the Migration Act referred to a Presidential Member who was a Judge of the Federal Court of Australia), Deputy Presidents may also now sit on migration appeals.

260. In recommending a change to the AAT’s constitution, the Council stated that it saw this as only an immediate and short term solution to the problems which had arisen in the AAT’s migration jurisdiction. These problems were identified as the sizeable numbers of applications received, the amount of time taken to hear an application, and the limited availability of Judges of the Federal Court, other than the President of the AAT, to hear appeals.

261. Clearly the amendment to the Migration Act resulting from the Council’s recommendation, while providing a means of alleviating some of the problems referred to above, relaxes but does not remove the fetter on the AAT’s constitution in its current Migration Act jurisdiction. The Council holds the view that the normal provisions of the AAT Act should apply in relation to the constitution of the AAT in an expanded Migration Act jurisdiction, and it therefore considers that the existing fetter on the AAT’s constitution in criminal deportation cases should be removed. The Council considers that it would ordinarily be desirable for the Tribunal to be constituted in its migration jurisdiction by a Presidential or Senior Member and two other Members of the AAT, but it does not wish to see a requirement of that kind formally laid down in legislation. However, repeal of sub-section 66E(4) is necessary before the AAT could be ordinarily constituted in the way the Council considers most desirable.

262. The Department has expressed reservations about the recommendation that the normal provisions of the AAT Act should apply to the constitution of the AAT in its expanded migration jurisdiction, in so far as it bears on the review of decisions made by Ministers. The Council believes, however, that the powers of the President to constitute the AAT will be exercised with due regard to the status of the decision maker where the decision has been made by the Minister, as required by sub-section 20(3).

263. The Council notes that the AAT already has jurisdiction to conduct determinative review on the merits of ministerial decisions in a number of jurisdictions without any fetter having been placed on the AAT’s constitution in such matters. Some examples of such jurisdictions are as follows:

- direction of the Minister as to the value of a part, component or ingredient of any goods (*Customs Tariff Act 1982*);
- decision of the Minister making, varying, revoking or amending a consumer product safety order (*Consumer Affairs Ordinance 1973* (A.C.T.));
- refusal by the Minister to approve an organisation or event for purposes of the Customs (Cinematograph Films) Regulations;
- decisions by the Minister making a declaration, concerning a change in the constitution, articles, or rules of a medical or hospital benefits fund, the effect of which is that the change is inoperative and of no legal effect unless and until the Minister approves the change (*National Health Act 1953*);
- decision of the Minister on reconsideration to affirm decisions relating to such matters as: grant or variation of a certificate approving in principle of a private hospital; approval with or without conditions of a certificate approving of premises as a private hospital or alteration or additions to premises as a private hospital; revocation of approval of premises...
as a private hospital; variation of categorisation of particular private hospitals etc. \textit{(Health Insurance Act 1973)};

- decisions of Ministers under the \textit{Freedom of Information Act 1982};
- decisions of the Minister concerning approval of a nursing home \textit{(Nursing Homes Assistance Act 1974)}.

264. The Council emphasises that it will be necessary to appoint to the AAT persons who have an affinity with the problems which arise in the migration area and who have an understanding of the differing cultural backgrounds of migrants. In the Council’s view, such persons should also be capable of sitting in other jurisdictions of the AAT, and should be expected to contribute to the work of those jurisdictions as well as to that of the migration jurisdiction.

\textbf{Recommendation 23: Constitution of the Administrative Appeals Tribunal}

(1) The provisions of the Administrative Appeals Tribunal Act should apply in relation to the constitution of the Tribunal to hear appeals in its current and proposed Migration Act jurisdiction. Sub-section 66E(4) of the \textit{Migration Act 1958} should be repealed.

(2) In practice the Tribunal should ordinarily be constituted in its migration jurisdiction by a Presidential or Senior Member and two other members of the Tribunal, but the President should retain discretion as to the Tribunal’s constitution in individual cases.

(3) Appointment should be made to the Tribunal of persons who have an affinity with the problems which arise in the migration area and who have an understanding of the differing cultural backgrounds of migrants.

\textbf{The Power to make a Binding Decision}

265. The Council has considered whether review by the AAT in the migration jurisdiction should be determinative or recommendatory. In addressing this issue previously in relation to the current Migration Act jurisdiction of the AAT, the Council indicated that:

- a recommendatory jurisdiction is inconsistent with the AAT’s character since its function is to determine the correct or preferable decision in a particular case and not to act as a ministerial adviser;
- to encourage an applicant to incur considerable hardship and expense in applying to the AAT with no guarantee that the applicant will not be deported even if successful before the AAT is to impose too great a burden on that person;
- a recommendatory jurisdiction is not inherently necessary in the area of migration decision making; and
- tribunals with power to review on the merits deportation decisions made on the grounds of criminal conviction, and to revoke such decisions, exist in the United States of America and Canada. \textit{(ARC Third Annual Report 1979, para. 87)}

266. No legislative action has been taken to give effect to the above view in respect of the current Migration Act jurisdiction of the AAT, and it is clear that successive governments have not accepted the Council’s views. However, the Council remains strongly of the view that a recommendatory power is not consistent with the character of the AAT, for the reasons given above. The Council notes also that as a recommendatory power is inconsistent with the AAT’s character, such a limitation on its powers in the migration jurisdiction would be unlikely to attract the best persons for appointment within that jurisdiction, and would be likely to deter Judges of the Federal Court from participating in hearings in the migration jurisdiction.

\textbf{Recommendation 24: Review by the Administrative Appeals Tribunal to be determinative}
Legislation should provide that the Administrative Appeals Tribunal exercises a power of determinative rather than recommendatory decision making in its migration jurisdiction, as it does in most of its other jurisdictions.
PUBLIC INTEREST CONSIDERATIONS AND MINISTERIAL CERTIFICATES

267. The Council is of the view that ministerial decisions should normally be subject to effective review on the merits. However, given that in the migration jurisdiction some decisions involve sensitive considerations of international relations, national security, or defence, the Council believes that access to the review process should be circumscribed by a power of the Minister to certify that, in the opinion of the Minister, the public interest requires the government to make the final decision in a particular case. In the Council’s view the Minister should be empowered to issue such a certificate only where the Minister is satisfied that to retain ultimate government responsibility would be in the public interest because of considerations such as national security, defence or the international relations of the Commonwealth. Consistently with the Council’s recommendation in Report No. 23, Review of Customs and Excise Decisions: Stage Two (ALPS, 1985) (paras 109-123), it is the Council’s view that only the Minister should be empowered to issue such a certificate, the certificate should disclose the grounds on which it is issued, and the Minister should be required to table a copy of the certificate in the Parliament within 15 sitting days of its issue. (The Council notes that while the issue of such a certificate would except a particular decision from review by the first and final review authorities, it would not preclude review in appropriate circumstances by the Courts, the Ombudsman (but only of advice given to the Minister and not a decision of the Minister as such), or the Security Appeals Tribunal, or inquiry by the Human Rights Commission.)

Recommendation 25: Ministerial certificates
Legislation should provide that:
(a) the Minister is empowered to issue a certificate, the effect of which is to exclude review on the merits in relation to a particular decision, stating that the Minister is of the opinion that it is in the public interest, because of considerations such as those of national security, defence or international relations, that responsibility for the decision should remain with the Government;
(b) a certificate issued in accordance with paragraph (a) shall be personally signed by the Minister and shall specify one or more grounds upon which the certificate is issued; and
(c) the Minister is required to table a copy of the certificate in the Parliament within 15 sitting days of its issue.

ACCRUAL AND EXERCISE OF RIGHTS OF REVIEW

268. In relation to the new appeal structure the Council has given consideration to the question of accrual and exercise of review rights and the review of sequential decisions. Thus, for example, refusal to grant a change of status may not in all cases be accompanied contemporaneously by a decision to issue a deportation order but both decisions will be subject to review. The Department has expressed the view that review bodies should not be entitled to hear an appeal where there is a series of decisions ‘until a final decision has been taken’. The Council considers that each decision should be amenable to review on the merits at the time it is made, but that an applicant for review should be required to exercise in one proceeding all review rights then available to him or her, and not to bring a separate appeal in respect of each decision.

269. The Council believes that persons should not have to postpone their rights of review until they have become the subject of a deportation order, under which their removal from Australia might be imminent and the time for appeal limited in extent. The Council does not consider that its proposals will lead to excessive delays, since on an application for review of a later decision, or for leave to seek further review of such a decision, the review body can be expected to take into account the decisions reached in previous review proceedings where
these are relevant, which would enable the proceedings to be disposed of quickly where there were no new issues or material to consider.

**Recommendation 26: Accrual and exercise of rights of review**
Legislation should provide that all rights to review on the merits existing at the date of any review by an Immigration Adjudicator or the Administrative Appeals Tribunal shall be exercised concurrently.

**Decisions recommended for review**

270. This section deals first with some questions concerning factors relevant to review of migration decisions, and then examines the substantive decisions in relevant migration and related legislation to determine which of them is suitable for review on the merits.

**Factors relevant to review of migration decisions**

271. This report has already summarised some of the questions involved in discussing the nature of the interests affected by migration decisions (paras 97-101). This section expands on the discussion concerning the following two matters:

- the potential impact on individual interests of particular classes of migration decisions; and
- other factors favouring the provision of review;

and also contains a discussion of:

- standing to seek review at both levels of the proposed review structure.

**THE POTENTIAL IMPACT OF MIGRATION DECISIONS**

272. It is self-evident that the various classes or categories of migration decisions have a different impact on significant individual interests depending on the personal circumstances of those affected by them. This is illustrated by the following examples:

- a decision to refuse migrant or temporary entry is likely to have a greater impact on significant individual interests if the affected person has some family or other ties with Australia which that person is concerned to maintain than might otherwise be the case; in addition, the interests of those with whom the person has those ties are likely to be affected to a significant degree;
- a decision to deport a person who has resided in Australia for a lengthy period, whether as a permanent resident or as a prohibited non-citizen, is likely to have a more severe impact on such a person than on one who has not been long in Australia, since the former is more likely to have established strong links with Australia through family and employment;
- a decision to deport may be more significant, in terms of its effect on individual interests, than a decision to refuse entry.

273. Objectively, certain classes of migration decisions are likely to have a greater impact than others. For example, a decision to deport a person will probably have a greater impact on that person and others associated with him or her than a decision varying the conditions for a temporary entry permit. However, the Council considers that those classes of migration decision which, prima facie, are capable of having significant consequences for those affected by them should in principle be subject to effective external review on the merits, although the likely impact of different classes of decision may not be the same and the severity of the consequences for the persons concerned may vary in individual cases.

274. The Council also believes that, in making judgments as to which decisions should be subject to review, it is highly desirable that due regard be had to the interests of Australian citizens and permanent residents. In this context, it has taken the view that a special duty is
owed to Australian citizens and permanent residents whose interests are affected by migration
decisions and that individual justice, in the form of the availability of effective review on the
merits, at least to such persons, should be assured as far as is reasonably practicable.

**OTHER FACTORS RELEVANT TO THE PROVISION OF REVIEW**

275. The Council recognises that decisions which do not directly affect the interests of
Australian citizens or permanent residents, or which, prima facie, may have less severe
consequences than, for example, deportation decisions, may nevertheless be of a nature which
makes it desirable that they be subject to effective review on the merits. Certain classes of
decision, because of their character, are likely to be regarded by the persons subject to them as
indicating that they might reasonably expect to be granted entry to Australia or, if already here,
might reasonably expect to be granted permission to remain. Those persons may have engaged
in conduct and incurred costs in reliance on the original decisions concerned. In such
circumstances it would be unfair and unreasonable to reach a later adverse decision without
providing a right of review on the merits to such persons.

276. The Council accordingly considers that, as a matter of principle, in cases involving a
prior favourable decision upon which persons reasonably rely in their conduct, a right of
review on the merits should be provided in the case of a subsequent unfavourable decision.
An example of such a prior favourable decision is the grant to a person of a visa authorising
travel to Australia for the purpose of permanent or temporary entry. If that person is
subsequently denied an entry permit on arrival in Australia, the Council considers that review
on the merits of that latter decision is desirable in view of the fact that the person concerned has
relied on the visa as indicating a likelihood of being permitted to enter Australia.

277. The application of the considerations discussed above may be seen in the specified
proposals for the review of discretionary powers set out below (paras 288-420) and in
Recommendation 28.

278. As stated above (para. 98), matters which the Council has taken into account in
considering the need to qualify the provision of review on the merits include the following:
• the costs of review;
• the volume of decisions of a particular class;
• the need to avoid excessive delay in implementing decisions, especially deportation
decisions;
• whether those affected by particular classes of decisions are located within Australia or
overseas; and
• whether those affected by particular classes of decisions have engaged in unlawful conduct.

**STANDING TO SEEK REVIEW**

279. The AAT Act (s.27) provides that a person has standing to seek review of a reviewable
decision where it affects the interests of that person. Moreover, sub-section 30(1A) provides
that where an application has been made by a person to the AAT for a review of a decision, any
other person whose interests are affected by a decision may apply in writing to the AAT to be
made a party to the proceedings, and the AAT may in its discretion make that person a party to
the proceedings. Further, section 31 provides that, where it is necessary for the purposes of the
Act to decide whether the interests of a person are affected by a decision, the matter shall be
decided by the AAT and, if it decides that the interests of a person are affected by a decision,
the decision of the AAT is conclusive. The Council considers that, with some modifications,
these provisions should apply in the migration jurisdiction in respect of review by both
Immigration Adjudicators and the AAT. The principal modification to the standing provisions
of the AAT Act which the Council proposes relates to those decisions which the Council
considers should only be reviewable at the instance of Australian citizens and permanent residents whose interests are affected by the decision. These decisions are identified later in this chapter where the reasons for placing restrictions on standing to seek review in particular instances are discussed (see para. 281). A second modification is that the Council believes that a determination by an Adjudicator that a person lacks standing should not be conclusive but should be subject to review by the AAT in accordance with the general recommendations made in this report, including the requirement of leave.

280. In determining whether or not there should be any limitations on standing to seek review by either the Immigration Adjudicators or the AAT, in addition to those which normally apply in respect of proceedings before the AAT, the Council has taken account of several factors. These include: whether a reasonable expectation has arisen as to a particular decision being taken, or whether action has reasonably been taken in reliance upon such a decision; the volume of decisions which could be involved; and whether persons concerned should be disqualified from personal standing by reason of their unlawful conduct. These factors are discussed in detail later in this chapter in so far as they arise in relation to particular classes of decisions.

281. The classes of decisions in respect of which the Council is proposing a limitation on the normal rules of standing, as they currently apply to applications to the AAT, in respect of applications for review by the Immigration Adjudicators, or for review by, or leave to appeal to, the AAT, are indicated in Recommendation 28(1). (Where no special limitation on standing is indicated there, the AAT provisions as to standing are to apply.) For convenience, listed below are all classes of decisions in relation to which the Council proposes some modification to the general principle that standing includes any person whose interests are affected by a decision. Unless otherwise shown, the modification is that standing is restricted to Australian citizens or permanent residents whose interests are affected by the decision in question:

- a decision to refuse a migrant entry or temporary entry visa;
- a decision to refuse change of status from one category of temporary entry to another;
- a decision to refuse to extend a temporary entry permit—standing restricted to:
  - an Australian citizen or permanent resident whose interests are affected;
  - any person whose interests are affected by the decision where the applicant is seeking an extension of time for medical treatment not available in that person’s home country, or for the purpose of continuing an approved course of study;
- a decision under sub-section 6(2), 6(5) or 7(2) of the Migration Act to refuse to grant a temporary entry permit to a prohibited non-citizen;
- a decision to require voluntary departure made pursuant to section 31A of the Migration Act;
- a decision to deport a person pursuant to section 12 of the Migration Act (as is currently provided by sub-s.66E(2) of the Migration Act);
- a decision to deport a person pursuant to section 14(2) of the Migration Act; and
- a decision to deport a prohibited non-citizen pursuant to section 18 of the Migration Act.

282. The Department favours a narrower standing requirement than that proposed by the Council in relation to decisions affecting temporary entrants. It proposes that standing to seek review of such decisions should be confined to an immediate family member, a permanent resident, or an Australian citizen who is, in addition, aggrieved by the relevant decision by reason of some exceptional personal compassionate factor. The Council considers that such a restricted standing requirement is undesirable. It would operate to deprive both temporary entrants and other persons of the right to seek review of decisions which may have a significant impact on their lives and interests. For example, such a requirement would preclude a student, whose temporary entry permit was cancelled, from seeking review of such a decision. It would
also operate to exclude as applicants for review in relation to temporary entry visa decisions persons with a business or employment interest in a particular decision or any family member who could not show an exceptional compassionate factor: such persons would be denied standing under the Department’s proposal even though they were Australian citizens or permanent residents. The Council considers that the Department’s proposal is unduly narrow.

283. The Council believes that there are particularly strong reasons for providing a channel for review of temporary entry decisions to those Australian citizens and permanent residents who can show that their interests are affected by them (see also para. 100). The Council envisages that the persons who would come within that description would include: the sponsors of migrants (for example, in relation to a decision not to grant an unrestricted entry permit), members of the close family of a person the subject of a decision, and employers or potential employers in appropriate cases. The phrase ‘person or persons whose interests are affected by a decision’ cannot be defined in advance, but it will undoubtedly operate as a limiting factor. The Council believes that the AAT and the Immigration Adjudicators will interpret and apply this phrase in the way that has so far prevailed in considering applications for review, or to be joined as a party, under the existing provisions of the AAT Act (see ss.27, 30 and 31).

284. Questions concerning standing to seek review arise in an acute form in relation to persons who have entered Australia illegally or have become prohibited non-citizens by ‘overstaying’. On 17 October 1985, the Minister announced a policy whereby such persons are no longer permitted to appeal to an Immigration Appeal Panel against adverse migration decisions. The Council has addressed itself to the special problems which arise in this respect in the sections of this chapter dealing with prohibited non-citizens, temporary entry permits and change of status (paras 358-73) and with refusal to grant a temporary entry permit or further permit to prohibited non-citizens (paras 376-7). However, it may be noted that the discussion is relevant also to the question of standing in relation to deportation decisions under sections 12, 14 and 18 of the Migration Act (see paras 400-12).

285. It is currently provided in section 31 of the AAT Act that the AAT’s determination whether a person has standing for the purposes of AAT review is conclusive. The Council considers that a determination by an Immigration Adjudicator concerning a person’s standing should be subject to review by the AAT at the instance of the appellant or the respondent. The Council also believes that its proposals concerning the requirement to obtain the leave of the AAT should also apply in relation to applications for review of decisions as to standing.

Recommendation 27: Standing to seek review
(1) Subject to the exceptions identified in Recommendations 28(1) and (3):
   (a) legislation should provide that sections 27, 30 and 31 of the Administrative Appeals Tribunal Act apply to determine who has standing for the purposes of Administrative Appeals Tribunal review in its proposed migration jurisdiction; and
   (b) provisions modelled on sections 27, 30 and the first part of section 31 should be enacted with regard to review by Immigration Adjudicators.

(2) Legislation should provide that a decision of an Immigration Adjudicator concerning standing is subject to review by the Administrative Appeals Tribunal provided that the leave of the Tribunal is first obtained.

Decisions not suited to review
286. The Council has on other occasions suggested examples of decisions which are not appropriate for review on the merits (see, for example, ARC Eighth Annual Report 1983-84,
Among those types of decisions which the Council considers inappropriate for review are decisions which are not of a substantive nature but are rather of a facultative character preliminary to substantive primary decisions (see *Eighth Annual Report*, para. 40). Decisions of a facultative or preliminary nature include decisions relating to the collection of material or information upon which a substantive decision will be made.

A further category of decisions which the Council considers is not appropriate for review concerns those decisions which as a class are of a politically sensitive character. It is not possible to give an exhaustive definition of such decisions but, as the Council suggested in Report No. 23, *Review of Customs and Excise Decisions: Stage Two* (AGPS, 1985, at para. 75), decisions of a sensitive political nature are likely to be made at a high level of government (or at least be subject to influences from such a level), and to display most of the following features:

- while they may be based to some extent on established facts and available evidence, they are likely to involve significant elements of political intuition and judgment;
- such decisions are likely to have significant consequences for the community as a whole rather than merely for the persons directly affected; and
- such decisions are frequently made in a situation where it is not feasible, or considered not desirable, to establish a precise policy with objective criteria which is capable of being administered by an independent body. Rather, the policy is in effect redefined as each decision is made.

Decisions examined by the Council

The following classes of decisions made under the *Migration Act 1958* and Regulations, the *Overseas Students Charge Act 1979* and Regulations and the *Overseas Students Charge Collection Act 1979*, are considered by the Council to be of a substantive nature and ought therefore to be examined with a view to determining their suitability for review on the merits.

**MIGRATION ACT AND REGULATIONS**

**Decisions in respect of persons overseas**
- Refusal of a visa in respect of migrant entry (para. 11 A(1)(a))
- Refusal of a visa for temporary entry (para. 11A(1)(a))
- Cancellation of a visa for either permanent or temporary entry (s.11B)
- Requirement to provide a maintenance guarantee (assurance of support) (reg. 21)

**Point of entry decisions**
- Refusal of an entry permit (sub-ss.6(2) and (5))
- Refusal of entry to exempt persons (sub-s.8(2))
- Grant of an entry permit subject to conditions which are inconsistent with a visa (s.6(6A))
- Prevention of entry to Australia of persons who would be prohibited non-citizens if they entered (s.35(1)(a))

**Decisions in respect of persons in Australia**
- Refusal of territorial asylum (see para. 6A(1)(a))
- Refusal of refugee status (see para. 6A(1)(c))
- Refusal of change to permanent resident status of a person eligible to apply (s.6A)
- Refusal to grant an entry permit, or further entry permit, to a prohibited non-citizen (sub-ss.6(2), 6(5) and 7(2))
- Declaration that it is undesirable for an exempt person to remain in Australia (sub-s.8(2))
- Refusal or cancellation of a resident return visa or return endorsement (para. 11 A(1)(b) and s.11B)
• Refusal to grant a temporary entry permit for a different purpose to the holder of an existing temporary entry permit (sub-s.7(2))
• Cancellation of a temporary entry permit (sub-s.7(1))
• Refusal to extend a temporary entry permit (sub-s.7(2))
• Requirement that a person depart Australia voluntarily (s.31 A)
• Decisions relating to deportation made pursuant to sections 12, 14, 18, 19 and 20 of the Migration Act
• Imposition of a requirement to provide a security in respect of compliance with the provisions of either or both the Migration Act and the Migration Regulations (s.54)
• Exercise of a discretion by the Minister for Social Security not to write off a debt incurred by a person who has provided a maintenance guarantee (assurance of support) (reg. 23))

OVERSEAS STUDENTS CHARGE LEGISLATION
• A decision that a person is liable to pay a charge imposed by the Overseas Students Charge Act (s.5)
• A decision made under the Overseas Students Charge Regulations determining the rate of such a charge (reg. 3)
• A decision under the Overseas Students Charge Collection Act to refuse a temporary entry permit to an overseas student (s.6)
• A decision under the Overseas Students Charge Collection Regulations that a student is exempt from a charge (reg. 4)
• A decision under the Overseas Students Charge Collection Regulations that a student is entitled to a refund of a charge (reg. 5)
• A decision under the Overseas Students Charge Collection Regulations that a student is entitled to a remission of a charge (reg. 8).

289. Where the Council has concluded that a particular class of decision should be reviewable it envisages that, except where otherwise stated, review will in the first instance be conducted by an Immigration Adjudicator and, subsequently, if leave is granted, by the Administrative Appeals Tribunal. It proposes that the Migration Act should provide accordingly.

290. The numbers of adverse decisions in respect of each class of decision made under the Migration Act and Regulations in the years 1982-83 to 1984-85 are provided in Appendix 6.

Decisions in respect of persons overseas

REFUSAL OF MIGRANT VISAS

291. While a decision to refuse a visa for the purposes of migrant entry may affect significant interests of the potential migrant, the Council considers that a person cannot generally be said to have a claim to obtain review of such a decision. A large number of adverse decisions is made each year (see Appendix 6), and there would be substantial costs involved in the review of those decisions, together with the imposition of considerable burdens on the Department, if every person refused a visa had a right of appeal to a formally constituted external body empowered to conduct review on the merits. These considerations do not necessarily preclude external review on the merits, but in the general absence in such classes of decisions of circumstances in which the persons subject to the decisions have been led by administrative action reasonably to expect, or rely on, a favourable outcome, the Council considers that the provision of review at the instance of those denied migrant entry visas is not warranted.

292. On the other hand, the Council is of the opinion that a distinction can be drawn between the interests of applicants for migrant visas and those of Australian citizens and
permanent residents whose interests are affected by the outcome of such applications (for example, through family or other close personal relationships or potential employment relationships). The interests of persons in the latter category may be substantially affected by decisions to refuse entry for permanent or temporary residence. The Council considers that a special duty is owed to Australian citizens and permanent residents to ensure that decisions which affect their interests are made in a fair and just manner. For these reasons, it is of the view that a decision to refuse a migrant entry visa which affects the interests of an Australian citizen or permanent resident should be reviewable on the merits at the instance of that citizen or permanent resident.

293. The Department has advised the Council that in 1984-85, 28,635 applications (representing 55,750 persons) for migrant entry visas were rejected at the assessment stage where a sponsorship had been lodged by a relative in Australia who was a citizen or permanent resident. These figures do not include applications which were rejected at the pre-selection stage (the Department does not keep statistics on such rejections). The Department also advised the Council that during 1984-85 a total of 3,738 applications (involving 8,431 persons) were rejected, lapsed, were cancelled or withdrawn after the assessment stage had been completed. These figures do not take account of the cases in which the interests of an Australian citizen or permanent resident who was not a relative (for example, a prospective employer) may have been affected. The figures demonstrate, however, that the number of review applications is likely to be substantial, at least initially, although the Council envisages that, if its recommendations concerning the structuring of the discretions conferred by the Migration Act and Regulations is implemented, the number of applications for review will diminish as affected persons become more familiar with the principles and criteria applicable to the making of particular classes of decisions.

294. The Council notes that the Department has expressed strong reservations as to this recommendation. In particular, it has referred to the potential for misuse of the review right by persons claiming to have interests in the matter, and refers to its views on the question of standing in relation to temporary entrants (see para. 282). The Council again takes the view that the potential for abuse is limited, since it would be necessary for an Australian citizen or permanent resident to satisfy the review authority that his or her interests were affected.

REFUSAL OF VISAS FOR TEMPORARY ENTRY

295. It is considered that, as with decisions to refuse visas in respect of migrant entry, applicants for visas for temporary entry cannot be said to have been led reasonably to expect or rely on the grant of a temporary entry visa. A decision to refuse a visa may, however, directly affect the interests of a citizen or a permanent resident of Australia (for example where the person seeking entry is a family member or close friend of a permanent resident or citizen, or where an employer is seeking the person’s entry for specialised temporary employment, or where sporting, community or business groups are interested in bringing someone to Australia for a particular purpose involving a temporary stay). The Council considers that, in such cases, there are reasons for providing review on the merits similar to those which apply in migrant entry cases. It has therefore concluded that decisions to refuse the grant of temporary entry visas should not, as a class, be subject to external review on the merits at the instance of the applicant, but that a decision which affects the interests of an Australian citizen or permanent resident should be so reviewable at the instance of such a person.

296. The Department has been unable to provide any figures for refusals of temporary entry visas where the person concerned has been sponsored by a citizen or a permanent resident. It is thus not possible to estimate the number of appeals likely to be lodged, but, again, the
Council assumes that, at least initially, the number may be substantial, with some diminution occurring in the longer term.

**Cancellation of a Migrant or Temporary Entry Visa**

297. As with decisions to refuse migrant or temporary entry visas, decisions to cancel such visas may affect significant interests of both the potential migrants and Australian citizens or permanent residents. Moreover, once a migrant or temporary entry visa has been issued, the recipient may reasonably rely on there being no obstacle placed in the way of that person’s movement to Australia and on being able to proceed confidently with arrangements to that end. Thus the person concerned may rely on the fact that a visa has been issued, in a way that is to the person’s detriment if it is subsequently cancelled (for example by incurring travel costs, selling property in preparation for movement to Australia, or incurring removal expenses).

298. A decision to cancel a migrant entry visa is, of course, likely to have a greater impact on the interests of the affected individual than a decision to cancel a temporary entry visa, but, in both cases, the impact is potentially significant. The Council has concluded that, in these circumstances, a decision to cancel either a migrant entry visa or a temporary entry visa should be reviewable.

299. The Council has considered whether review of this category of decision should only be available to an Australian citizen or permanent resident whose interests are affected by a decision to cancel a visa. It is of the view, however, that the potential impact on the former visa holder’s interests (resulting from the expectation reasonably created by the initial favourable decision) is sufficient to justify granting a right of appeal to anyone whose interests are affected by the decision, including the former visa holder.

300. The review of decisions to cancel migrant and temporary entry visas will have to be conducted in the absence of applicants who are overseas and who will, accordingly, need to present their cases in writing or through a representative in Australia. While the Council is of the opinion that it is highly desirable that the parties to an application for review have the opportunity of presenting their cases in person, it does not consider that the absence of that opportunity constitutes grounds for denying any form of merits review in such cases. It seems likely that there will be some cases in which a decision to cancel a visa will directly affect the interests of a citizen or permanent resident. The Council considers that, as a general principle, provision should be made for any person whose interests are affected by a decision to be joined as a party to review proceedings if such a person so requests. In the physical absence of the applicant from the hearing, the adoption of such a procedure could facilitate effective review by assisting the presentation of the applicant’s case to the review authorities. The Council notes that adequate provision to this effect already exists in the AAT Act (sub-s.30(1A)), and the Council proposes that similar legislative provision be made for review by Immigration Adjudicators (see para. 279 and Recommendation 27).

**Maintenance Guarantees (Assurances of Support)**

301. A decision to require a guarantee (assurance) (under regulation 21 of the Migration Regulations) is made only when it has been determined that a person is otherwise acceptable for migrant entry. A decision of this nature may place great pressure on the sponsoring relative in Australia and, if the requirement to provide the guarantee cannot be met, it may effectively preclude the entry to Australia of the person in respect of whom the guarantee is sought. Clearly then, a decision to require a maintenance guarantee may affect significant interests of both the applicant for migrant entry and an Australian citizen or permanent resident, to the extent that it may have similar consequences to a decision to refuse a migrant
entry visa. The Council has thus concluded that decisions requiring maintenance guarantees (assurances of support) should be subject to external review on the merits by any person whose interests are affected by the decision.

Point of entry decisions

Refusal of entry permits

302. Decisions relating to the grant or refusal of either a temporary or permanent entry permit may be made by departmental officers at the point of entry (see sub-s.6(5)). As indicated in Chapter I (paras 33-4), the possession of a valid visa or a return endorsement does not give the holder a right of entry. Thus a decision to refuse an entry permit may be made in respect of a person who arrives with or without such a visa or endorsement. Entry may also be refused, in certain circumstances, to a person who is not required to obtain an entry permit (see paras 35 and 305-8).

303. While individual interests may be affected by a decision to refuse entry to a person who arrives without a visa or a return endorsement and who is not exempt from the requirement to obtain an entry permit, the Council does not consider that such a person has any reasonable expectation of being permitted to enter Australia, or that such a person has acted to that person’s detriment in reliance on any decision or action of the administration. It has concluded, therefore, that a right of review should not be granted in these circumstances. On the other hand, a person who possesses the requisite travel documents should, in the Council’s opinion, have a right of appeal to an external review authority where that person is refused an entry permit. The Council considers that such persons may reasonably expect to be permitted to enter Australia on arrival, and may well have placed considerable reliance on their possession of a visa or a return endorsement in arranging their affairs and presumably in incurring the considerable expense associated with their travel to Australia. A refusal to grant an entry permit in these circumstances could significantly affect the interests of the person concerned.

304. The provision of a right of review to a person holding a visa who is refused an entry permit raises several questions relating to such matters as whether such a person should be permitted to enter Australia pending the finalisation of an appeal, whether such persons should be required to leave Australia and appeal from abroad, or whether they should be taken into custody. These matters are discussed below (see paras 309-13).

Refusal of entry to exempt persons

305. Considerations similar to those involved in refusing an entry permit may apply in relation to a decision to refuse entry to a person who is exempt from the requirement to obtain an entry permit. Such refusals are effected by means of the provisions of sub-section 8(2), under which the Minister or an authorised officer may, by writing under his or her hand, declare in relation to a person referred to in sub-section 8(1) that it is undesirable that that person be permitted to enter, or to remain in, Australia. The Council believes, however, that a distinction should be made between the classes of persons exempted under paragraphs 8(1)(a) to 8(1)(c) of the Migration Act (that is, a member of the armed forces of the Crown, diplomatic or consular officials, members of the complement of vessels of the regular armed forces of recognised governments) and the classes of persons exempted under the other paragraphs of that sub-section. It is true that the interests of persons exempted under paragraphs (a) to (c) may be significantly affected by a refusal to permit entry to Australia and, by virtue of the fact of their exemption and their individual circumstances, they may have a reasonable expectation that entry will be permitted. Nevertheless, the Council considers that decisions in respect of these classes of persons are, because the movement of the persons concerned is not for private
purposes but at the direction of their governments, properly the province of the Executive and
should not be the subject of external review on the merits.

306. Paragraph 8(1)(e) of the Migration Act is the provision which is invoked to facilitate the
visa-free entry of New Zealand citizens in accordance with the trans-Tasman travel
arrangements which exist between Australia and New Zealand. Persons so exempted under
this latter provision may, in the Council’s view, reasonably expect that no obstacle will be
placed in the way of their free movement between Australia and New Zealand. Moreover,
they may have established themselves in Australia in a similar fashion to other persons who
have entered Australia for the purposes of permanent residence. Consequently, a decision to
refuse entry may substantially affect their interests and the interests of family members in
Australia. It is therefore considered that, as with decisions to refuse entry to persons holding
visas and return endorsements, decisions to refuse entry to persons, exempted under
paragraph 8(1)(e) of the Migration Act from the requirement to obtain an entry permit, should
be subject to external review on the merits at the instance of any person whose interests are
affected by the decision.

307. The Council considers that its reasoning regarding decisions made under paragraph
8(1)(e) applies equally to decisions under paragraph 8(1)(f) which concerns inhabitants of the
zone established under Article 10 of the Torres Strait Treaty as defined in sub-section 5(1) of the
Migration Act. Accordingly, the Council has concluded that decisions to refuse entry to
persons exempted under paragraph 8(1)(f) of the Act from requirements to obtain an entry
permit should be subject to external review on the merits.

308. In relation to persons exempted from the requirement to obtain an entry permit under
paragraph 8(1)(d) of the Migration Act (that is, crews of vessels in Australia who have leave
from the vessel during its stay in port), the Council is of the opinion that significant individual
interests may be affected by a decision to refuse entry and that, in addition, such persons have
a reasonable expectation of being permitted to enter Australia. As such decisions are not, in the
Council’s opinion, distinguishable on the grounds that they are the prerogative of the
Executive, it has concluded that they should be subject to review on the merits on the same
basis as adverse decisions made in respect of persons exempted from the requirement to
possess an entry permit under paragraph 8(1)(e) of the Migration Act.

RIGHT OF ENTRY AND PROVISION FOR REVIEW
309. Decisions refusing entry are usually made, and the person’s removal from Australia
effected, as soon as possible, often within only a few hours of arrival. A person affected by
such a decision and entitled to appeal may need to indicate immediately whether that person
intends to appeal if that person is to be considered for permission to remain in Australia
pending the hearing of the appeal. (Of course, such a person would also be entitled to
commence review proceedings from overseas within the prescribed time limits.) Considerable
expedition will be necessary in such cases in the conduct of review by the first-level review
authority and the Council envisages that Immigration Adjudicators will be available to hear
appeals at the major points of entry within Australia and will be able to act quickly in the
hearing of appeals. It recognises, however, that it may not be possible to dispose immediately
of an appeal (because, for example, of the unavailability, at short notice, of relevant
information). In addition, the applicant for review may, if unsuccessful, decide to seek leave to
appeal to the Administrative Appeals Tribunal. In these circumstances, a question obviously
arises as to whether an applicant should, where an appeal cannot be disposed of immediately,
be permitted to enter Australia for a limited period, or should be required to leave Australia
and appeal from abroad, or should be taken into custody pending finalisation of the appeal
process. (Sub-section 36(4) of the Migration Act provides that a person taken into custody shall
be deemed not to have entered Australia.) The Department favours the return of persons subject to such decisions to their home country and the pursuit of appeal rights from there.

310. The Council has noted that, in the United Kingdom, the United States, and Canada provision exists for a person who has a valid document authorising travel to those countries for the purpose of temporary entry or permanent residence to be permitted entry pending the determination of an appeal where it is considered that the person will not abscond and does not constitute a danger to the community. The Council acknowledges that a prolonged appeal process may result in a person being permitted entry for the period for which that person originally intended to stay in Australia. It considers, nevertheless, that provision should be made for the entry for a limited period of a person appealing against a decision to refuse entry where the appeal cannot be disposed of immediately and where the applicant is unlikely either to abscond or to pose a threat to the community. It considers that to require appellants to return to their own countries before the determination of their applications for review would place them at a severe disadvantage in conducting their cases.

311. A decision to permit entry for the purposes of an appeal could be made by an authorised immigration officer, but, where such an officer decides that an applicant should be taken into custody, the Council considers that the duration of such custody should not extend beyond 48 hours. If an authorised officer determines that the applicant should continue to be detained in custody for more than 48 hours, the Council believes that there should be provision for a procedure similar to that contained in section 38 of the Migration Act concerning the custody of alleged prohibited non-citizens. In the Council’s view it should be necessary for an authorised officer to take an applicant before a ‘prescribed authority’ appointed in accordance with section 40 of the Migration Act within 48 hours of the commencement of the applicant’s custody. The prescribed authority should have the power to inquire into whether there are reasonable grounds for continuing to detain the applicant pending the hearing of the application for review, and should be empowered to authorise the detention of the applicant for such periods as are necessary. In addition, a ‘prescribed authority’ should be empowered to release a person being held in custody on reasonable conditions, as is recommended by the Human Rights Commission in paragraphs 264-5 of its Report No. 13.

312. A question as to whether a person should be detained in custody may also arise where an Immigration Adjudicator determines that an appeal against a decision to refuse entry should be upheld and the Department indicates that it will seek leave to appeal to the Administrative Appeals Tribunal. The Council considers that provisions similar to those proposed in the preceding paragraph should be made for this eventuality.

313. The Council considers that a decision to detain a person in custody should be made only after careful consideration of whether the person concerned is likely to abscond or where there is evidence to suggest that the person poses a threat to the community.

GRANTING OF ENTRY PERMITS INCONSISTENT WITH VISAS

314. Sub-section 6(6) of the Migration Act provides that an entry permit which is intended to operate as a temporary entry permit may be granted subject to conditions. Sub-section 6(6A) of the Act specifically provides that such conditions may include restrictions with respect to the work, if any, which the holder may perform. The Council considers that, where a temporary entry visa has been granted to a person on a particular basis, for example, that work will be permitted, the person concerned may reasonably expect to be allowed to enter Australia on that basis. A decision to grant an entry permit which is inconsistent with that expectation may affect the person’s interests in a substantial way (for example, if the person has travelled to Australia for the purpose of a working holiday and is granted an entry permit which precludes
employment). In the Council’s opinion, the existence of a reasonable expectation and the consequent impact on the affected person’s interests are sufficient to justify making provision for the external review on the merits of this class of decision.

315. The same may be said where a person arrives in Australia in possession of a migrant visa but is granted only a temporary entry permit. The Council considers, therefore, that a decision of this nature should be reviewable except where the temporary entry permit is granted for the purpose of allowing entry while the person’s eligibility for permanent residence is determined. (A final decision to refuse permanent residence in these circumstances should, however, be reviewable (see paras 346-75).) Any decision to grant an entry permit on a basis different to that indicated in a visa should be subject to review on the merits.
PREVENTION OF ENTRY OF POTENTIAL PROHIBITED NON-CITIZENS

316. Paragraph 35(1)(a) of the Migration Act provides that an officer may prevent a person from entering Australia where that person would, if he or she so entered, be a prohibited non-citizen. The prevention of entry in these circumstances could affect significant individual interests, including the interests of an Australian citizen or permanent resident. On the other hand, persons seeking to enter without the necessary authority (that is, illegally) could not reasonably expect to be permitted entry and to provide a right of review would, in the Council’s opinion, encourage the use of the review system to circumvent migrant entry policy. In these circumstances the Council does not consider that a right of review should be provided in respect of such decisions.

Decisions in respect of persons in Australia

REFUSAL TO GRANT TERRITORIAL ASYLUM

317. Paragraph 6A(1)(a) of the Migration Act provides that a person may be considered for the grant of a permanent entry permit if he or she has been granted, by instrument under the hand of a Minister, territorial asylum. While a decision to grant permanent residence on this basis can only be made by the Minister for Immigration and Ethnic Affairs (see sub-s.6A(2)), the Council was advised that in practice a decision to grant or refuse asylum is made by the Minister for Foreign Affairs.

318. Unlike the position concerning refugee status (see para. 322), there is no accepted definition in international law of what constitutes ‘asylum’; however, that concept is commonly taken to mean any act of a state granting residence by way of protection to an individual from another state. In some jurisdictions, such as the United States, the concept of asylum is used synonymously with that of refugee status but in Australia a distinction has been drawn between the two concepts for the purposes of the Migration Act. But while the Act expressly adopts the definition of refugee status under the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, the Act is silent on the meaning of ‘territorial asylum’ for the purposes of paragraph 6A(1)(a). The Council was advised by the Department of Foreign Affairs that for the purposes of administering this provision, the Department has adopted a definition of ‘territorial asylum’ as meaning ‘the protection which a State grants on its own territory. At the time of seeking territorial asylum the applicant may be either outside that territory seeking to go there, or already inside that territory on a temporary basis’. The Council was advised that a grant of territorial asylum is generally regarded as a significant political statement and that such a grant is likely to have much stronger implications for bilateral international relationships than a grant of refugee status. Furthermore, the Council was advised that, although the Department of Foreign Affairs receives a substantial number of requests for ‘asylum’, many of which are dealt with as applications for refugee status, in only a handful of cases in the last 30 years has territorial asylum been granted. The Council was also advised by the Department that territorial asylum decisions are frequently taken at a high political level.

319. It is the Council’s view that territorial asylum decisions are, as a class, of a politically sensitive character and for this reason are not suitable for review on the merits. The question whether external review on the merits should be available in relation to a decision to refuse an application for a change of status to a person who has been granted territorial asylum is considered below (paras 349-50).

DETERMINATION OF REFUGEE STATUS OF PERSONS IN AUSTRALIA
Introduction

320. The effect of paragraph 6A(1)(c) of the Migration Act is that a person who is the holder of a current temporary entry permit and who has been determined by the Minister to have the status of a refugee is eligible for consideration for change of status by the grant of a permanent entry permit. The Council has considered whether the Minister’s determination of a person’s entitlement to refugee status should be subject to external review on the merits, and also whether such review should be available in relation to a decision to refuse a permanent entry permit to a person who has received a favourable determination on the question of that person’s status as a refugee (see paras 349-50).

321. In determining whether a person has the status of refugee within the meaning of the relevant international agreements referred to in paragraph 6A(1)(c) of the Act, the Minister receives advice from a non-statutory body known as the Determination of Refugee Status (DORS) Committee. Details of the function and character of that Committee are provided in Appendix 1, paras 7-8. The Minister is not obliged to act in accordance with the Committee’s advice. The Committee also has a limited review function.

322. The Council has noted that the Migration Act expressly adopts the definition of ‘refugee status’ from the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol on that subject. Under those international agreements, a refugee means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion:

(a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country; or

(b) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reasons of such fear, is unwilling to return to that country.

323. Until recently there was some doubt in Australia whether the Minister’s determination of a person’s status as a refugee was a determination taken in the exercise of a statutory power or was simply one made in the exercise of an inherent power. This issue is relevant to the Council’s consideration whether refugee status determinations should be subject to external review on the merits in two respects. First, the AAT’s jurisdiction to review decisions is currently confined to decisions made in the exercise of powers conferred by an enactment (see sub-s.25(1) of the AAT Act). Secondly, the Council has also noted that one of the primary reasons advanced by the Department in opposing the notion of merits review of refugee status determinations was the alleged non-statutory basis of such determinations. In its submission on the Council’s draft report the Department stated:

The Department wishes to emphasise the distinction between the basis on which decisions are taken under the Migration Act, and the basis on which decisions are taken to grant refugee protection and/or refugee resettlement from applicants from within Australia or applying overseas. The Migration Act provides no legislative basis for refugee decisions of a protection or resettlement nature. These are, therefore, not decisions which are taken under an enactment, but are a matter concerning the refugee policies of successive Australian Governments.

The Council has noted that the question whether refugee status determinations are made under an enactment or not has now been settled by a decision of the High Court of Australia in Minister for Immigration and Ethnic Affairs v. Mayers, (1985) 61 ALR 604), in which it was held by majority that the Minister’s determination is one made under the Migration Act. The effect of the High Court’s decision is to establish that refugee status determinations attract the provisions of the AD(JR) Act- including the obligation under section 13 of that Act to provide a
written statement of reasons for decision upon request, but the Council also believes that, in view of the High Court’s ruling, it is required to consider whether refugee status determinations are appropriate for review on the merits since they are decisions made under legislation falling within the ambit of the Council’s current project.
The Council considers that a decision to refuse refugee status may have a very substantial impact on an applicant’s interests and, accordingly, such decisions ought in principle to be subject to merits review. Not only will such a decision preclude the applicant from being considered for permanent residence under paragraph 6A(1)(c) of the Migration Act but, given the nature of a claim for refugee status, very serious consequences may also ensue if the decision is incorrect and the applicant is subsequently returned to his or her native country.

The Council has noted that, as a signatory to the 1951 Convention Relating to the Status of Refugees, Australia has accepted an obligation under international law to protect and assist but not necessarily to resettle refugees. There is no legal obligation on Australia under either international or domestic law to grant permanent residence to a refugee; however, resettlement of refugees constitutes an important part of Australia’s migration policy. In the Council’s view, the absence of a legally enforceable right of a refugee to be granted permanent resident status does not provide a sufficient reason for exempting a refugee status determination from external review when account is taken of the serious impact such a determination may have (see paras 272-4).

The Council considers that, while the current practice of the DORS Committee of reconsidering its advice at the request of the Minister or an applicant for refugee status is a desirable one in the absence of a system of external appeals, reconsideration by that Committee is not an adequate alternative to review on the merits by an independent tribunal. In reaching this conclusion the Council has been particularly influenced by the fact that the Committee cannot be said to provide an independent review of its own primary decisions. Moreover, the Council has noted that the Committee lacks a power of determinative decision making, and does not allow applicants either to appear before it in person or to be represented by some other person.

In its submission on the Council’s draft report, the Department opposed the proposal to subject refugee decisions to merits review on the grounds that such decisions are not made under a legislative enactment, and also because, in the Department’s view, such ‘decisions are properly for Ministers on political grounds’.

The Department’s view that refugee status decisions are not made under a legislative enactment needs now to be read in the light of the High Court’s decisions to the contrary in the Mayer case, as described above (para. 323). It is clear that this ground can no longer be relied upon as an objection to merits review of such decisions. Of course, the fact that a decision is amenable to judicial review does not necessarily imply that it is appropriate and desirable that it should also be subject to merits review, but the Council considers that the High Court’s decision is significant in establishing that refugee status decisions are amenable to external scrutiny under the AD (J R) Act.

The Council has also considered the Department’s view that refugee status decisions involve issues of such a politically sensitive nature that they should not as a class be subject to merits review. The Council recognises that political considerations, particularly relating to Australia’s international relations, may be relevant in some cases in determining whether a particular person is entitled to refugee status, but it does not consider that such considerations will arise in every case. (See also para. 267 and Recommendation 25 on the Minister’s power to issue a certificate exempting a particular decision from review.)
330. It is the Council’s view that most refugee status decisions are capable of being measured against objective criteria such as those contained in the definition provisions of the relevant international agreements which are elaborated upon in a publication by the United Nations High Commissioner for Refugees entitled *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*.

331. The Council has also considered whether merits review is inappropriate in relation to refugee status determinations because of the possibility that review proceedings will be commenced by some individuals with the primary objective of publicising their claim for refugee status. Given the definition of refugee status it is apparent that publicity could significantly strengthen a claim or, indeed, even establish a claim which was without foundation when it was initially lodged. While acknowledging that this risk exists, the Council does not consider that the risk is sufficiently compelling to deny merits review. In the Council’s view, the risk is no greater than that which applies to publicity surrounding the initial lodgment of a claim or any judicial review proceedings which might be commenced. Quite different considerations apply to the need for review bodies themselves to protect privacy and confidentiality in the conduct of review proceedings and this matter is discussed earlier in this report (paras 234-6).

332. The Council’s conclusion, that a determination whether or not a person is a refugee within the meaning of the relevant international agreements is a matter which is appropriate for review on the merits, is supported by the fact that comparable review is currently available in overseas jurisdictions such as the United Kingdom, Canada and the United States of America.

333. The jurisprudence and experience of review authorities in overseas jurisdictions is likely to be of benefit to the AAT in exercising its proposed review function in relation to refugee status determinations in Australia. A considerable body of jurisprudence has developed in those jurisdictions on the definition of refugee status and matters relating to the determination of that issue such as, for example, the information or evidence which might be relied upon by an applicant for refugee status in review proceedings. The Council has noted that, in reviewing a refugee status application, review bodies in those overseas jurisdictions receive not only official governmental and departmental reports on conditions in particular countries, but also relevant reports from human rights organisations such as Amnesty International and the International Commission of Jurists. The Council has also noted that the United Nations High Commissioner for Refugees issues advisory opinions on individual refugee cases upon request.

*Ministerial certificate exempting review in particular cases*

334. While the Council considers that it is appropriate that refugee status decisions as a class be subject to merits review, it also considers that, since sensitive political considerations are likely to arise from time to time in relation to particular claims for refugee status, the Minister should be empowered to certify to the Parliament that he or she believes on specified grounds that it is in the public interest that final responsibility for a particular refugee status decision should remain with the Government with the consequence that the decision should not be reviewed on the merits by an external tribunal. Details of the proposed certificate power in relation to review of migration decisions in general are provided elsewhere in this report (see para. 267), and it is especially relevant in the context of refugee status decisions to note that international relations is suggested as one of the grounds upon which the Minister may conclude that the public interest requires that the government retain final responsibility for a particular decision. It is the Council’s view that the proposed certificate power is desirable to enable the government to retain final responsibility in appropriate cases while enabling other
refugee status decisions which do not involve politically sensitive issues to be reviewed on their merits.
335. The Council’s proposal that refugee status decisions be subject to external merits review is confined to applications for such status made by persons who have arrived in Australia. It is not intended that the proposed right of review should extend to persons applying for such status who are overseas, primarily because of the substantial number of cases involved. Moreover, the Council considers that no duty exists to provide a right of review on the merits to persons overseas who have no connection with Australia. On the other hand, the Council notes that as a consequence of its recommendation that migrant entry visa decisions should be reviewable at the instance of an Australian citizen or permanent resident whose interests are affected by the decision, the issue of a person’s eligibility for consideration for migrant entry as a refugee might become the subject of external review on the merits in review proceedings brought by such a citizen or resident.

336. In confining the proposed right of review on refugee status decisions to persons who have arrived in Australia, the Council has drawn a distinction between ‘arrival in’ and ‘entry to’ Australia. It has noted that in the case of a person arriving in Australia by aircraft at a proclaimed airport, paragraph 5(2)(b) of the Migration Act provides that, for the purposes of that Act, entry only occurs when that person physically leaves the airport. The Council was advised by the Department that all major Australian international airports as well as certain other stipulated airports are proclaimed airports. It is the Council’s view that a person who arrives in Australia by aircraft and claims refugee status should be entitled to seek review of an unfavourable decision on this issue irrespective of whether that person has left the airport of arrival or is in possession of a temporary entry permit. (Possession of such a permit is a prerequisite for eligibility to be considered for change of status under para. 6A(1)(c) but is not a precondition to a determination by the Minister whether a person is a refugee.)

337. In recommending that persons who have arrived in Australia but may not have ‘entered’ the country within the meaning of the Migration Act should be entitled to seek a review of refugee status determinations, the Council recognises that it may be necessary in some cases for the Department to exercise relevant powers under that Act to detain appellants in custody pending the finalisation of a review (see paras 309-13).

Appropriate review body and its procedures

338. The Council considers that, because of the complexity and importance of the issues which arise in determining the question of refugee status, review of such a determination should be of a high standard. The procedures adopted by the review body would also have to be such that the confidential and sensitive nature of some of the information likely to come before it (relating, for example, to political conditions in the applicant’s home country) would be adequately protected. The importance of this is further demonstrated by the possible repercussions, for the applicant and the applicant’s family, which might result from any public disclosure of the fact that the applicant has sought refugee status. (This might, for example, result in persecution of any family members remaining in the applicant’s home country, or of the applicant if he or she was to be unsuccessful in an appeal.)

339. In the Council’s view, it would not be appropriate for decisions refusing refugee status to be reviewed at the Immigration Adjudicator level because of the particular characteristics, and the important consequences for the affected persons, of these decisions. The Council considers, on the other hand, that the AAT is equipped to provide the necessary standard of review and to ensure that privacy and confidentiality are maintained where there is some feature of an application which indicates that this is desirable.
The Council considers that a primary objective of any migration review system should be to ensure that appeals are finalised in the speediest time possible consistent with a fair and just consideration of the issues raised in an appeal. The need for speedy determination of appeals is especially important in refugee cases. A prompt resolution of the question of a person’s entitlement to refugee status is not only in the interests of the individual concerned but the public interest is also likely to be served if appeals are resolved quickly in order to minimise abuse of the review system and delays in securing the departure of persons who are not entitled to remain in Australia.

For these reasons the Council has considered whether any modification should be made to the normal procedures of the AAT for processing and hearing appeals. The Council has noted in this context that in Canada, merits review of refugee status determinations is conducted by the Immigration Appeal Board in a two-stage process. If an applicant for refugee status is dissatisfied with the Minister’s determination on this issue, he or she may within seven days seek a review of that decision by the Immigration Appeal Board. That body is first required to consider any written material presented by the appellant, as well as the transcript of an examination of that person under oath conducted by a departmental officer, and to decide on the basis of that written material whether or not the appellant is a refugee. If the Board is satisfied on the basis of that material that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established, it is required to allow the application to proceed to an oral hearing at which both the appellant and the respondent are entitled to appear, be examined, and to present additional evidence. If the Board is not so satisfied, it is required to refuse to allow the application to proceed and to determine that the appellant is not a Convention refugee: (See s.71 of the Canadian Immigration Act 1976.)

It is the Council’s view that there is considerable merit in the Canadian system and it proposes that a similar two-stage process should apply to AAT review of refugee status determinations. The Council believes that the existing provisions of the AAT Act should apply to the proposed jurisdiction of the Tribunal to review refugee status determinations, subject, however, to a requirement that an applicant for review should be required to obtain the leave of the Tribunal before lodging an application for review.

It is the Council’s view that a leave requirement is desirable in this context to guard against the possibility of some individuals bringing review proceedings primarily to prolong their time in Australia in circumstances where they have no arguable case for obtaining refugee status. The Council considers that the potential problem of abuse of a right of review in relation to refugee status determinations justifies a requirement of leave and distinguishes such cases from other areas where the Council has taken the view that a right of review should lie direct to the AAT as a matter of right (see paras 400-6). The Council considers that its recommendations concerning the proposed requirement of leave in relation to AAT review of some classes of decisions taken by Immigration Adjudicators (see paras 181-8) should also apply to AAT review of refugee status determinations, including those criteria to which the Tribunal should have regard in deciding whether to grant leave except where such criteria are inapplicable to a single-tier review system as is being proposed in respect of refugee status decisions. The Council also considers that section 37 of the AAT Act should operate in an unmodified form to oblige the respondent to provide the Tribunal with a written statement of the reasons for the decision together with every other document which is in the respondent’s possession which is relevant to the appeal. It is the Council’s view that the transcript of the applicant’s examination by immigration officials (see Appendix 1, para. 8) will be covered by this provision, as will any written report on conditions in the applicant’s native country which was before either the DORS Committee or the ultimate primary decision-maker. The Council
344. If an application for review of a refugee status determination is to be dealt with by the AAT according to the proposed two-stage process, the Council notes that it has recommended that the AAT should be given a discretion to determine applications for leave to seek review on the basis of the written documents alone without conducting an oral hearing (para. 185). If leave is granted, the Council considers that the ordinary provisions of the AAT Act should govern the Tribunal’s powers and procedures in relation to the hearing of the application for review.

345. If jurisdiction is conferred upon the AAT to review refugee status decisions, but is subject to the granting of leave by the AAT, there may remain a role for the DORS Committee to reconsider recommendations it has made. With the availability of AAT review the Council would not expect this reconsideration role to be a large one. However, in at least some cases where leave has been granted it may be appropriate for the Committee to reconsider its recommendations and to advise the Minister of the result of that reconsideration prior to the AAT hearing.

REFUSAL OF CHANGE TO PERMANENT RESIDENT STATUS

Introduction

346. The conditions under which a person is eligible to be considered for change of status from temporary to permanent resident are set out in section 6A of the Migration Act. They are if that person:

- has been granted territorial asylum in Australia;
- is the spouse, child or aged parent of an Australian citizen or permanent resident;
- has the status of refugee and is the holder of a current temporary entry permit;
- is the holder of a current temporary entry permit and is authorised to work in Australia provided the person is not a prescribed non-citizen;
- is the holder of a current temporary entry permit and there are strong compassionate or humanitarian grounds for the grant of permanent residence.

347. While some of the conditions of eligibility to be considered for such change of status are quite specific (e.g. that the person is the spouse, child or aged parent of an Australian citizen or of the holder of an entry permit), paragraph 6A(1)(e) in particular confers considerable discretion on the decision maker in that it provides that a person holding a temporary entry permit may be considered for change of status if there are strong compassionate or humanitarian circumstances present.

348. The Council has considered whether change of status decisions made under the various paragraphs in sub-section 6A(1) should be subject to merits review and if so, by which review bodies. The Council has also considered the question of standing to seek such review. These matters are now discussed in turn.

Appropriateness of merits review

349. It is the Council’s view that an unfavourable change of status decision may have a substantial impact on the interests of individuals affected by it and, accordingly, as a matter of general principle, such a decision should be subject to external review on the merits. For example, decisions to refuse permanent residence to a person who is the spouse or minor child of a citizen or permanent resident, to a person granted territorial asylum, or to a person granted
refugee status, could have ramifications for the protection of the family unit and for the personal liberty, and possibly the personal safety, of persons affected by such a decision.

350. The Council proposes that external merits review should be available in relation to change of status decisions concerning each of the conditions specified in paragraphs (a)-(e) of sub-section 6A(1). Hence, even though the Council has concluded for reasons given above (paras 317-9) that a decision whether a person should be granted territorial asylum ought not to be subject to merits review, the Council considers that the separate decision to refuse change of status to a person who has been granted territorial asylum should be reviewable. Moreover, the Council’s proposal reflects its opinion that a decision to refuse change of status to a person who has been granted refugee status and is the holder of a current temporary entry permit should be reviewable. The Council has proposed above that a separate right of review should be available in relation to the determination of whether a person has refugee status (paras 324-33). The proposed review of change of status decisions is intended to cover any dispute which might arise as to a person’s eligibility to be considered for change of status under those provisions including, for example, whether in fact an applicant is the spouse of an Australian citizen for the purposes of paragraph (b).

Review structure
351. It is the Council’s view that change of status decisions should be subject to the proposed two-tier system of review which is described above (paras 172-266).

352. In making this recommendation, the Council notes that decisions are likely to be taken by the Minister in some cases, particularly those including change of status under paragraphs 6A(1)(a) and (c) (relating to persons granted territorial asylum and refugees respectively). It is not possible, however, to predict which of these decisions will be made by the Minister personally and, in these circumstances, the Council considers that all change of status decisions ought in principle to be subject to the proposed two-tier system of review, but decisions taken by the Minister personally in individual cases ought to be reviewable directly by the AAT in accordance with Recommendation 8.

Standing
353. The Council has considered whether it should propose any modification in this context to its general principle concerning standing, that any person whose interests are affected by a decision should be able to seek review (paras 279-85). It has noted that the Department favours a narrow standing requirement with respect to all appeals concerning temporary entrants (see para. 282).

354. The Council acknowledges that there is a risk that some unsuccessful applicants for change of status will take advantage of any rights of review available to them with the primary objective of obtaining more time in Australia, but the Council considers that it is an unacceptable response to this problem to deprive all applicants for change of status of standing to seek review in their own right. To restrict standing in the manner suggested by the Department, or in some other way, would, with respect to many change of status decisions, effectively render the proposed right of review nugatory. That would often be the case, for example, if a person seeking change of status on the basis of his or her refugee status were denied standing to challenge an adverse decision in his or her own right. In some refugee cases there is unlikely to be an Australian citizen or permanent resident whose interests are affected by a refusal to grant a change of status. It is the Council’s view that a person seeking change of status based on his or her status as a refugee should be able to seek review on his or her own motion and should not have to depend on some other person commencing review proceedings. The Council does not consider that the factors which have been identified by it (see para. 280)
as being relevant to the question whether some restriction should be imposed on the general
test of standing apply to this class of decisions.

355. Similar considerations apply in relation to paragraph (e) of sub-section 6A(1). A person
who is not a refugee within the meaning of the relevant international agreements may
nevertheless be eligible for consideration for change of status on humanitarian and
compassionate grounds as is stated in a booklet distributed by the Department of Immigration
and Ethnic Affairs dated July 1985 entitled ‘General Information on Grant of Resident Status in
Australia’. It is stated at page 5 of that booklet that:

- strong compassionate or humanitarian circumstances cannot be defined precisely. It can
  include gross and discriminatory denial of fundamental freedoms and basic human rights on
  return to the person(s) country of nationality or former habitual residence provided
  residence elsewhere is not more appropriate.
- Such claims must be greater than the hardships and adversity experienced by the generality
  of the population in (the) country of residence.

356. To deny standing to an applicant for change of status in these circumstances, as is
proposed by the Department, would effectively undermine the proposed right of review
because there may be no other person whose interests are affected by the refusal to grant
change of status. The Council does not consider that there are any factors which would
indicate a need to restrict standing in this way (see para. 280).

357. For these reasons, the Council has concluded that, in relation to change of status
decisions as a class, no modification should be made to the general principle that standing to
seek review at both levels of review should be available to any person whose interests are
affected by a decision. In the Council’s view the problem of delay is more likely to be
effectively dealt with by the Adjudicators giving priority to the hearing of appeals brought by
temporary entrants and also by the operation of the proposed leave requirement in relation to
review by the AAT. However, the Council proposes later that there should be a restriction on
standing to seek review of a decision not to grant a temporary entry permit to a prohibited
non-citizen who is required to obtain such a permit as a precondition of applying for a change
of status (paras 358-73).

Prohibited non-citizens: temporary entry permits and change of status

358. As noted above (para. 42), the Department’s normal practice is to consider an
application by a prohibited non-citizen for change of status under paragraph 6A(1)(e) and at
the same time to determine whether that applicant should be granted a temporary entry permit
which is a precondition to eligibility for consideration for permanent residence under that
paragraph. The Council has already mentioned that in its view the Department’s current
practice is not in accordance with the statutory provisions and that either the Department
should consider the question of a person’s entitlement to a temporary entry permit before
considering whether change of status should be granted, or there should be a change in the
legislation to permit the two matters to be considered together. The Council is not suggesting
that the two decisions are mutually exclusive. They clearly do relate to each other, but the
legislation proceeds on the basis that a temporary entry permit has already been granted before
a change of status application can be considered under paragraph 6A(1)(e). Therefore a
decision concerning the grant of a temporary entry permit should be taken before a change of
status decision, but a relevant consideration in making the first decision will be the fact that the
applicant is also applying for a change of status. In structuring the criteria for grant or refusal
of a temporary entry permit, the Department may wish to consider specifying the fact that an
applicant has applied for a change of status. The Council’s recommendations below are made
on the assumption that the Department’s procedures will be amended in accordance with the law.

359. In contrast with section 6A, which deals with the grant of permanent entry permits, there are no conditions or criteria prescribed in the Act which restrict eligibility to be considered for the grant of a temporary entry permit. Sub-section 7(2) provides:

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.

Sub-section 6(2) provides:

An officer may, in accordance with this section and at the request or with the consent of a non-citizen, grant to the non-citizen an entry permit.

Sub-section 6(5) provides:

An entry permit may be granted to a non-citizen either upon his arrival in Australia or, subject to section 6A, after he has entered Australia . . .

360. The Council has considered whether a right of review on the merits should be available in respect of a decision to refuse to grant a temporary entry permit to a person who is otherwise eligible for consideration for change of status under paragraph (e) of sub-section 6A(1) and, if so, who should be entitled to exercise that right. The Council has concluded, for reasons given immediately below, that merits review should be available but should be confined to an Australian citizen or permanent resident whose interests are affected by the decision.

361. In the Council’s opinion, merits review is appropriate in these circumstances because the personal interests of the applicant may be significantly affected as in the case of other applicants for temporary entry permits, but especially in that the effect of a refusal to grant a temporary entry permit to a person who fulfils the other conditions prescribed in paragraph (e), will be to deprive that person of an opportunity to be considered for permanent resident status. In addition, the interests of Australian citizens or permanent residents may be significantly affected by such decisions, a matter which the Council considers tends in the direction of providing a right of review at least at the instance of such persons (see para. 283). Of course, there is no legal right to be granted permanent resident status even if a person fulfils the conditions prescribed in section 6A. As indicated above (paras 346-57), however, the Council considers that the interests of both applicants and other persons who are associated with such applicants are likely to be significantly affected by a decision refusing to grant change of status under paragraph 6A(1)(e) and the Council has proposed that such decisions should be subject to review.

362. The Council considers that it is significant that the Act clearly provides in sub-sections 6(2), 6(5) and 7(2) that a temporary entry permit may be granted to a person upon request either at the time of entry into Australia or afterwards (even if the person’s previous temporary entry permit has expired and, as a consequence, the person has become a prohibited non-citizen). Moreover, section 10 of the Act provides that a person ceases to be a prohibited non-citizen if an entry permit is granted.

363. The Council has noted the Minister’s recent statement that prohibited non-citizens will only rarely be granted temporary or permanent resident status, but this does not detract from
the fundamental point that, under the Act, provision is made for such persons to have their illegal status regularised. The Council also emphasises that if a right of review is available in this context, the ultimate decision will depend on any legislative or non-legislative criteria or considerations which are relevant to the grant of a temporary entry permit or permanent resident status in the particular case. The Council has noted in this context that the Minister’s recent policy statement on illegal immigration spells out the relevance of a person’s illegal status and conduct to the question of that person’s chances of obtaining a further temporary entry permit or a permanent resident permit. It can be expected that review bodies will take such policy considerations into account and, of course, any such considerations which are entrenched in legislation will be legally binding on such bodies.

364. The Council acknowledges that there is a risk that the availability of review in these circumstances will contribute to delays in administrative action relating to ‘illegal immigrants’. The Council considers, however, that such delays can be minimised if the recommendations made elsewhere in this report with regard to the expeditious processing of review applications and the proposed two-tier system of review are implemented. The Council would also expect that, in view of the desirability of appeals relating to temporary entrants who are in Australia being dealt with as quickly as practicable, the review authorities will be concerned to give priority to such appeals. Speedy finalisation of such matters is desirable not only in the interests of good administration of Australia’s migration laws and policies but also in the interests of prohibited non-citizens themselves, some of whom may be in detention, and all of whom are entitled to certainty in decision making at both primary and review levels. The latter consideration is also relevant to associates of a prohibited non-citizen, such as members of his or her family whose interests are invariably bound up with those of the prohibited non-citizen.

365. Finally, as far as the problem of the delay associated with review being used to strengthen a prohibited non-citizen’s claim for change of status is concerned, the Council considers that this problem can adequately be met by devising an appropriate policy or criteria governing the significance to be attached to developments arising after a review application has been lodged as, indeed, is currently provided for in the Minister’s policy statement relating to illegal immigration. The Council is not suggesting that all such developments should be disregarded. Clearly any policy on such matters will need to recognise that some such developments will be relevant to a claim for change of status and appropriate weight will need to be accorded to such considerations in determining a change of status application.

366. The Council has considered whether a person who is illegally in Australia should be entitled to seek merits review of a decision refusing to grant that person a temporary entry permit for the purposes of being considered for change of status under paragraph 6A(1)(e), or whether standing to seek review of such a decision should be more restricted.

367. In considering this question the Council has taken into account the Government’s current policy regarding illegal immigration (see para. 43) and, in particular, the Minister’s statement that: it will be rare, indeed, that illegal immigrants will be granted permission to remain in Australia. They will have to apply overseas for permanent residence as they should have done in the first place.

368. The Council has also noted that, following the tabling in the Parliament of the Minister’s policy statement, prohibited non-citizens no longer have a right to seek review by an Immigration Review Panel of a decision refusing such persons temporary or permanent residence.
In the Council’s view, the arguments for and against providing prohibited non-citizens with standing in this context are finely balanced. On the one hand, there is a strong argument (which forms the basis of the Government’s current policy) that such persons should not be able to benefit from their own wrong-doing and have access to review rights which are not available to applicants for permanent residence who apply from overseas. Moreover, there is a danger that some prohibited non-citizens might bring unmeritorious appeals which are designed primarily to delay their departure from Australia, possibly with a view to taking advantage of any additional time in Australia to strengthen their claims for permanent resident status.

Another factor to be considered in determining whether prohibited non-citizens should be able to seek merits review of temporary entry permit decisions is whether it is appropriate and desirable that such persons should be able to commence review proceedings where they have breached the conditions of their entry or have failed to regularise their status before their temporary entry permits have expired, and the Government has been put to the expense and trouble of apprehending them. Arguably, prohibited non-citizens have no reasonable expectation of being allowed to remain in Australia and, accordingly, any right of review should be restricted to a person whose interests are affected by the decision and to whom the Australian Government can be thought of as owing a duty.

On the other hand, there are contrary arguments which suggest that rights of review should not be denied to prohibited non-citizens simply because of their illegal status. First, while it is true that many prohibited non-citizens will have acquired that status as a result of their own unlawful actions or failures to act (e.g. a failure to renew a temporary entry permit while it is still in force), it is possible to identify others who become prohibited non-citizens through no, or only minor, reprehensible action on their part. For example, the holder of a temporary entry permit who applies, while that permit is in force, for an extension of permit or for change of status, becomes a prohibited non-citizen if the Department delays in processing the application and in the interim the previous permit expires. The Council was also advised by the Marrickville Legal Centre of cases where persons had become ‘illegal immigrants’ as a result of a genuine misunderstanding on their part regarding the differences between a visa and a permit (a permit having expired while a visa was still current). Unless regard is paid to the reasons why a person has become an ‘illegal immigrant’, there is a likelihood that an absolute rule which deprives all prohibited non-citizens of standing to challenge temporary entry permit decisions made in the context of an application for change of status will operate in a harsh and unjust way in some cases.

Secondly, it might be argued that the opportunity to seek permanent residence on compassionate and humanitarian grounds should not be denied even to ‘illegal immigrants’ since this is likely to be the only legal basis for their remaining in Australia and they may have developed strong connections here. Particularly in cases where their ‘illegality’ is not the result of any reprehensible action on their part, such persons should not have to depend on whether or not there is an Australian citizen or permanent resident whose interests are affected and who is prepared to commence proceedings for review of a decision.

Having weighed up the above considerations, the Council has concluded that standing to seek review on the merits with regard to a decision to refuse a temporary entry permit to a prohibited non-citizen who wishes to be considered for permanent resident status should be restricted to an Australian citizen or permanent resident whose interests are affected by the decision. The Council has noted that a similar restriction on standing ‘currently exists with regard to review by the AAT of deportation decisions made under section 12 (see sub-
section 66E(2) and the Council believes that such a restriction on standing is justified where
the person the subject of the decision has acted unlawfully.

Refugees: temporary entry permits and change of status

374. The Council has proposed above that both refugee status determinations and change of
status decisions under paragraph 6A(1)(c) of the Act should be subject to external merits
review. Since possession of a current temporary entry permit is also a precondition to
consideration for change of status under that paragraph, the Council has considered whether a
decision refusing to grant a temporary entry permit in these circumstances should be subject to
merits review and, if so, by whom.

375. In the Council’s view, review is clearly warranted in this context because the effect of a
refusal to grant a permit will be to deprive a person who is otherwise eligible to be considered
for change of status of an opportunity to be so considered. Moreover, for similar reasons to
those relied upon by the Council in concluding that there should be no modification to the
general principle of standing with regard to review of change of status decisions (see
paras 353-7), the Council considers that any person whose interests are affected by a decision to
refuse a temporary entry permit to a refugee, including the refugee himself or herself, should
have standing to seek review.

REFUSAL TO GRANT A TEMPORARY ENTRY PERMIT (OR FURTHER PERMIT) TO A
PROHIBITED NON-CITIZEN

376. In addition to seeking a temporary entry permit for the purpose of applying for a
change to permanent resident status (see paras 358-73), a prohibited non-citizen may seek a
temporary entry permit for other purposes, for example, to enable that person to put his or her
business or personal affairs in order, or to complete a course of study or training. Section 10 of
the Act provides that a person who has become a prohibited non-citizen ceases to be such if
and when an entry permit, or further entry permit, is granted to that person.

377. Since the personal interests of such a person may be significantly affected by a decision
to refuse to grant a temporary entry permit, the Council proposes that such refusals should be
subject to review on the merits. However, given the unlawful status of a prohibited non-
citizen, and consistently with the limitations on standing proposed in relation to prohibited
non-citizens seeking a temporary entry permit in association with an application for a change
of status, the Council proposes that standing to seek review of such decisions should be
restricted to Australian citizens or permanent residents whose interests are affected by such
decisions.

EXEMPT PERSONS: DECLARATION THAT PRESENCE UNDESIRABLE

378. A person exempt under sub-section 8(1) of the Migration Act may be declared, by
writing under the hand of the Minister or an authorised officer, to be a person whose continued
presence in Australia is undesirable. Unless such a person has an entry permit endorsed to the
effect that the person granting the permit recognises that he or she is a person in respect of
whom a declaration is in force, the person thereupon becomes a prohibited non-citizen and is
liable to deportation pursuant to section 18 of the Act.

379. As in the case of a decision to refuse entry to persons exempt from the requirement to
possess an entry permit under paragraphs 8(1)(a) to 8(1)(c), the Council considers that a
decision, to declare that the presence in Australia of an exempt person (being an exempt person
under paragraphs (a) to (c)) is undesirable, is the function of the Executive, since the presence
in Australia of such exempt persons is at the discretion of their governments and the matter of
their continued stay is one which would be dealt with on a government to government basis. It has therefore, concluded that such a decision should not be reviewable.

380. The Council considers, however, that a decision to issue such a declaration in respect of a person who is an exempt person under paragraph 8(1)(d), (e) or (f) should be subject to external review on the merits. Such a decision can have important consequences for persons who are exempt under section 8(1)(d) (crews of vessels) since the consequence of being declared undesirable is likely to be removal from Australia and a ban on further entry. This may place such persons at risk of losing their livelihood.

381. In the case of persons exempt under section 8(1)(e), such persons will usually, under present circumstances, be New Zealand citizens resident in Australia. Removal from Australia and the prevention of re-entry is likely to have a substantial impact on their interests in terms of their employment and family ties in this country. It is also likely to have similar effects on the interests of any family the person has in Australia and, possibly, the interests of an employer, but the Council does not consider it appropriate to restrict standing to seek review to Australian citizens or permanent residents whose interests are affected.

382. Similarly, the interests of persons who are exempt under the provisions of paragraph 8(1)(f) could be significantly affected by a decision to make a declaration under sub-section (2). The persons concerned are inhabitants of the Protected Zone established under the Torres Strait Treaty, who are entering a part of Australia that is in the Protected Zone or an area in the vicinity of that Zone in connection with the performance of traditional activities. In the Council’s opinion review of such decisions is also appropriate. The Department has expressed general agreement with the proposals in this section, but the recommendation regarding paragraph 8(1)(f) was not included in the draft report.

REFUSAL OR CANCELLATION OF A RESIDENT RETURN VIS A OR RETURN ENDORSEMENT

383. The difference between a resident return visa and a return endorsement is explained in Appendix I (paras 11-13). The latter is usually issued in appropriate cases only to persons who have resided in Australia for at least 12 months, while the former is issued in appropriate cases to persons who have lived in Australia for less than 12 months. In such cases only permanent residents are eligible to seek or are required to obtain such travel documents. In its submission to the Human Rights Commission, the Department stated that return endorsements may be refused or cancelled on the following grounds:

- the applicant or holder has come under adverse notice because of extreme political, subversive or criminal activities;
- the applicant or holder is under consideration for deportation, or is being repatriated; or
- the applicant or holder clearly no longer maintains a true residence in Australia.

The Council understands that similar considerations apply to the refusal or cancellation of resident return visas.

384. Resident return visas and return endorsements may be refused, or cancelled (s.11B), when the affected person is in Australia or overseas. A decision to refuse or cancel a visa or a return endorsement can therefore prevent freedom of movement to and from Australia. Cancellation can, in fact, represent de facto deportation if a person is overseas at the relevant time. Clearly, then, decisions of this nature can have a substantial impact on the interests of persons who are permanent residents of Australia, and possibly on members of their families also permanently resident in Australia. Moreover, in the Council’s view, persons admitted to Australia as permanent residents may reasonably expect that, in the normal course of events,
no undue restriction will be placed on their movements in and out of Australia. In this respect the Council has noted the provisions of Article 13 of the International Covenant on Civil and Political Rights which prohibit the expulsion of aliens lawfully in the territory of a state otherwise than in accordance with law and subject to the right to submit reasons against expulsion and to have the case reviewed by, and to be represented before, the competent authority or a person or persons designated by it. While not strictly applicable to cases of resident return visas and return endorsements, in the opinion of the Council the effect of a cancellation of such a visa or endorsement has the same effect as an ‘expulsion’ of a person, and should therefore be subject to the same procedural safeguards. Given these considerations, the Council has formed the view that a decision to refuse or cancel a resident return visa or a return endorsement should be reviewable.

385. In the case of a person refused a resident return visa or a return endorsement while overseas, the review process will have to be conducted in the absence of the applicant. For reasons similar to those outlined in paragraphs 297-300 in relation to decisions to cancel migrant or temporary entry visas, the Council does not consider that this should preclude review of this particular class of decision. An Australian citizen or permanent resident who is physically present in Australia and whose interests are directly affected by the decision could, of course, be joined as a party to the review proceedings; and the applicant would, if Recommendation 14 is adopted, be entitled to be represented by a person of the applicant’s choice.

APPLICATIONS FOR CHANGE FROM ONE CATEGORY OF TEMPORARY ENTRANT TO ANOTHER

386. Persons who enter Australia for a temporary stay are issued with entry permits authorising temporary entry for a specific period and a specific purpose. Once in Australia such persons may seek to change status from one category of temporary entrant to another. In the Council’s view it would not be reasonable for such persons either to expect or to rely on permission being granted for them to remain in Australia for a purpose different from that in respect of which entry was granted. In some circumstances the interests of such persons may not be significantly affected by a refusal to grant a change in purpose, but in others there may be significant effects on individual interests.

387. In the absence of a reasonable expectation that a change in the kind of temporary permit held would be granted, the Council does not consider that the person subject to the decision should be able to make an application for review of such decisions. However, the Council considers that the interests of Australia citizens or permanent residents may be affected to a significant degree by a decision to refuse temporary entry change of status, and, consistently with the Council’s recommendations concerning overseas applicants for visas, it proposes that external review on the merits of such decisions should be provided, at the instance only of an Australian citizen or permanent resident whose interests are affected.

CANCELLATION OF A TEMPORARY ENTRY PERMIT

388. Sub-section 7(1) of the Migration Act empowers the Minister, in his or her absolute discretion, to cancel a temporary entry permit at any time by writing under the Minister’s hand. Upon such cancellation the person who is the holder of the permit becomes a prohibited non-citizen (sub-s.7(3)), and thus becomes liable to deportation under section 18.

389. In Minister for Immigration and Ethnic Affairs v. Gaillard (1983) 49 ALR 277, the Full Court of the Federal Court held that a person whose temporary entry permit was cancelled could not be said to have a ‘legitimate expectation’ of receiving a hearing because of the absolute discretion which the Migration Act confers on the Minister. Nonetheless, in the opinion of the
Council, a person who is granted a temporary entry permit for a particular period of time could reasonably expect to be permitted to remain in Australia for that time and to rely on such permission in arranging that person’s affairs, both in terms of travel to Australia (relying on the period of validity of a visa) and in terms of arrangements within Australia. Changes to these arrangements could cause financial loss and other forms of hardship. For those reasons, the Council considers that a decision to cancel a temporary entry permit should be subject to external review on the merits at the instance of a person whose interests are affected by the decision.

REFUSAL TO EXTEND A TEMPORARY ENTRY PERMIT

390. As a general proposition, the Council considers that a person who is permitted to enter Australia for a fixed period cannot reasonably expect to be allowed to remain for a longer period. A decision to refuse an extension of stay may, however, affect the interests of an Australia citizen or permanent resident (for example, where the person who is the subject of the decision is a close relation of the Australian citizen or permanent resident and, since the person’s arrival in Australia, family circumstances have altered necessitating that he or she remain for a longer period; or where an employer requires the services of a person in Australia for temporary employment for a longer period than originally anticipated). In other cases a decision to refuse an extension of stay can affect very significant interests of the person who is the subject of the decision, although the interests of an Australian citizen or permanent resident may not be involved, for example, where a person has come to Australia for medical treatment which cannot be obtained in that person’s home country and which has not been completed by the end of the period of authorised stay. Similarly, where a person has been permitted entry for study purposes a refusal to extend that person’s stay where the extension is sought in order to continue those studies could have a significant effect on individual interests. Moreover, such a person might reasonably expect that his or her entry permit will be renewed as required provided that the person is progressing satisfactorily in the course of study in respect of which entry has been granted.

391. The Council appreciates that there may be other instances where it might be said that a reasonable expectation exists or where it could be claimed that individual interests are significantly affected by an adverse decision. It is also conscious, however, that the creation of a general right of review in respect of a refusal to extend a temporary entry permit may well encourage the lodgment of unmeritorious appeals aimed at gaining additional time. It has therefore concluded that a right of review by an external review authority should be provided only in certain specified circumstances (as described in para. 392 below) in order to achieve a balance between the need to recognise that significant individual interests may be affected by this class of decision and the desirability of ensuring that, as far as possible, the review system is not open to abuse.

392. Accordingly, the Council proposes that provision should be made for review of decisions to refuse to extend temporary entry permits but only at the instance of (a) an Australian citizen or permanent resident whose interests are affected by a decision, or (b) where the applicant is seeking an extension for medical treatment not available in his or her home country, or for the purpose of continuing an approved course of study, at the instance of a person (including the applicant) whose interests are affected.

‘VOLUNTARY’ DEPARTURE

393. Section 31A of the Migration Act provides that a prohibited non-citizen may be required to leave Australia within a specified time. The penalty for failure to comply with this requirement is $1000 or imprisonment for six months. The Council has been informed by the Department that a person may be required to depart Australia pursuant to section 31A where
that person has applied to remain in Australia beyond the authorised period of stay (either temporarily or permanently) but has been refused permission to do so, or where a person has overstayed an authorised period of stay and has thus become a prohibited non-citizen. The Department has not kept statistics on the number of requests made for ‘voluntary’ departure. While a prohibited non-citizen is liable to deportation it is the Council’s understanding that, in some cases where such a person indicates a willingness to depart Australia voluntarily and makes arrangements accordingly, deportation action may be stayed. However, the Minister’s recent policy statement on ‘illegal immigrants’ expresses the view that ‘illegal immigrants’ who do not leave of their own accord, and who conceal themselves from the Department, cannot expect that when they are apprehended they will have a right to depart voluntarily in order to avoid prosecution and deportation and the usual condition that a deportee should not be allowed back into Australia within five years.

394. The imposition of a requirement that a person depart Australia pursuant to section 31A may, in fact, be a precursor to deportation since this would be the normal consequence of a failure to comply with the requirement. It may also be the ultimate step in the determination of an application for an extension of temporary stay or for a change of status from temporary entrant to permanent resident. Thus decisions on ‘voluntary’ departures involve many of the same considerations which are relevant in determining whether those other decisions should be reviewable. Such considerations include the severe consequences which may be entailed for the person who is the subject of the decision and the possibility that the interests of an Australian citizen or permanent resident may be affected by the decision. In the light of these considerations, the application of the Council’s usual principles in relation to the provision of review (see ARC Eighth Annual Report 1983-84, para. 39) leads prima facie to the conclusion that decisions taken under section 31A should be subject to review on the merits.

395. The Department commented on the Council’s draft report that the proposal that there should be review of decisions under section 31A could lead to duplication of proceedings and attempts to frustrate migration controls. In the Council’s view, however, this view does not take account of the severe nature of the impact of such decisions. The making of an order under section 31A is tantamount to an order for deportation. A person who fails to comply with it is exposed both to the strong likelihood of future deportation action, and the attendant administrative penalties in relation to readmission to Australia at a future date, and to liability to prosecution and the imposition of a heavy fine or imprisonment. The pressure to comply with the order is thus extremely strong, even if the person concerned believes there are grounds on which the decision could be challenged on the merits. As discussed above (para. 269), the Council does not consider that a person should be exposed to the threat of imminent deportation before being permitted to seek review on the merits, and, just as importantly, the Council does not believe that a person should be exposed to the risk of criminal prosecution before being able to challenge such a decision.

396. The Council recognises that there may have been previous review proceedings in which many of the relevant issues will have been adjudicated upon. The Council also notes, however, that a person subject to a requirement under section 31A may not, for whatever reason, have sought review at an earlier stage, and that this is a further reason why a right of review ought not to be denied at this stage.

397. Moreover, the Council does not believe that the risks of abuse with respect to the proposed right of review are substantial. Where there is an application for review of a decision which has been preceded by decisions which are themselves subject to review, or for leave to seek further review of such a decision, the review body can be expected to take into account the decisions reached in previous review proceedings where these are relevant, which should
enable the proceedings to be disposed of quickly where there are no new issues or material to consider.

398. There remains the question whether review on the merits should be obtainable at the instance of the prohibited non-citizen concerned, or whether it should only be available at the instance of an Australian citizen or permanent resident who can show that his or her interests are affected by the decision. Consistently with the Council’s proposals on review of applications for the grant of temporary entry permits to prohibited non-citizens (paras 358-73), the Council concludes that review should only be available at the instance of an Australian citizen or permanent resident whose interests are affected (see also paras 407-12 for review of deportation decisions concerning prohibited non-citizens).

DEPORTATION

399. As noted in Chapter 1 (paras 44A-46) deportation of a permanent resident may, in certain specified circumstances, be effected by invoking sections 12 and 14 of the Migration Act, while a prohibited non-citizen may be deported pursuant to section 18. In addition, the Minister may, in accordance with the provisions of section 19 of the Act, at the request of the spouse of a deportee, deport the spouse and dependent children of that deportee. The Minister may also, pursuant to section 20 of the Act, revoke a deportation order. The various categories of deportation decisions are discussed in the following paragraphs in terms of the Council’s views as to whether they should be subject to external review on the merits and, if so, by what means.

Section 12 deportations

400. A right of appeal already lies to the AAT in respect of a decision to deport a permanent resident pursuant to section 12 of the Migration Act. The Council considers that such decisions should continue to be subject to review but that it would not be appropriate for such review to be subject to the same conditions as the Council has recommended apply to the majority of migration decisions. In its view, the nature of the decisions, including the often direct involvement of the Minister in their making, and the significance of the individual and community interests which may be affected, render it inappropriate that such decisions be subject to review by the recommended first-level review authority. The Council therefore proposes that an appeal should lie directly to the Administrative Appeals Tribunal in respect of section 12 deportation decisions.

401. The Council has noted that under sub-section 66E(2) of the Migration Act the right to seek review of section 12 deportation orders is restricted to a person who is either an Australian citizen or a non-citizen (other than a prohibited non-citizen) whose continued presence in Australia is not subject to any limitation as to time imposed by law. The Council has considered whether this restriction on standing to seek review of such decisions should remain and it has concluded that it should for similar reasons to those which were relied upon by the Council in concluding that standing to seek review of a refusal to grant a temporary entry permit to a prohibited non-citizen should be confined to an Australian citizen or permanent resident whose interests are affected by the decision (see paras 358-73 and 376-7). That is to say, persons who are subject to deportation orders under this section are, by definition, persons who have been convicted of a criminal offence in Australia and do not have a reasonable expectation of being allowed to remain in Australia in those circumstances.

Section 14 deportations

402. The Migration Act already provides for the review of section 14 deportation decisions by an independent Commissioner. The Commissioner, however, exercises only a recommendatory power. The Council considers that the interests affected by section 14
deportation decisions are no less significant than those which may be affected by deportation decisions made pursuant to section 12 of the Act. In principle, then, it considers that such decisions should be reviewable on a similar basis.

403. The Council has noted, however, that deportation decisions made pursuant to subsection 14(1) of the Migration Act are made on national security grounds and also that, under the Australian Security Intelligence Organisation Act 1979, a right of appeal lies to the Security Appeals Tribunal in relation to adverse security assessments made by the Australian Security Intelligence Organisation (ASIO). In its Report No. 7, Citizenship Review and Appeals System (paras 13-15), the Council expressed the view that, where the Minister decided to act on an adverse ASIO security assessment in making a decision pursuant to the Australian Citizenship Act 1948, the affected person should be limited to any rights of review under the ASIO Act. In effect, then, the Council recommended that there should be no right of appeal to the AAT where the Minister had acted on the basis of an adverse or qualified ASIO security assessment. The Council considers that a similar condition should apply to deportation decisions made pursuant to subsection 14(1) of the Migration Act. The Council therefore proposes that there should be review of decisions to deport persons pursuant to section 14 of the Migration Act except where such decisions have been made on the grounds of an adverse or qualified security assessment provided by ASIO, in which case no appeal should lie.

404. In view of the nature of decisions made under section 14 and the often direct involvement of the Minister, the Council considers that such decisions should as a class be directly reviewable by the AAT.

405. So far as standing to seek review of such decisions is concerned, the Council distinguishes between deportation orders made under subsection 14(1) and those made under subsection 14(2). In the case of the latter there is a requirement that the person concerned has been convicted of a specified offence under Commonwealth, State or Territory law generally relating to security matters. Accordingly, the Council believes that the legislative policy manifested in subsection 66E(2) that standing should be restricted to an Australian citizen or permanent resident in circumstances where a migrant has been convicted of a serious offence also applies in this case and, accordingly, standing to seek review should be similarly restricted. Different considerations apply, however, to cases arising under subsection 14(1) where the making of a deportation order depends not on the fact of a person’s conviction of a serious offence but only on formation of an opinion by the Minister that conduct of the non-citizen concerned constitutes or has constituted a security threat to the Commonwealth or a State or Territory. Accordingly, the Council proposes that standing in relation to deportation orders made under subsection (2) should be restricted to an Australian citizen or permanent resident (the latter of which could in some cases include the person subject to the decision), but that there should be no restrictions on the standing of persons affected by decisions made under subsection (1).

406. Following the introduction of external review on the merits by the AAT of decisions made under section 14, existing sub-sections (3) to (8) concerning the role of the Commissioner under the section will become redundant, and the Council proposes that they should be repealed.

Section 18 deportations

407. The Council recognises that, as a practical matter, a prohibited non-citizen who has been ordered to be deported pursuant to section 18 may have established substantial ties in Australia in much the same manner as a permanent resident. The Council has concluded, therefore, that in principle a right of external review on the merits should be provided in
respect of a decision to deport a person under the provisions of that section. It has considered, however, whether such rights of review should be at the instance of the prohibited non-citizen or should only be at the instance of an Australian citizen or permanent resident whose interests are affected by the decision. The issues raised in this regard are in most respects very similar to those which were discussed in paragraphs 358-73 in connection with standing to seek review of temporary entry permit decisions concerning prohibited non-citizens, and it has not been thought necessary to repeat that discussion.

408. The Council notes that the Department’s comments on the Council’s draft report indicated that the Department agreed with the proposal to grant a right of review to a deportee. However, the Department also considered that to give such persons the right of appeal at their own instance could encourage persons to remain illegally in Australia and would undermine the limitations on standing to seek review of temporary entry permit decisions, as proposed by the Council in its draft report.

409. Consistently with the Council’s proposals on review of applications for temporary entry permits by prohibited non-citizens, whether in association with applications for change of status or otherwise (see paras 358-73 and 376-7), and with its proposals on review of decisions requiring the ‘voluntary’ departure of prohibited non-citizens (paras 393-8), the Council has concluded that the right to seek review of a section 18 deportation decision should be restricted to an Australian citizen or permanent resident whose interests are affected by the decision.

410. The Council has also considered whether it is necessary or desirable to provide for two-tier review of deportation decisions taken under section 18 of the Act, or whether such decisions should be directly reviewable by the AAT. The Council has been informed by the Department that the power to order the deportation of prohibited non-citizens has been delegated by the Minister to senior officers of his Department and that the Minister is likely to be involved in the decision-making process only where representations have been made to the Minister or where a particular case raises complex, important, or sensitive issues. Deportation decisions made under section 18 are therefore in a different category from those made under sections 12 and 14 of the Act, and on this ground are more appropriately reviewable by both tiers of the review structure. Nonetheless, where a decision has in fact been taken personally by the Minister, Recommendation 8 of this Report provides for direct review by the AAT.

411. Finally, a further consideration which in the Council’s view tends against the provision of direct review by the AAT in normal circumstances is the volume of decisions, and potential decisions, in this area. According to the Department, the number of deportations actually ordered pursuant to section 18 in the past three years has been:

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It is the Council’s view that if external merits review had been available at the relevant times, a large percentage of deportation orders would have been reviewed. Some indication of the high level of review action which is likely to occur with regard to deportation orders can be obtained from the fact that a substantial number of applications for review of migration decisions under the AD(JR) Act relate to such orders.

412. In recommending that section 18 deportation decisions be subject to merits review, the Council reiterates its expectation that the review authorities will take into account the relevance of any previous review proceedings concerning the particular case.
Section 19 deportations

413. Decisions of this nature are made only at the request of a spouse of a deportee and involve the exercise of the Minister’s discretion as to whether to accede to such a request. The Council assumes that the spouse of a deportee would only request that the spouse and any dependent children of the deportee also be deported in the interests of maintaining the family unit, or where the spouse wished to reside close to family or friends able to provide support in a case in which, for example, the deportee was likely to be taken into custody in the receiving country. In that sense, the individual interests affected by a decision not to grant such a request may be considered to be significant. On the other hand, there is usually no barrier, other than lack of funds, to the family of a deportee departing Australia, although in rare cases the receiving country may refuse to permit the entry of a deportee’s spouse (for example, where the spouse has engaged in criminal activities of a serious nature).

414. The Council has concluded that a right of review should be provided in respect of a decision to refuse to deport a deportee’s family in order to ensure provision for those cases which may arise where substantial interests are affected because, owing to financial hardship or other circumstances, deportation is the only means of maintaining the family unit or of ensuring that a deportee’s spouse and dependent children are not deprived of the support of relatives or close friends living outside Australia.

Revocation of a deportation order under section 20 of the Migration Act

415. In the normal course of events a deportation order would only be revoked where it had been determined that the person should be permitted to remain in Australia. A deportation order issued in respect of a prohibited non-citizen may, however, be revoked if the person concerned indicates a desire to depart Australia voluntarily and the Department is willing to agree to that course of action (without it being necessary to invoke section 31A of the Migration Act). The revocation of a deportation order may have some effect on the application of administrative decisions in relation to re-entry to Australia, although it may be noted that even those who have departed voluntarily, rather than being deported, may be subject to a period within which readmission is unlikely to be allowed. With this exception, any significant interests affected by a decision not to revoke an order can be assumed to have been covered by the provision of review rights in respect of related decisions (for example, the review of the initial decision to deport, or an earlier decision not to grant change of status from temporary entry to permanent resident). In view of this, and bearing in mind the possibility that the existence of a right of review in respect of a refusal to revoke a deportation order may be used by some persons as a means of delaying deportation, the Council considers that a decision not to revoke a deportation order should not be reviewable.

Maintenance guarantees (assurances of support): refusal to write off a debt

416. In Report No. 21, The Structure and Form of Social Security Appeals (paras 175-7), the Council recommended that action by the Department of Social Security to recover from a guarantor a debt arising under regulation 22 of the Migration Regulations in respect of the payment of special benefit to a person the subject of a maintenance guarantee should be reviewable by the Social Security Appeals Tribunal and, thereafter, by the AAT. If this recommendation is implemented it will mean that a person who has provided a maintenance guarantee (assurance of support) in respect of a person who later receives special benefit payments from the Department of Social Security will be able to seek review of a decision to recover the debt which that person has incurred as guarantor. If the appeal is successful the effect will not be to expunge the debt but will be merely to indicate that, in the circumstances
relevant at the time, recovery of the debt was inappropriate. The debt itself, however, will
continue to exist, although the Minister for Social Security may exercise a discretion to write it
off under regulation 23 of the Migration Regulations.

417. A debt to the Commonwealth may also be raised under regulation 22 in respect of
accommodation and dental and surgical expenditure, as well as in respect of payments of
special benefit. The Minister for Social Security is also empowered to write off debts of this
kind. While enquiries made by the Council’s Secretariat have not revealed any Commonwealth
agency which seeks to recover such debts it is conceivable that a case may arise at some stage.
The Council considers therefore that provision should be made for the review of a decision by a
Commonwealth agency to recover a debt arising under regulation 22 of the Migration Act, to
be conducted by an Immigration Adjudicator, and subsequently (if leave is granted) by the
AAT, unless provision already exists for review by the Social Security Appeals Tribunal and,
thereafter, by the AAT. The Council envisages, on the information available to it, that there
would be few, if any, instances in which this right of appeal would be exercised.

Securities in respect of compliance with the Migration Act
417A. The Council understands that it is not the practice of the Minister or the Department to
require the provision of some financial security to ensure compliance with the provisions of the
Migration Act or the Migration Regulations, although there is provision in section 54 of the Act
for the taking of securities. Nevertheless, such a decision, if made, may have a substantial
impact on the interests of the individual not only in financial terms, but also in relation to
whether that person is permitted entry to Australia. In this context, the Council is conscious
that a financial security could be sought from an Australian citizen or permanent resident in
respect of the entry of a friend or relative (in order to ensure, for example, that the person
seeking entry will, if permitted to come to Australia, leave at the end of the authorised period
of stay). In the circumstances, the Council is of the view that a decision to require a financial
security to ensure compliance with either or both the Migration Act and the Migration
Regulations should be subject to external review on the merits by any person whose interests
are affected by the decision. This is consistent with the Council’s other recommendations
concerning the reviewability of decisions relating to the entry of persons from overseas.

Overseas students charge legislation
418. The interests affected by decisions made under the overseas students charge legislation
may be significant to the individuals concerned, and the Council considers that the following
substantive decisions should be subject to review on the merits under the proposed two-tier
structure of review:
  • a decision that a person is liable to pay a charge imposed by the Overseas Students Charge
     Act (s.5);
  • a decision made under the Overseas Students Charge Regulations determining the rate of
     such a charge (reg. 3);
  • a decision under the Overseas Students Charge Collection Act to refuse a temporary entry
     permit to an overseas student (s.6);
  • a decision under the Overseas Students Charge Collection Regulations that a student is not
     exempt from the charge (reg. 4);
  • a decision under the Overseas Students Charge Collection Regulations that a student is not
     entitled to a refund of charges (reg. 5); and
  • a decision under the Overseas Students Charge Collection Regulations that a student is not
     entitled to a remission of a charge (reg. 8).
419. Review of such decisions should be at the instance of a person whose interests are affected by them. The Council recognises that where the applicants are overseas there may be difficulties in pursuing applications for review. As in other similar cases discussed above (paras 300 and 385), the Council does not consider that such difficulties constitute sufficient reason to exclude review rights in such cases.

420. The Council’s recommendations in respect of the review of the classes of decisions discussed in paragraphs 291-419 are set out below.

**Recommendation 28: Decisions subject to review**

1. Legislation should provide that the following classes of decisions made under the Migration Act and Migration Regulations are subject to review by the Immigration Adjudicators, and, subsequently, subject to any leave requirement which may apply (see Recommendation 5), by the Administrative Appeals Tribunal, at the instance, unless otherwise specified, at each level of review, of any person whose interests are affected by such a decision:
   a. a decision to refuse a migrant entry or temporary entry visa, but only at the instance of an Australian citizen or permanent resident whose interests are affected by the decision;
   b. a decision to cancel a migrant entry or temporary entry visa;
   c. a decision requiring the provision of a maintenance guarantee (assurance of support);
   d. a decision to refuse entry to a person who has a visa, or a return endorsement, or who is exempt from the requirement to possess an entry permit under paragraph 8(1)(d), (e) or (f) of the Migration Act;
   e. a decision to grant a temporary entry permit which is subject to conditions which are inconsistent with the basis on which a visa has been granted, or a decision to grant any other permit inconsistent with the basis on which a visa has been granted, other than a decision to grant a temporary entry permit for the purpose of allowing entry while eligibility for permanent residence is determined;
   f. a decision to refuse an application for a change of status from temporary to permanent resident made in accordance with section 6A of the Migration Act other than a decision taken under paragraph 6A(1)(c) in relation to change of status to permanent resident based on an applicant’s status as a refugee (see Recommendation 28(3)(a));
   g. a decision under sub-section 6(2), 6(5) or 7(2) of the Migration Act to refuse to grant a temporary entry permit to a prohibited non-citizen, at the instance only of an Australian citizen or permanent resident whose interests are affected;
   h. a decision to declare, pursuant to sub-section 8(2) of the Migration Act, that the continued presence in Australia of a person who is in an exempt class of persons under paragraph 8(1)(d), (e) or (f) of the Migration Act is undesirable;
   i. a decision to refuse or cancel a resident return visa or a return endorsement;
   j. a decision to refuse change of status from one category of temporary entrant to another, but only at the instance of an Australian citizen or permanent resident whose interests are affected;
   k. a decision to cancel a temporary entry permit;
   l. a decision to refuse to extend a temporary entry permit, but only at the instance of an Australian citizen or permanent resident whose interests are affected or at the instance of any person whose interests are affected by the decision where a person is seeking an extension for the purpose of medical treatment not available in that person’s home country, or for the purpose of continuing an approved course of study;
   m. a decision not to grant a temporary entry permit to a person who has been granted refugee status and who wishes to apply for permanent resident status in accordance with paragraph 6A(1)(c);
(n) a decision to require voluntary departure made pursuant to section 31A of the Migration Act, at the instance only of an Australian citizen or permanent resident whose interests are affected;
(o) a decision to deport a prohibited non-citizen pursuant to section 18 of the Migration Act, at the instance only of an Australian citizen or permanent resident whose interests are affected;
(p) a decision under section 19 of the Migration Act to refuse to deport, at the request of the spouse of a deportee, the spouse and any dependent children of a deportee;
(q) a decision by a Commonwealth agency to take action to recover a debt arising under regulation 22 of the Migration Regulations, unless a right of appeal in respect of such a decision is already provided for to the Social Security Appeals Tribunal and the Administrative Appeals Tribunal; and
(r) a decision to require a security to secure compliance with the provisions of the Migration Act or the Migration Regulations.

(2) Legislation should provide that the following classes of decisions made under the Overseas Students Charge legislation are subject to review by the Immigration Adjudicators, and subsequently the Administrative Appeals Tribunal, at the instance of a person whose interests are affected by such a decision:
(a) a decision under section 5 of the Overseas Students Charge Act that a person is liable to pay a charge;
(b) a decision under regulation 3 of the Overseas Students Charge Regulations determining the rate of a charge;
(c) a decision under section 6 of the Overseas Students Charge Collection Act refusing a temporary entry permit to an overseas student;
(d) a decision under regulation 4 of the Overseas Students Charge Collection Regulations that a student is not exempt from a charge;
(e) a decision under regulation 5 of the Overseas Students Charge Collection Regulations that a student is not entitled to a refund of a charge;
(f) a decision under regulation 8 of the Overseas Students Charge Collection Regulations that a student is not entitled to a remission of a charge.

(3) Legislation should provide that decisions from which a right of review lies directly to the Administrative Appeals Tribunal at the instance, unless otherwise specified, of any person whose interests are affected by such a decision, are:
(a) a decision to refuse a claim, by a person who has arrived in Australia, for refugee status under paragraph 6A(1)(c) of the Migration Act;
(b) a decision to deport a person pursuant to section 12 of the Migration Act, at the instance only of an Australian citizen or permanent resident whose interests are affected by the decision; and
(c) a decision to deport a person pursuant to section 14 of the Migration Act, except where it has been made on the grounds of an adverse or qualified security assessment provided by the Australian Security Intelligence Organisation, at the instance of:
(i) in the case of a decision made under the provisions of sub-section 14(1) - any person affected by the decision;
(ii) in the case of a decision made under the provisions of sub-section 14(2) - only an Australian citizen or permanent resident whose interests are affected.

(4) Sub-sections 14(3) to (8) of the Migration Act should be repealed following the introduction of external review on the merits of deportation decisions made under section 14.

(5) In relation to review of a refugee status decision referred to in paragraph (3)(a) above, an applicant, before lodging an application for review, should be required to obtain the leave of the Tribunal in accordance with the general principles specified in Recommendation 5.
(6) Legislation should provide that:
(a) a person who has been refused entry to Australia but is in possession of a valid visa or is exempt from the requirement to possess a visa is permitted to remain for the purposes of the hearing of an appeal, but may be held in custody subject to the recommendations below;
(b) a prescribed authority under section 40 of the Migration Act shall inquire into whether there are reasonable grounds for continuing to detain an applicant in custody for more than 48 hours pending the hearing of an appeal, and to authorise the detention of the applicant for such periods as are necessary;
(c) in circumstances where the Department is seeking leave to appeal to the Administrative Appeals Tribunal, provisions similar to those referred to in paragraph (b) shall apply;
(d) a decision to detain a person in custody shall be made only after consideration of whether the person concerned is likely to abscond or to pose a threat to the community; and
(e) a prescribed authority is empowered to release on reasonable conditions a person being held in custody.
CHAPTER 4

ESTIMATED COSTS OF THE PROPOSED SYSTEM OF REVIEW

421. Both the Department and the AAT have provided, in response to requests from the Council, estimates of the resource implications for their institutions of the Council’s proposals. The Department has also provided its estimates of the resource implications of the Council’s recommendation that Immigration Adjudicators be appointed to serve as the first tier of external merits review.

422. It is the Council’s view that the costs of its proposals cannot be predicted with any precision and that the estimates provided by both the Department and the AAT should be regarded as giving only a very general indication of the resource implications of its recommendations. The primary reason for this view is the uncertainty surrounding the number of appeals which are likely to be lodged at both levels of review. The Council’s general experience is that there has been a tendency to overstate the likely workload of the AAT in two-tier structures of review, but it acknowledges that there may be special features in the migration area which will contribute to a high volume of appeals being brought at both levels of review.

Estimates of departmental staff needs

423. The Department has supplied the following estimates of departmental staff needs resulting from the implementation of the Council’s proposals as set out in its draft report of 1984, but excluding the proposed review rights in relation to temporary entrants. The Department considers the latter would be extremely difficult to gauge accurately, but that they could result in significant further increases in the number of staff required. Moreover, the estimates have not sought to take account of the staffing impact of the Council’s proposals as to the structuring of migration discretions.

424. While the Department’s estimates were based on the earlier draft report, the Council does not consider that the proposals contained in this report are likely to lead to staffing estimates of a magnitude substantially greater than the original proposals, except in relation to the proposal that there be established a specialist immigration advisory service independent of the Department to assist applicants for review and, in the period before its establishment, government funding for migrant welfare groups (see para. 241 and Recommendation 19), which was not included in the draft report. The Council has also noted that the Department’s estimates include resources required to handle requests under the Freedom of Information Act 1982 and investigations by the Ombudsman. Of course, such matters are unrelated to the proposals made by the Council in this report which is concerned with merits review.

425. The Department stated that under the proposed two-tier system of external review, the review function within the Department would need to be expanded to deal with the increased flow of documentation and correspondence involving the Minister, the review authorities, applicants for review and their representatives. The Department pointed out that there would be associated consequences in management-related areas including staffing, the level of classification of staff positions, the deployment of resources and, generally, the division of review responsibilities within the Department.

426. The Council has some difficulty in understanding why there would be any increase in Ministerial correspondence as a result of its proposals. On the contrary, the Council believes
that a diminution in work is likely to occur in this area with the establishment of an effective external system of merits review (paras 120-1); however, this will depend in large measure on the attitude of the Minister.

427. The Department acknowledges that it has had considerable difficulty in predicting with accuracy such matters as: the number of appeals which may be made under the new system of review; the extent to which policy changes or improved training for primary decision makers may speed up the review process or diminish the need for it; and the method by which the Department would structure discretions. Nonetheless, the Department has provided estimates which have made assumptions concerning a number of matters including:

- the number of appeals likely to be lodged;
- the number of special leave applications resulting from the Adjudicators’ decisions;
- the likely number of cases proceeding to the AAT;
- the average length of time taken for officers to deal with the various stages of the review process; and
- the workload associated with Ministerial representations at various levels.

428. The Department has assumed that there would be 6,700 applications annually for review by the Adjudicators and that, on the basis that each application would involve two days’ work for an officer, there would be a need for approximately 60 staff to perform the tasks necessary to process their review, such as: assessing review requests; advising applicants; dealing with related representations; processing applications where there are no review rights; preparing statements for the Adjudicators and appearing before them, and responding to Freedom of Information (FOI) requests.

429. At the second level of review, the Department has assumed that there would be: between 750 and 1,500 representations to the Minister; between 1,200 and 2,500 applications for special leave to appeal to the AAT; and between 200 and 375 appeals to the AAT following the granting of leave to appeal. On the basis that each special leave application would take about half a day and each AAT case about one day, the Department estimates a need for about 60 departmental officers to service the second level of review. Included in the Department’s estimates is a figure of 25 staff involved in: training review staff; monitoring decisions of the Adjudicators and the AAT; monitoring the application of policy; processing Ombudsman complaints, FOI requests, and requests for statements of reasons; and co-ordinating all forms of external review.

430. Against the 120 estimated additional staff, the Department has offset the existing 51 positions devoted to review work, to give a net estimate for additional staff of 69 positions, based on the assumptions already referred to. However, the Department has expressed the view that the uncertain nature of the assumptions could lead to the final additional staffing estimate being either too high or too low, and that the real figure for additional staff could be within the range of 40 to 100.

Estimates of Immigration Adjudicators required

431. On the same assumptions as were employed in the preceding paragraphs, and assuming that there would be Adjudicators in each capital city, the Department has estimated a need for 11 full-time Adjudicators, including the Chief Adjudicator, and 19 part-time Adjudicators. The Department also envisages the need for about 14 full-time equivalent support staff for the Adjudicators. Against the provision which will need to be made for the appointment of Adjudicators may be offset the current provision for 29 members of the Immigration Review Panels and three chairmen.
In the initial stages there would be considerable expenditure involved in setting up the new first-level review authority in terms of recruitment and appointment of Adjudicators, the appointment of clerical/administrative staff, the establishing of offices and hearing rooms in the capital cities, and the provision of support services and office requisites. It may be expected that expenditure will level off once the new review authority has been established, but ongoing expenses may nevertheless be substantially more than those presently incurred by the Immigration Review Panels given the different structure of those bodies and the different nature of the review they provide. The Council also considers that it may not be either necessary or desirable to fill at the outset all the Immigration Adjudicator positions which the Department estimates will be required. A better approach may be to appoint only such number of persons as can confidently be predicted will be required to deal with the workload in a new jurisdiction and to postpone appointment of additional Adjudicators until more experience of the jurisdiction has been obtained which should enable a more reliable assessment to be made of the number of Adjudicators needed.

Estimates of additional AAT resources required

The expenditure incurred by the AAT in an expanded Migration Act jurisdiction also has to be taken into account. While the leave requirement will limit the number of applications which will proceed to a full review by the Tribunal, an increased volume of appeals will necessitate the appointment of additional members and support staff.

At this stage the AAT’s estimate of the additional members required to enable it to deal with both applications for leave and for review is that there will be a need for one additional Deputy President as well as three Senior members and between 5 and 8 part-time members. In extending the Tribunal’s part-time membership it is envisaged that close consideration will be given to appointing members who have an appropriate knowledge and understanding of Australia’s ethnic communities.

General considerations

It is important, of course, in assessing the cost of establishing a system of effective review on the merits in the migration area, to bear in mind that current review processes place considerable strains on the Department and cause substantial duplication of effort. In the Council’s view, implementation of its recommendations is likely to result in the rationalisation of the overall review process (see paras 122-33). This may be expected to have a beneficial effect in terms of offsetting the costs of review, but will not avoid the necessity for some increased costs if effective review on he merits is to be provided. However, in the Council’s view those costs must be balanced against the benefits which are likely to be derived from an effective system of review.

The experience of the AAT indicates that while the initial number of appeals edged in a newly conferred jurisdiction may be significant, numbers often decline as principles and practices applicable to the making of particular classes of decisions are enunciated or clarified (see paras. 177-8). The Council believes that this decline indicates an improvement in the primary decision-making process and that this is a substantial benefit of effective review which, in the long-term, can be expected to offset to some extent the costs involved in initially providing that review. As it has aid above (para. 178), the Council is not certain that the pattern of applications for view by the AAT in the migration jurisdiction will parallel those in other jurisdictions, but it expects that some elements of that experience will recur in the expanded jurisdiction.
437. There are also more direct and immediate benefits which flow to the individual who has access to the review system since, even where the original decision is maintained, such a person is more likely to feel that the decision has been fairly and properly made and that he or she has been given a fair hearing. Thus, while less able to be quantified than the costs, the benefits of administrative review are, in the Council’s view, no less real. It is conscious, however, of the desirability of striking a proper balance between pragmatism and principle in determining the extent to which such review should be provided in particular jurisdictions and believes that, if its recommendations relating to the structure and scope of review are implemented, this balance will be achieved in the migration jurisdiction.
CHAPTER 5

DISSENTING OPINION

438. The following paragraphs record the dissenting view of one member of the Council, Mr Julian Disney, on two issues dealt with above.

Introduction

439. There are two recommendations in this report with which I disagree to such an extent, and which are of such importance, that I feel bound to record my dissent from them and briefly to explain my reasons.

440. First, I disagree with the recommendation that the first-level review authority should consist of a single Immigration Adjudicator. In my view, it should be a three-member Immigration Review Board, a possible composition of which is outlined in a later paragraph (para. 454). The Board could sit with only one member in certain specified circumstances, notably where the review needs to be conducted urgently at an airport or other port of entry. The Council states that, although it prefers a single-member authority, it does not oppose a multi-member body. While I welcome this statement, I consider that the case for a multi-member authority is overwhelming.

441. Secondly, I disagree with the recommendation to the effect that in almost every significant category of immigration appeal there should not be an automatic right of appeal to the Administrative Appeals Tribunal (AAT). In my view, there should be such a right without the need to seek permission from the AAT, save perhaps in relation to visa refusals and point of entry cases.

442. Each of these recommendations marks a major departure by the Council from policies which it has recommended, and which have been adopted by the Government, in the most directly comparable areas of administrative review. The contrast with the Council’s recent reports on social security and repatriation appeals is especially striking.

A multi-member tribunal

443. Immigration issues commonly involve difficult assessments of people’s personalities, capabilities and motivations, and consideration of cultural and other factors in relation to which many Australian-born people are likely to have little understanding and perhaps considerable prejudice. Not infrequently they involve issues about which different sectors of the community have very strong feelings, perhaps deeply opposed to each other. Consequently this is an area in which it is especially important for a wide range of experience and perspectives to be present within a review authority in order to increase the prospects not only of arriving at well-informed and balanced decisions but also of attracting broadly-based public confidence.

444. A single-member authority is much less likely than a multi-member one to have within itself a broad diversity of perspectives and experiences. Moreover, the prospect of ill-considered decisions, based perhaps on incorrect assumptions and prejudices arising from restricted personal experience, is greater where there are no colleagues hearing the same case to whom one’s reasoning may be articulated and exposed for comment before arriving at a concluded view.
Perhaps the greatest disadvantage of an authority whose members sit alone is that appointments to it are highly likely to consist entirely, or overwhelmingly, of persons who are already expert in the relevant law and bureaucratic practices but have little or no broader experience in the community. (Experience both in Australia and overseas suggests that many of them will be retired officers of the Department whose decisions are under review.) This tendency is perhaps understandable, since it is essential that the authority have such expertise. But it can be aggravated by restricted perspectives and allegiances amongst those Government advisers who are responsible for recommending appointments. Moreover, many people whose experience and personal qualities would make them excellent members of a multi-member tribunal are likely to be understandably reluctant to seek or accept appointment to a single-member authority where they would bear sole responsibility for interpreting the relevant law and observing the appropriate procedures.

By contrast, experience of the multi-member Social Security Appeals Tribunals (SSATs) has demonstrated the benefits which collegial discussion and decision making can provide both in the quality of those decisions and in the members’ enjoyment of their work. In the real world, factors such as members’ enjoyment are of very great, but often underestimated, significance to the effectiveness of a review authority. They can have a crucial effect on the calibre of persons who seek or accept appointment and re-appointment, especially when membership does not provide other attractions, such as relatively high status and income within the judicial hierarchy.

The likelihood that most appointees to a single-member authority will be lawyers or public servants (whether active or retired) raises the grave risk of proceedings being unduly formal and legalistic, or at least pedantic. This would affect adversely not only the quality of decision making but also the time and expense involved in proceedings, and the degree of satisfaction amongst appellants that their cases had been properly understood and fairly considered, irrespective of outcome. The presence of welfare members on SSATs has had a major impact on developing and maintaining simple, informal and economical procedures. Even the ‘most concerned’ lawyers and public servants, if left to their own devices, can place too much emphasis on formalities without appreciating that, too often, many people are unable to master the procedures sufficiently to put their cases adequately or, indeed, to get before the authority at all.

Some of the considerations to which I have referred have been acknowledged, at least to some extent, by the Council in this report. Some appear to have been given considerable weight by the Council when recommending multi-member tribunals in areas such as social security and repatriation. The question arises why a different composition should be proposed in the immigration area.

The Council states several reasons. First, it is suggested that a multi-member authority would cost more to establish and operate (para. 196). The only substantial increase, however, would seem to be the sitting fees paid to the additional members most of whom, presumably, would be part-time. If the model of the SSATs were followed, any significant increase in the cost of accommodation and administration is unlikely. Furthermore, if, as I have suggested, multi-member tribunals are likely to be less formal and adversarial than single-member ones, they are also likely to handle matters more economically. There also will be less demand for appellants to be provided with legal representation at Government expense. If multi-member tribunals are more likely to make correct decisions and to win public confidence, they are likely to give rise to fewer appeals and consequential public expense. Of course, even in stringent times a modest increase in cost can be entirely justifiable if it produces a substantially fairer system.
450. Another reason given by the Council for preferring a single-member authority is that it would give rise to less delay because of the need in a multi-member tribunal to gather together the members and to allow time for consultation between them (para. 196). Experience of the SSATs suggests that, in practice, this argument is of little weight. It is true, however, that in urgent point of entry cases serious delay, cost and inconvenience could be caused by having to convene several members to hear an appeal. It may be in the interests of both the appellant and the Government for an appeal to be heard speedily by a single member, rather than being delayed to such an extent that the appellant has been removed from Australia, or held for some time in a detention centre, before the appeal is heard. The Chairman of the authority could be given the discretion to decide whether particular point of entry cases may be heard by a single member. A similar discretion could be exercisable in relation to appeals against visa refusals if, which is by no means certain, they become so numerous as to threaten crippling the system with cost and delay.

451. The Council and the Department of Immigration and Ethnic Affairs have been understandably concerned by notorious cases of delay caused by particular appellants having the money and incentive to manipulate the appeal system. So far as can be ascertained, however, the delays have not arisen largely from the first level of appeal but rather from subsequent appeals to the Federal Court or High Court. These cases provide no persuasive reason for preferring a single-member rather than multi-member authority at the first level. Moreover, the danger of abuse of appeal processes at the first level could be met by empowering the Department to take particular cases directly to the AAT if it so wished. An analogous power exists already in the social security area.

452. When seeking to justify a single-member authority for immigration appeals, the Council distinguishes the position in repatriation and social security areas, where it says multi-member tribunals are well-established and have won public confidence (para. 197). There can be little doubt, in my view, that it is at least as important for immigration tribunals to win public confidence, and that they are more likely to do so if they have an appropriate, multi-member composition. The Council adds that the tribunals in social security and repatriation provide the ‘diversity of qualifications, knowledge and experience desirable in those jurisdictions’. It is very difficult indeed to appreciate why such diversity should be less necessary in the immigration area; indeed, I believe it to be even more important.

453. In conclusion, it should be noted that the need for a multi-member composition at the first level of review is made even greater by the Council’s recommendation that in almost every category of immigration appeals there should be no appeal beyond that level unless the AAT gives leave (Recommendation 5).

454. For the reasons outlined above, I believe that the first-level review authority should sit with three members, save that in point of entry cases, and possibly visa refusals, it might be made permissible to sit with a single member. The three members should comprise a lawyer, a person with a close understanding of the perspectives and experiences of immigrants, and a person with experience in public administration.

**Automatic rights of appeal**

455. The Council has recommended (Recommendation 5) that in almost every category of immigration appeal there should be no right of appeal to the AAT save with the leave of that Tribunal. I do not oppose the imposition of a leave requirement for certain categories of appeal. For example, it might be appropriate in relation to appeals against visa refusals if their
volume became so extraordinarily high as to threaten grave damage to the expedition and quality of the AAT’s work. Even so, careful thought would have to be given to the processes for handling leave applications lest they became merely bureaucratic rather than judicial or, on the other hand, so thorough that the problems of overload remained acute.

456. Also, there may be a case for requiring leave in categories where there is a special need for urgent finalisation. Point of entry cases may constitute such a category.

457. But I am opposed to the introduction of a general leave requirement or, as in this report, a leave requirement in most cases. Such an approach is unfair to appellants, who should be entitled, after a first-level review which is purposely informal and quick, to a more thorough-going and formal review by the AAT. In immigration and other areas the Council, correctly in my view, has favoured informality at the first level in order to maximise accessibility and has justified any increased risk of error by pointing to the right of appeal to the AAT. This justification is gravely eroded if the AAT is accessible only by leave, especially if leave applications are determined by looking only at written material and the jurisdiction is one such as immigration in which many appellants will be unable adequately to convey the merits of their case in writing.

458. The proposed leave requirements also pose great dangers for the AAT itself. If applications for leave are very numerous, and are given adequate consideration (albeit brief), the resultant burden on AAT members will be heavy and unconvivial. The increase in the bureaucratic element of the Tribunal’s work would adversely affect its standing and its ability to attract and retain members of high calibre.

459. The statistics given in Appendix 6 suggest that, with the exception of visa refusals (to which I have referred above), there is no category of primary decisions which is likely to give rise to so many appeals as to justify a leave requirement. If subsequent experience proves otherwise, a selective requirement could be imposed where clearly necessary. In this context it is important to bear in mind the very high number of potential appeals in some other jurisdictions, such as social security, but the absence of any demand for introduction of leave requirements therein.

460. I have referred earlier to notorious cases of extreme delay caused by appellants to whom money was no barrier to their relentless manipulation of appeal and judicial review processes. It is by no means clear, however, that a leave requirement for AAT appeals is either necessary or sufficient to solve this problem. Some of the worst instances have risen principally through appeals beyond the AAT, and even if AAT appeals were barred, other avenues (notably judicial review) would provide ample opportunity for gross delay. The proposed leave requirement is likely to prejudice bona fide appellants without significantly reducing the notoriously gross abuses by which it appears largely to be motivated. In my view a detailed analysis of the most serious examples of gross delay in migration appeals is likely to reveal that other more effective options are available to deal with this problem.
APPENDIX 1

IMMIGRATION POLICIES AND PRIMARY DECISION MAKING

Entry to Australia

1. A non-citizen may seek to enter Australia either temporarily or permanently. The conditions which must be satisfied in order to obtain a visa for travel to Australia differ according to the entry category. These conditions are outlined below in terms of the relevant policy guidelines.

MIGRANT ENTRY

2. A ministerial statement of 18 May 1983 (House of Representatives, Parliamentary Debates, p. 662) indicated that current migrant entry policy is founded on the following principles:
   - The Australian Government alone decides who can enter Australia
   - Migrants must provide some benefit to Australia, although this will not always be a major consideration in the case of refugees and family members
   - The migrant intake should not jeopardise social cohesiveness and harmony in the Australian community
   - Immigration policy on selection is non-discriminatory
   - Applicants are considered as individuals or individual family units, not as community groups
   - Suitability standards for migrants reflect Australian law and social customs
   - Migrants must intend to settle permanently
   - Settlement in closed enclaves is not encouraged
   - Migrants should integrate into Australia’s multicultural society but are given the opportunity to preserve and disseminate their ethnic heritage.

3. There are five categories of persons eligible to be considered for migrant entry under the migrant entry policy. They are the Family Migration category (ie spouses, minor children, parents, fiance(e)s, siblings and non-dependent children); the Refugee and Special Humanitarian category; the Labour Shortage and Business Migration category (ie persons whose occupations are in demand in Australia, persons who have work skills which would enable them to take up positions for which suitable applicants have not been found in Australia, or persons who have business skills and propose to establish a business likely to benefit Australia); the Independent Migration categories (persons not eligible under other categories but who have outstanding characteristics of obvious benefit to Australia); and the Special Eligibility category (self-supporting retirees and persons with special creative or sporting talents).

4. Of course, the fact that a person falls within one of these eligibility categories does not guarantee that the person will receive authorisation to travel to Australia for entry purposes. A decision in this regard is dependent upon a number of factors, including the person’s ability to meet the selection criteria applicable to the relevant eligibility category. Thus, for example, all applicants are required to meet general health and character requirements and those falling within the Family Migration category, to whom special concessions apply, must nevertheless be sponsored by a close relative in Australia who is a citizen or permanent resident. Non-dependent children and siblings in this category are required to satisfy the points assessment which applies to persons in some of the other categories. The points assessment is designed to measure an applicant’s prospects of earning a living and supporting the applicant’s family in
Australia and is based on the allocation of a certain number of points in respect of an applicant’s employment skills; whether the applicant has arranged employment in Australia; the applicant’s age, education and qualifications, employment record, economic prospects, and capacity to adjust to life in Australia; and whether the applicant intends to settle in a designated growth area in Australia. An applicant who is not exempt from the points assessment requires a score of 60 points to be considered for migrant entry.

5. In addition, the Migration Regulations specify that an assurance of support (formerly termed a maintenance guarantee) may be required where a de facto wife or an aged or retiring parent is seeking to settle permanently in Australia. The language of the regulation is, however, sufficiently broad to encompass any situation in which the Minister considers it appropriate to require such a guarantee or assurance.

6. Maintenance of a person is defined in the Migration Regulations (regulation 20) as encompassing accommodation, surgical or dental treatment, and any allowance paid to, or in respect of, the person, including a special benefit paid under the Social Security Act 1947, but not including any other pension, allowance or benefit paid under that Act. Regulation 22 specifies that where maintenance for a person, who is the subject of a current assurance of support, has been provided by the Commonwealth, a State or a public or charitable institution, an amount equal to the funds expended is a debt due and payable and may be recovered in a court of competent jurisdiction. This regulation also specifies, however, that the Minister for Social Security may, in the Minister’s discretion, write off any debt due to the Commonwealth. Thus, while it is within the discretion of the Minister (for Immigration and Ethnic Affairs) to determine whether a maintenance guarantee or assurance of support is to be required in a particular case, it is the Minister for Social Security who may, under the Regulations, write off the guarantor’s debts to the Commonwealth.

REFUGEE ENTRY AND THE DORS COMMITTEE

7. People seeking refugee resettlement in Australia are individually assessed under the Australian Guidelines for the Determination and Processing of Refugees, which were introduced in July 1982. The Guidelines concern applicants’ claims to refugee status within the meaning and intentions of the United Nations Convention definition of a refugee, and their settlement prospects in Australia. Any person of any nationality who is outside his or her country may apply for consideration.

8. Recommendations to the Minister on the grant of refugee status are made by an interdepartmental committee known as the Determination of Refugee Status (DORS) Committee, which consists of representatives of the Departments of Immigration and Ethnic Affairs, Prime Minister and Cabinet, Foreign Affairs, and the Attorney-General. The Australian Representative of the UN High Commissioner for Refugees is an invited observer at all Committee meetings. There are no formal provisions for appeals against its recommendations, but the Minister can (and sometimes does) refer a matter back to the Committee for reconsideration. Those who are granted refugee status must still, however, be granted permission to enter Australia as migrants. The Department has informed the Council that in practice it may take up to six months for the Committee to consider cases referred to it. In practice, also, the Committee does not interview applicants for refugee status in person but instead relies on the record of interview between the applicant and departmental officers.

TEMPORARY ENTRY

9. Temporary entry policy is, in fact, made up of three sub-policies related to visitor entry (for holiday and other purposes), entry for temporary residence (usually for employment purposes), and student entry (for study or training purposes). These three sub-policies are
characterised by the common principle that persons entering Australia on a temporary basis should not, except in the circumstances specified in section 6A of the Migration Act, subsequently be permitted to remain permanently.

10. The major features of each of the three temporary entry sub-policies are as follows:

- **Visitor entry** (in respect of tourism, business, visiting relatives or friends, or pre-arranged medical treatment). Applicants must intend a bona fide short-term visit only; be in possession of, or have access to, sufficient funds for maintenance and travel purposes; be in possession of a valid acceptable travel document; be of sound health and good character; sign an undertaking that they will not engage in employment or studies while in Australia; and depart Australia at the end of their authorised period of stay (usually up to six months).

- **Temporary residence** (in respect of entry for a specified short or long-term period to engage in employment or other pursuits in Australia, for example, a working holiday). With the exception of working holiday-makers, and some other categories of temporary resident (where a stay of under 4 months is intended), applicants must be sponsored by a person or organisation in Australia and are expected to depart Australia at the end of their authorised period of stay. (Maximum periods of stay vary depending on the reason for entry to Australia.)

- **Student entry** (in respect of private overseas students entering for study or training purposes). The policy is aimed at providing opportunities for people from overseas to acquire qualifications and skills which will be of value in pursuing a career in their homelands. Applicants must be able to demonstrate that they have an adequate knowledge of English if relevant; that they have sufficient financial resources to cover living and educational expenses in Australia (including overseas student charges if required); that they can meet health and character requirements; that they have a genuine intention of studying in Australia; and that they intend to return home on completion of their studies.

**RESIDENT RE-ENTRY**

11. The resident re-entry policy is directed at facilitating the re-entry to Australia of permanent residents who are non-citizens and who have been, or plan to be, temporarily absent overseas, while, at the same time, preventing persons who do not genuinely intend to settle permanently from obtaining and maintaining resident status simply by making brief visits here. Thus the policy sets out the circumstances in which a person who is a permanent resident but not a citizen may be granted a visa authorising travel to Australia for the purposes of re-entry after a temporary absence. (Such visas are known as resident return visas and return endorsements; for the distinction see below.)

12. Return endorsements. A person may only be granted a return endorsement if he/she has resided in Australia for at least twelve months and, in the case of an applicant overseas, has been absent for less than three years. A return endorsement is valid for a period of three years from date of issue and is automatically renewed for a further three years each time the holder departs Australia.

13. Resident return visas. A permanent resident who has lived in Australia for less than 12 months may be issued with a resident return visa if settlement bona fides have been established by reference to the applicant’s reason for wishing to depart temporarily and to the proposed length of absence. The visa provides for travel before a specified date and usually permits only one journey, although those issued in Australia may provide for more than one journey in certain circumstances. Resident return visas may also be issued to applicants overseas if they have been absent from Australia for less than twelve months, to persons who are eligible to apply, but who are unable to meet all the requirements for the grant of a return
endorsement, or, in certain circumstances, to persons overseas who hold return endorsements or resident return visas which have lapsed. A person overseas who claims to be a resident of Australia but has no evidence of this may, in an emergency, be issued with a temporary visa which is valid for one journey before a specified date and authorises a stay in Australia of three months.

ENTRY PERMITS

14. It is important to note that the possession of a visa authorising travel to Australia for the purposes of temporary or permanent residence does not confer a right of entry to Australia and, on arrival here, the holder is required to obtain an entry permit before he/she can legally enter Australia.

15. Entry permits may operate either as temporary entry permits (authorising a stay in Australia for a specified period) or as permits authorising permanent residence. The Migration Act exempts certain persons from the requirement to obtain an entry permit and provides that such persons may be removed from an exempted category by the making of a written statement by the Minister for Immigration and Ethnic Affairs which declares them to be persons whose entry to, or continued presence in, Australia is undesirable. Exempted categories of persons include members of the armed forces of the Crown, diplomatic and consular representatives, persons included in the complement of a vessel of the regular armed forces of a government recognised by the Commonwealth, crews of vessels, and classes of persons exempted by instrument under the hand of the Minister. Of most significance in this last category are New Zealand citizens.

16. A temporary entry permit maybe subject to conditions (eg preventing the holder from taking up employment while in Australia as a visitor), may be cancelled at any time at the absolute discretion of the Minister, and may be extended for a further period of stay. An entry permit authorising permanent residence may not be cancelled.

17. Certain persons may be required to have endorsed entry permits certifying that the permit has been issued in the knowledge that the person is in one of the following categories:
   • a person suffering from a prescribed disease, or a prescribed physical or mental condition;
   • 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 one year;
   • a person who has been convicted of two or more crimes and sentenced to imprisonment for periods aggregating not less than one year;
   • 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 the person was of unsound mind;
   • a person who has been deported from Australia, or another country; or
   • a person who has been excluded from another country in prescribed circumstances.

18. A person who has met the migrant entry requirements and has been permitted to enter Australia (by the issue of a valid entry permit not limited as to time) thereby becomes a permanent resident. A person permitted to enter on a temporary basis may reside in Australia only for as long as he or she holds a valid temporary entry permit. The period of authorised stay varies depending on the reason for entry.

LIMITATIONS ON RETURN TO AUSTRALIA

19. In the ‘Policy on Illegal Immigrants’ tabled by the Minister in the House of Representatives on 17 October 1985, it is stated that people who have been in Australia illegally will not readily be readmitted to Australia within the next several years. The general time
limits applied under the policy are as follows, although approval for readmission inside them may be given in exceptional circumstances:

- persons who have been deported from Australia for any reason - five years from the date of their departure;
- persons who were ‘illegal immigrants’ detected in the community as a result of departmental enforcement action but who were not deported, or visitors found to have worked without authority - three years from the date of their departure (irrespective of whether they departed ‘voluntarily’ or under the supervision of departmental officers); and
- people known to have been illegally in Australia and who have departed of their own volition without departmental enforcement action - one year from the date of their departure.

However, people who have overstayed their entry permits for less than 28 days and left Australia of their own volition are not normally subject to such specific re-entry limitations, although their previous immigration history may be taken into account in deciding future applications to enter Australia.

Change of status

20. Persons temporarily in Australia may seek to change their status from either temporary entrant to permanent resident or from one category of temporary entrant to another.

21. The policy as it relates to persons seeking to change status from one category of temporary entrant to another (for example, from visitor to temporary resident: see para. 10 above) is that no advantage should be conferred on an applicant in Australia over an applicant from overseas seeking entry in the same category. Except in special circumstances, applicants seeking temporary entry change of status are refused. Special circumstances might be held to exist where, for example, a private overseas student wishes to remain in Australia to attend a graduation ceremony and wishes to change his status to that of a visitor for that purpose (the person’s eligibility to remain in Australia as a temporary resident for study purposes having ceased on completion of his/her studies).

22. In the case of an applicant wishing to change status from, for example, a visitor or working holiday-maker to a temporary resident able to seek employment, the applicant is required to demonstrate the possession of special employment skills and/or professional qualifications in demand in Australia and a genuine interest in a long-term but only temporary stay for employment purposes. In addition, the applicant must be sponsored by a reputable employer who can show that it has not been, and is not, possible to obtain anyone from the local labour market with similar skills. All applicants must also meet the general requirements of the temporary residence policy.

23. Change of status from temporary entry to permanent residence is governed by the provisions of section 6A of the Migration Act. Under these provisions a person is eligible to be considered for such change of status if that person has been granted territorial asylum in Australia; is the spouse, child or aged parent of an Australian citizen or permanent resident; has the status of refugee and is the holder of a current temporary entry permit; is the holder of a current temporary entry permit and is authorised to work in Australia provided that the person is not a prescribed immigrant under section 6A(4)(c) of the Migration Act; or is the holder of a current temporary entry permit and there are strong compassionate or humanitarian grounds for the grant of permanent residence.
24. (Prescribed immigrants for the purposes of paragraph 6A(4)(c) are persons who acknowledged, in writing, when applying for a visa that they understood and accepted that they would be required to leave Australia on completion of their studies or training; a person who is the spouse or child of a person who gave such an acknowledgment; or a person who, immediately before the grant of a temporary entry permit, was a diplomatic or consular representative of another country or the spouse or dependent relative or a member of the staff of such a person.)

25. The purpose of section 6A is to restrict the categories of persons who may be granted change of status from temporary entrant to permanent resident. Nevertheless, the provisions of the section are sufficiently broad to permit consideration to be given to a potentially wide range of persons, particularly as it is possible to bring a prohibited non-citizen within the provisions of section 6A by regularising his/her status through the grant of a temporary entry permit pursuant to section 6 of the Migration Act. The Department has informed the Council that it is the usual practice for it to consider concurrently whether or not to grant a temporary entry permit and whether or not to grant an unrestricted entry permit under the provisions of paragraph 6A(1)(e) on humanitarian or compassionate grounds.

26. The Government’s change of status policy states that people who wish to settle in Australia should apply for migrant entry before coming to Australia, and should not come to Australia as visitors or temporary residents expecting to be able to change their status to permanent resident after arrival in Australia. Potential applicants for change of status are informed that a change of status to permanent resident may be granted in exceptional circumstances but generally only to people who can demonstrate a marked change in their circumstances since their arrival in Australia. (This does not apply, of course, to the aged parent or unmarried minor child of an Australian resident.) There are separate criteria specified in relation to each of a number of grounds on which a change of status to permanent resident may be granted. The following is a summary of the most important of the criteria applicable to each category, bearing in mind that successful applicants are also required to be in sound health and of good character.

**Marriage or de facto marriage relationship**

The partner must be an Australian citizen or permanent resident who supports the application and the relationship must not have been contrived for the purpose of obtaining residence in Australia with no intention of maintaining a lasting relationship beyond migration considerations. The applicant must be living with the partner, and the relationship must not have ended in divorce or separation. The applicant must not have another ongoing partnership, and the applicant and partner must intend to live together on a genuine domestic basis.

**Migration to Australia as a fiance(e) of an Australian resident**

The applicant must have been granted a visa overseas (loosely called a ‘fiance(e) visa’), have been granted an unconditional temporary entry permit, and have been married to the Australian resident within three months of the applicant’s arrival in Australia.

**Being an aged parent of an Australian resident**

The applicant must be the parent of an adult Australian citizen or an Australian permanent resident who supports the application, and must be aged 65 years or over (in the case of men) or 60 years or over (in the case of women). The son or daughter must have been a legal resident of Australia for more than two years before the application is made, and must complete an assurance of support for a ten-year period.
Being a minor unmarried child of an Australian resident
The applicant must be the child of an Australian citizen or permanent resident who supports the application, and must fall within one of the following categories:
- a person under 18 years of age;
- a person between the ages of 18 and 21 who is dependent on the parent concerned or is an integral part of that family; or
- a person assessed as being an integral part of the family of the Australian citizen or resident.

The applicant must not be the marriage or de facto partner of another person or be engaged to be married.

Occupational grounds
The applicant must hold a valid temporary entry permit and be authorised to work in Australia, must not be ‘a prescribed non-citizen’ (e.g. a student or diplomat or a dependent thereof) or a working holiday-maker, and the prospective employer must:
- have a business which is, or is part of an industry which is, of significant economic or social benefit to Australia;
- have adequately tried but been unsuccessful in finding an Australian citizen or permanent resident suitable for the position;
- have a satisfactory record in training Australian employees;
- abide by the usual Australian employment conditions applicable to the position; and
- intend to use the applicant’s qualifications and experience to train Australian citizens and permanent residents or to create employment opportunities in Australia.

The applicant must be essential to the prospective employer’s business or industry, have qualifications for the job recognised by the relevant body or bodies, have a high professional reputation and record of achievement in the proposed occupation and have qualifications appropriate to the position.

Strong compassionate or humanitarian grounds
The policy states that the circumstances relied on by an applicant must be of indefinite duration and have occurred after the applicant’s last entry into Australia. The applicant must establish that an unreasonable degree of hardship would result from those circumstances for that person and any people who are affected who are Australian citizens or permanent residents, if the applicant is not allowed to settle permanently in Australia. It is stated also that the applicant must have good reasons for not applying from overseas for migration and for not departing and applying for migration from outside Australia. The policy states that it is not possible to define ‘strong compassionate or humanitarian circumstances’ precisely, but that it may include potential gross and discriminatory denial of fundamental human rights on return to a person’s country of nationality or former habitual residence provided residence elsewhere is not more appropriate. Such claim must, it is said, be greater than the hardship and adversity experienced by the generality of the population in the country of residence. Other circumstances which it states may constitute a good claim for consideration are those where the applicant:
- is the sole remaining family member who is not an Australian resident;
- is a relative required to fill a special need;
- is a close relative of an Australian citizen or permanent resident who supports the application, and the applicant is suffering hardship in overcoming which the applicant would receive a degree of support in Australia which would not otherwise be available; or
- is a dependent relative.
Prohibited non-citizen

The Minister’s policy statement on ‘Illegal Immigrants’, tabled in the House of Representatives on 17 October 1985, provides that people illegally in Australia, whether they entered without valid authority or overstayed their temporary entry permits, will not readily be given permanent residence while they remain in Australia, and that where the following circumstances exist they will weigh heavily against the applicant:

- the applicant entered Australia unlawfully;
- the applicant, although entering Australia lawfully, violated conditions of entry, for example by working without permission;
- the applicant misled the Minister or an officer in obtaining a visa or entry permit eg by fraudulent documents or false information of a material kind;
- the applicant avoided contact with or ceased contact with the Department of Immigration and Ethnic Affairs, or in the case of overseas students, with the Overseas Students Office, and came to notice because of the applicant’s illegal status;
- the period during which the applicant has illegally resided in Australia;
- the applicant has improperly drawn upon government cash benefits or other services, e.g. social welfare payments, Medicare, free or subsidised adult immigrant education programs;
- the applicant has committed offences against Australian laws (apart from becoming a prohibited non-citizen or ‘illegal immigrant’).

The statement also makes it clear that changed circumstances advanced in support of an application to remain (for example, development of ties in Australia), but which arise or develop after the expiry of an entry permit, will normally be given little weight. Applications to remain in Australian after apprehension will rarely be granted.

Deportation

PROHIBITED NON-CITIZENS

27. A person who has entered Australia and is required to hold a valid entry permit but is not in possession of such a permit (including a person whose temporary entry permit has expired) is termed a prohibited non-citizen and may be deported.

28. The Minister’s statement of 17 October 1985 entitled ‘Policy on Illegal Immigrants’, tabled in the House of Representatives, sets out the Government’s policy as to the factors which will be taken into account in considering whether or not to order the deportation of a prohibited non-citizen. These include the following factors:

- the personal details of the ‘illegal immigrant’;
- the current and past immigration status of the ‘illegal immigrant’;
- the history of the person’s dealings with the Department and the events leading to the status of the ‘illegal immigrant’ including the means by which the person entered or remained in Australia unlawfully;
- the disposition of family in Australia and overseas;
- the personal circumstances of the ‘illegal immigrant’ as advanced to, or otherwise known to, the Department;
- any new material or compelling circumstances revealed by representations on behalf of the ‘illegal immigrant’;
- the avenues of redress available at law to the ‘illegal immigrant’;
- the Government’s policy on immigration and illegal immigration.

(See paragraph 26 above for factors which will be taken into account in change of status decisions involving prohibited non-citizens.)
The policy statement also provides that ‘illegal immigrants’ located by the Department should have the opportunity to present matters to be taken into account on their behalf, but that as a general policy, 48 hours is a reasonable time to allow before deportation occurs.

**CRIMINAL DEPORTATION**

The Act provides also for three other categories of persons who are liable for deportation. The first comprises non-citizens who have been convicted of certain criminal offences and who at the time of the commission of those offences had been present in Australia as permanent residents for less than ten years (s.12). The second category comprises non-citizens who have been present in Australia for less than ten years where the Minister considers their conduct to be a threat to the security of the Commonwealth or a State or Territory (s.14(1)). The third category comprises non-citizens, who were non-citizens at the time of being convicted of certain offences under the *Crimes Act 1914* or certain other laws (s.14(2)).

A ministerial statement of 4 May 1983 indicated that deportation policy as it relates to the deportation of permanent residents who are non-citizens and have been convicted of serious criminal offences is directed at striking a proper balance between the following factors:

- the need for the community to be protected against criminal behaviour;
- the need to take into consideration the legitimate human rights of other persons, including the family of the person liable to deportation; and
- the need to avoid discrimination when making deportation decisions.

In his statement the then Minister said that:

> The purpose of deporting a person who has been convicted of a criminal offence in Australia is to protect the safety and welfare of the Australian community and to exercise a choice on behalf of the community that the benefit accruing to the community as a whole by his/her removal outweighs the hardship to the person concerned and his/her family.

According to the Minister’s statement, the broad criteria on which judgments are made as to whether deportation is appropriate in cases where the person concerned has been convicted of certain criminal offences are: the nature of the crime; the possibility of recidivism; the contribution that the person has made to the community or may reasonably be expected to make in the future; and the family and/or social ties which exist in Australia. In particular the following factors are taken into account when making a decision on whether a deportation order should be made:

- the nature of the offence and the length of sentence imposed by the court;
- the person’s previous general record and conduct;
- the risk of further offences;
- the extent of rehabilitation already achieved, the prospect of further rehabilitation, and the positive contribution to the community the person may reasonably be expected to make;
- the length of lawful residence in Australia, the strength of family, social, business and other ties in Australia;
- the degree of hardship which would be caused to lawful residents of Australia, especially Australian citizens, known to be affected adversely by deportation or, conversely, the extent of support for deportation from persons directly affected;
- any unreasonable hardship the offender would suffer;
- ties with other countries;
- the relevant obligations of the Commonwealth of Australia under international treaties ratified by the Australian Government;
- the likelihood that deportation of the offender would prevent or inhibit the commission of like offences by other persons.
34. The list is stated not to be exhaustive; if relevant, other factors that come to notice are taken into account in individual cases.

DEPORTATIONS ON SECURITY GROUNDS

35. In relation to deportations made on security grounds, no formal policy has been laid down. The Department has indicated that it is rare for a person to be deported on these grounds.
RECOVERY OF DEPORTATION COSTS
36. The Migration Act (s. 21A) provides for recovering from a deportee costs associated with detaining and removing that person. Where a person who has not discharged such a debt wishes to return to Australia, it is expected that the debt will be discharged before a visa is granted. Where entry is permitted without the debt being discharged, policy provides that recovery action should be resumed in Australia.

Policy implementation
THE PRIMARY DECISION-MAKING PROCESS
37. Persons identified by the Migration Act as authorised to exercise decision-making powers under that Act and the Migration Regulations are the Minister, authorised officers (i.e. persons authorised by the Minister to exercise particular powers), and officers (i.e. officers of the Department, persons who are officers for the purpose of the Customs Act 1901, members of the Australian Federal Police or of the police force of a State or internal Territory, and any other persons who are, or who are included in, a class of persons authorised by the Minister to exercise a particular power). In addition, section 66D(1) of the Migration Act provides that the Minister may delegate all his powers under that Act except the power of delegation itself. Table 1 provides details of Migration Act decisions and identifies authorised decision makers.

38. The levels at which migration decisions are made may vary considerably depending on the nature of the decision and/or the circumstances of the particular case. Generally, however, first instance decisions on straightforward matters are made by departmental officers at the lower middle to middle levels of the clerical administrative range of the Australian Public Service.

39. Migration decisions are made in a variety of geographical locations. (For example, a decision to grant or refuse a visa would usually be made at an overseas post, while a decision to grant or refuse an entry permit would normally be made at the point and time of disembarkation.) The employees represented by the Department’s average operating staffing level of 2,152.5, including the full-year equivalent of part-time staff, are located in eight Regional and nine Area offices in the various States and in 40 overseas posts. A breakdown of staff numbers by location appears at Appendix 4.

40. The decentralised and hierarchical nature of the decision-making structure is common to several areas of Commonwealth activity where the client population is widely scattered, where large numbers of decisions are involved, where decision-makers have a discretion as to how they exercise their powers, and where many first instance decisions are made at relatively junior levels. Reliance on detailed guidelines and instructions is a feature of such a structure as is the use of standard forms of advice to convey notice of decisions to affected persons. The Department’s operating manuals indicate that this latter practice is one which it has adopted. Its advantage is that notice of decisions can be conveyed more quickly in terminology which is consistent and which accurately reflects relevant policy and practice. Its disadvantage is that the reasons for decisions, as they relate to the specific circumstances of the individual case, may not be communicated effectively.
## Appendix 1: Table 1  Authorised decision making under the Migration Act 1958 and related legislation

<table>
<thead>
<tr>
<th>Legislative Provision</th>
<th>Power</th>
<th>Minister*</th>
<th>Authorised Officer</th>
<th>Officer</th>
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</thead>
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<td><strong>Migration Act</strong></td>
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<td>6</td>
<td>To grant an entry permit to a non-citizen on arrival in Australia, or, subject to s.6A, after entry to Australia</td>
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<td>X</td>
<td>X (not after entry into Australia)</td>
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<td>6A</td>
<td>To grant an entry permit in certain circumstances after arrival in Australia</td>
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<td></td>
<td>To determine that a non-citizen has the status of a refugee</td>
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<td>X</td>
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<td></td>
<td>To grant territorial asylum in Australia</td>
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<td>7(1)</td>
<td>To cancel a temporary entry permit</td>
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</tr>
<tr>
<td>8(2)</td>
<td>To declare that it is undesirable that a person exempted from the requirement to obtain an entry permit be allowed to enter or to remain in Australia</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>11A(1)(a)</td>
<td>To grant a visa in respect of travel to Australia</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>11A(1)(b)</td>
<td>To grant a return endorsement in respect of return travel to Australia</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>11B</td>
<td>To cancel a visa or return endorsement</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>To order the deportation of a non-citizen convicted of an offence in Australia</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>To order the deportation of a non-citizen on the grounds of conduct prejudicial to the security of the Commonwealth, a State, or a Territory, or on the grounds that he/she has been convicted or specified offences under the Crimes Act</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>To order the deportation of a prohibited non-citizen</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>To order the deportation of the spouse and dependent children of a deportee</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>To revoke a deportation order</td>
<td>X</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Under section 3(1AA) of the Migration Act any power that may be exercised by an officer or authorised officer under the Act may also be exercised by the Minister.

Under section 66D the Minister may be writing delegate any of his or her powers, except the power of delegation, to an officer.
<table>
<thead>
<tr>
<th>Legislative Provision</th>
<th>Power</th>
<th>Minister*</th>
<th>Authorised Officer</th>
<th>Officer</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Migration Act</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>21(1)</td>
<td>To require a carrier to remove a deportee from Australia without charge to Commonwealth</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>21(3)</td>
<td>To require a carrier to provide a passage for a deportee, without charge to the Commonwealth, to the place of original embarkation for Australia</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>21(6)</td>
<td>To exempt a carrier from the provisions of section 21(3)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>21A(4)</td>
<td>To arrange for use of ticket held by deportee for travel to a place designated by the Commonwealth</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>22(1)</td>
<td>To require a carrier to receive a deportee on board vessel/aircraft</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>26(1)</td>
<td>To exempt the master of a vessel from liability to comply with a provision</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>26(2)</td>
<td>To exempt the master of a vessel from liability to comply with any of the provisions of section 23</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>31A</td>
<td>To require a prohibited non-citizen to leave Australia within a specified time</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>34</td>
<td>To exempt a master from requirements relating to vessels entering ports</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>35(1)(a)</td>
<td>To prevent entry to Australia of a person who would be a prohibited non-citizen if he/she entered Australia</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>36(1) and 36A(1)</td>
<td>To direct or approve the taking ashore and placing in custody of a person who, if he/she entered Australia, would be a prohibited non-citizen, or of a person refused an entry permit</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>37</td>
<td>To enter and search a vessel/aircraft</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>37(3)</td>
<td>To issue a search warrant</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>38(1)</td>
<td>To arrest and detain a person, reasonably supposed to be a prohibited non-citizen, without warrant</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Legislative Provision</td>
<td>Power</td>
<td>Minister*</td>
<td>Authorised Officer</td>
<td>Officer</td>
</tr>
<tr>
<td>----------------------</td>
<td>----------------------------------------------------------------------</td>
<td>-----------</td>
<td>--------------------</td>
<td>---------</td>
</tr>
<tr>
<td><em>Legislative Provision</em></td>
<td><em>Power</em></td>
<td><em>Minister</em></td>
<td><em>Authorised Officer</em></td>
<td><em>Officer</em></td>
</tr>
<tr>
<td><strong>Migration Act</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>39(1) and 39(6)</td>
<td>To arrest and detain a person ordered deported from Australia</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>38(7) and 39(7)</td>
<td>To order at any time the release of a person in custody</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>40(1)</td>
<td>To appoint prescribed authorities</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>42 and 43</td>
<td>To question, to take actions aimed at identifying, and to move from place to place, persons detained in custody</td>
<td>X</td>
<td>X (only in respect of taking actions aimed at identifying persons detained in custody)</td>
<td>X (only in respect of powers to question and to move from place to place person detained in custody)</td>
</tr>
<tr>
<td>44(1)</td>
<td>To direct that a vessel remain at a port or place</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>45(1)</td>
<td>To direct that a vessel be detained</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>48(1)</td>
<td>To direct that a person is not to act as a migration agent</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>51(1)</td>
<td>To direct that migration agents furnish particulars</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>54(1)</td>
<td>To require and take security for compliance with Act</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>58(1)</td>
<td>To establish immigration centres</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>58(2)</td>
<td>To approve conditions applying to admission to immigration centres</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>66D(1)</td>
<td>To delegate powers (except the power of delegation)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Migration Regulations</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>To require a passenger to complete a passenger card</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>To require that a master of a vessel arriving at a port in Australia furnish a list of all overseas passengers on board and a certificate as to health</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legislative Provision</td>
<td>Power</td>
<td>Authorised Officer</td>
<td>Minister* Officer</td>
<td></td>
</tr>
<tr>
<td>-----------------------</td>
<td>-------</td>
<td>--------------------</td>
<td>-------------------</td>
<td></td>
</tr>
<tr>
<td><strong>Migration Act</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>To require the master of a vessel to produce lists in respect of crew and other persons</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>To require the master of a vessel to produce a deportee who has been placed on board for the purpose of deportation</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Power of Commissioner appointed under Act to summon persons to appear before the Commissioner, give evidence and produce any documents</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Power of Commissioner to issue a warrant for the apprehension of a person who fails to respond to a summons</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Power of Commissioner to administer an oath to a witness (or obtain an affirmation)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>To require a maintenance guarantee</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>Power of director of an immigration centre to manage and control it, subject to direction from Secretary of Department</td>
<td>X (Secretary to the Department)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>To cause the establishment and operation of a canteen service at an immigration centre</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Overseas Students Charge Act</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>To determine that a person is liable to pay a charge</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Overseas Students Charge Regulations</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>To determine the rate of a charge</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Overseas Students Charge Collection Act</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6(1)</td>
<td>To refuse to grant a temporary entry permit to a person proposing to undertake a prescribed course of study except in certain circumstances</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legislative Provision</td>
<td>Power</td>
<td>Authorised Officer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------------</td>
<td>----------------------------------------------------------------------</td>
<td>--------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Overseas Student Charge Collection Regulations</td>
<td>4  To determine that a student is exempt from a charge</td>
<td>Minister* Officer Officer</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>5  To determine that a student in entitled to a refund of charges</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>8  To determine that a student is entitled to a remission of a charge</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX 2

THE MIGRATION REGULATIONS

1. The Migration Regulations comprise six parts. Part I is introductory; Part II confers certain powers to obtain information from, or concerning, passengers on vessels or aircraft arriving in Australia; Part III sets out the procedures applicable to the consideration, by a Commissioner, of a case where the Minister proposes to deport a person pursuant to section 14 of the Migration Act; Part IV confers certain powers to obtain maintenance guarantees (now termed ‘assurances of support’) in respect of persons seeking to enter or to remain in Australia; Part V deals with matters relating to the operation of migrant centres; and Part VI contains certain miscellaneous provisions relating to prescribed diseases for purposes of the Migration Act, the form of a search warrant issued under sub-section 37(3), notice of intention to act as an immigration agent, fees of various kinds, service of documents, and offences under the regulations.

2. Parts II, III, IV and V of the Migration Regulations contain provisions which confer powers of decision. Regulation 4 in Part II provides that a person entering or departing Australia may be required to complete a passenger card, regulations 5 and 6 provide that an officer of the Department may require the master of a vessel to produce information relating to his passengers and crew; and regulation 7 provides that an officer may require the master of a vessel to produce to the officer a deportee who has been placed on board for the purpose of deportation from Australia in pursuance of an order made by the Minister under the Migration Act. Regulations 9, 11 and 13 in Part III confer power on a Commissioner appointed under section 14 of the Act to consider the case of a person whom the Minister proposes to deport under that section, to summon persons to appear before him/her to give evidence and to produce any documents (reg. 9); to issue a warrant for the arrest of a person who fails to respond to a summons (reg. 11); and to administer an oath to a witness (reg. 13). Regulation 21 in Part IV provides that the Minister may, in such circumstances as the Minister thinks fit, require maintenance guarantees (now called assurances of support) to be given in relation to persons seeking to enter or to remain in Australia. Regulation 24 in Part V confers on the director of an immigration centre powers relating to entry to, admission for residence in, and removal from, that centre. Regulation 25 in Part V provides that the Minister may make arrangements for the establishment and operation of a canteen service in an immigration centre.
APPENDIX 3
DEPARTMENTAL MANUALS AND INSTRUCTIONS, AND MINISTERIAL POLICY STATEMENTS

Manuals

1. The following is a list of departmental manuals containing guidelines on particular subjects.

- Residence Control Manual
- Temporary Entry Handbook
  - Part 1
  - Part 2
- Grant of Resident Status Handbook
- Migrant Entry Handbook
- Re-entry Handbook
- International Movement Control Inspection Manual
- Determination of Refugee Status: Notes for Guidance of Interviewing Officers
- Medical Standards for Selection of Migrants
- Notes for Guidance of Medical Examiners of Persons Seeking Entry to Australia
- Private Overseas Students and Trainees Handbook
- Visitors and Temporary Residents Handbook

Instructions

2. In addition to manuals and handbooks the Department from time to time issues Instructions for the guidance of its officers on a wide range of matters, many of them updating material already dealt with in the manuals and handbooks.

Ministerial policy statements

3. The following is a list of current ministerial policy statements which have been made to or tabled in the Parliament:

- 4 May 1983 - Criminal Deportation Policy
- 18 May 1983 - Migrant Entry Policy
- 17 October 1985 - Policy on Illegal Immigrants
APPENDIX 4

TOTAL AVERAGE OPERATING STAFFING LEVEL (AOSL) OF DEPARTMENT OF IMMIGRATION AND ETHNIC AFFAIRS APPROVED FOR 1985-86

<table>
<thead>
<tr>
<th>Central Office</th>
<th>782.900</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Regional Offices:</strong></td>
<td></td>
</tr>
<tr>
<td>New South Wales</td>
<td>456.370</td>
</tr>
<tr>
<td>Victoria</td>
<td>356.950</td>
</tr>
<tr>
<td>Western Australia</td>
<td>116.010</td>
</tr>
<tr>
<td>Queensland</td>
<td>117.000</td>
</tr>
<tr>
<td>South Australia</td>
<td>81.360</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>36.750</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>34.240</td>
</tr>
<tr>
<td>Tasmania</td>
<td>22.920</td>
</tr>
<tr>
<td>(Total RO)</td>
<td>1021.600</td>
</tr>
<tr>
<td>(Australian total)</td>
<td>2004.500</td>
</tr>
<tr>
<td>Overseas</td>
<td>148.000</td>
</tr>
<tr>
<td>DIEA total</td>
<td>2152.500</td>
</tr>
</tbody>
</table>

* The total figure includes the full-year equivalent of part-time staff

*Source: Department of Immigration and Ethnic Affairs*
## APPENDIX 5

### STATISTICS ON EXISTING MEANS OF REVIEW

#### Table I

(a) Requests to the Department of Immigration and Ethnic Affairs for statements of reasons pursuant to section 13 of the AD(JR) Act

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Requests received</th>
<th>Complied within full</th>
<th>Complied within part</th>
<th>Refusal</th>
<th>Withdrawn</th>
<th>Pending at end of period</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>4</td>
<td>na</td>
<td>na</td>
<td>na</td>
<td>na</td>
<td>na</td>
</tr>
<tr>
<td>1982</td>
<td>44</td>
<td>38</td>
<td>-</td>
<td>1</td>
<td>(5)</td>
<td></td>
</tr>
<tr>
<td>1983</td>
<td>123</td>
<td>78</td>
<td>-</td>
<td>19</td>
<td>-</td>
<td>18</td>
</tr>
<tr>
<td>1984</td>
<td>89</td>
<td>47</td>
<td>23</td>
<td>4</td>
<td>12</td>
<td>12</td>
</tr>
</tbody>
</table>


na = not available

(b) Applications to the Federal Court for an order of review concerning immigration and ethnic affairs decisions

<table>
<thead>
<tr>
<th>Year</th>
<th>Received</th>
<th>Requests granted</th>
<th>Refused</th>
<th>Withdrawn</th>
<th>Pending at end of period</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>18</td>
<td>na</td>
<td>na</td>
<td>na</td>
<td>na</td>
</tr>
<tr>
<td>1982</td>
<td>30</td>
<td>7</td>
<td>5</td>
<td>13</td>
<td>5</td>
</tr>
<tr>
<td>1983</td>
<td>31</td>
<td>7</td>
<td>6</td>
<td>1</td>
<td>16</td>
</tr>
<tr>
<td>1984</td>
<td>45</td>
<td>3</td>
<td>14</td>
<td>23</td>
<td>20</td>
</tr>
</tbody>
</table>


na = not available

#### Table II

Immigration complaints to the Human Rights Commission

<table>
<thead>
<tr>
<th>Year</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981-82</td>
<td>17</td>
</tr>
<tr>
<td>1982-83</td>
<td>15</td>
</tr>
<tr>
<td>1983-84</td>
<td>41</td>
</tr>
<tr>
<td>1984-85</td>
<td>51</td>
</tr>
</tbody>
</table>

Table III – Administrative Appeals Tribunal, Applications for the review of decisions made pursuant to sections 12 and 13 of the *Migration Act 1958*

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of Applications (These include, as a separate application, any application to be a party).</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Applications determined by formal decision</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Affirmed</td>
<td>5</td>
<td>11</td>
<td>17</td>
<td>17</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Remitted for reconsideration</td>
<td>3</td>
<td>9</td>
<td>8</td>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>8</td>
<td>20</td>
<td>25</td>
<td>24</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Withdrawn</td>
<td>1</td>
<td>4</td>
<td>10*</td>
<td>7*</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conceded</td>
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<td>2</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* These figures relate to deportation orders rather than applications and party applications.

Source: *Administrative Review Council, Sixth Annual Report 1981-82*, Appendix 4, p. 70 and the Administrative Appeals Tribunal

Table IV – Complaints to the Ombudsman concerning acts of the Department of Immigration and Ethnic Affairs

<table>
<thead>
<tr>
<th>Year</th>
<th>Oral or Written</th>
<th>Total received</th>
<th>Outside jurisdiction</th>
<th>Discretion exercised</th>
<th>Withdrawn or refused</th>
<th>Resolved substantially in complainant’s favour</th>
<th>Resolved partially in complainant’s favour</th>
<th>Resolved in Dept’s favour</th>
<th>Total finalised in period</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977-78</td>
<td>Both</td>
<td>153</td>
<td>9</td>
<td>18</td>
<td>9</td>
<td>14</td>
<td>3</td>
<td>47</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>Written</td>
<td>149</td>
<td>15</td>
<td>16</td>
<td>8</td>
<td>17</td>
<td>7</td>
<td>76</td>
<td>139</td>
</tr>
<tr>
<td>1978-79</td>
<td>Written</td>
<td>115</td>
<td>3</td>
<td>12</td>
<td>8</td>
<td>23</td>
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* Complainant advised to submit written complaint

Source: *Commonwealth Ombudsman Annual Reports, 1977-78 – 1984-85*
APPENDIX 6

NUMBER OF MIGRATION DECISIONS IN CLASSES OF DECISIONS RECOMMENDED FOR REVIEW

<table>
<thead>
<tr>
<th>Decision</th>
<th>1982-83</th>
<th>1983-84</th>
<th>1984-85</th>
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<tr>
<td>Grant of migrant entry visa</td>
<td>67 833</td>
<td>48 394</td>
<td>63 472</td>
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<tr>
<td>Total settler arrivals</td>
<td>93 177</td>
<td>69 805</td>
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<td>Refusal of migrant entry visa</td>
<td>241 451</td>
<td>86 544</td>
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<td>Grant of temporary entry visa</td>
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<td>Refusal of temporary entry visa</td>
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<td>Acceptance of maintenance guarantee</td>
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<td>Cancellation/refusal of return endorsement</td>
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<td>No statistics kept</td>
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<td>Refusal of entry to person holding migrant entry visa</td>
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<td>Nil</td>
<td>Nil</td>
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<td>Refusal of entry to person holding temporary entry visa or return endorsement</td>
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<td>37</td>
<td>68</td>
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<td>Refusal of entry to exempt persons</td>
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<td>Declaration that it is undesirable to allow exempt persons to remain in Australia</td>
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<td>Grant of change of status from temporary entry to permanent resident</td>
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<td>6014</td>
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<td>Refusal of change of status</td>
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<td>693</td>
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<td>Cancellation of temporary entry permit</td>
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<td>Refusal to extend temporary entry permit</td>
<td>1972</td>
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<td>Deportations pursuant to s.12 and s.13:</td>
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<tr>
<td>- ordered</td>
<td>95</td>
<td>41</td>
<td>36</td>
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<tr>
<td>- carried out</td>
<td>82</td>
<td>24</td>
<td>23</td>
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<tr>
<td>Deportations pursuant to s.18</td>
<td>741</td>
<td>683</td>
<td>457</td>
</tr>
<tr>
<td>Persons liable to deportation under s.18 (prohibited non-citizens) (f)</td>
<td>50 000</td>
<td>50 000</td>
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<tr>
<td>Persons liable to s.18 deportation who depart voluntarily</td>
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<td>1871</td>
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<tr>
<td>Requests to depart voluntarily</td>
<td></td>
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<td>No statistics kept</td>
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Source: Department of Immigration and Ethnic Affairs

na = not available

Notes

(a) Does not include New Zealand citizens. Figures for 1982-83 and 1983-84 do not include visa granted under refugee and special humanitarian programs.
(b) Includes New Zealand citizens. Does not otherwise correspond to numbers of migrant entry visas granted as visas granted in one year may be exercised in subsequent years.
(c) Preliminary figure.
(d) Figures not regarded as reliable; collection discontinued from July 1984 onwards.
(e) No breakdown available of those decisions which involve sponsorship by an Australian resident or citizen.
(f) Estimated.
APPENDIX 7

ADMINISTRATIVE REVIEW COUNCIL PARTICIPANTS IN IMMIGRATION SEMINAR 1980

Mr S. Antonelli, Australian Institute of Multicultural Affairs
Mr E. Attridge, Attorney-General’s Department
Mr L. M. Blacklow, Project Officer, Secretariat, Administrative Review Council
Mrs P. Boero, Executive Officer, Ethnic Communities Council of New South Wales
Mr G. P. Brouwer, Chairman, Committee on Migrants and the Law, Sydney
Mr M. H. Codd, Administrative Review Council
Mr L. J. Daniels, C.B., O.B.E., Administrative Review Council
The Hon. Mr Justice J. D. Davies, Administrative Review Council
Dr G. Flick, Faculty of Law, University of Sydney
Mr A. J. Goward, Department of Immigration and Ethnic Affairs
The Hon. A. J. Grassby, Commissioner for Community Relations
Ms P. Jamieson, Ecumenical Migration Centre, Melbourne
Mr T. Joustra, Chairman, Ethnic Communities Council of Tasmania
Mr P. Judd, Department of Immigration and Ethnic Affairs
Mr A. G. Kerr, Deputy Commonwealth Ombudsman
Mr J. Kiosoglous, S.M., Children’s Court, Adelaide
The Hon. Mr Justice M. D. Kirby, Administrative Review Council
Mr I. K. Lindermayer, Department of Immigration and Ethnic Affairs
Mr W. Lippmann, M.B.E., President, Ethnic Communities Council of Victoria
Mr V. Menart, Federation of Ethnic Communities Council of Australia
Mr B. L. Murrray, Department of Immigration and Ethnic Affairs
Ms M. Perret, Department of Immigration and Ethnic Affairs
Mr M. B. Smith, Acting Director of Research, Administrative Review Council
Mr P. Taylor, Chairman, Law Council, Administrative Law Committee
Mr E. J. L. Tucker, Chairman, Administrative Review Council
Mr I. Vickovich, Project Officer, Ethnic Affairs Commission of New South Wales
Mr D. Volker, Department of Immigration and Ethnic Affairs

Note: The agency or organisation represented is as of the date of the seminar in 1980.