ADDITIONAL COMMENTS FROM THE AUSTRALIAN DEMOCRATS

1.1 The majority report contains many positive suggestions and recommendations which we support. However, before more piecemeal changes are made to the administration of the Migration Act in response to ongoing problems that have been identified through this Inquiry, I believe there is an urgent need for a complete review of the entire Migration Act.

1.2 More piecemeal actions attempting to patch up a flawed system runs the risk of more complexities and inconsistencies. The evidence to this Inquiry has been valuable, but it has not been able to fully canvas the operation of many sections of the Migration Act.

1.3 The 'culture problems' within the Department of Immigration have now been widely acknowledged, but efforts to address it can not fully succeed just through administrative restructuring. This Inquiry has again demonstrated that the migration law itself inevitably impacts on the culture of how it is administered and enforced, and without significant changes to that law, some of the same problems that have been identified in inquiry after inquiry will inevitably continue to occur.

1.4 Following the introduction of the *Migration Legislation Amendment Act 1989*, the complexity and harshness of the legislation has been continually increasing, with the Executive and the Senate regularly adopting a wide range of changes. Whilst most of these amendments to the Migration Act have been aimed particularly at asylum seekers and refugees, it has impacted on the fairness, adequacy and administration of the entire Migration Act, with more and more power being placed in the hands of the Minister and the Department, more restrictions placed on the powers of the Courts and a continual reduction in the rights of those who are subjected to the Migration Act and its Regulations.

1.5 It is my view that the widely acknowledged problems with the culture of the Immigration Department stems in significant part from the innate unfairness and restrictions on due process, as well as the complexity, built into much of the Migration Act.

1.6 There have been many harmful changes made to the Migration Act and Regulations since 1989. A good starting pointing for improving the law would be to examine these changes with an eye to whether reversing them would help undo the negative impacts on the culture of how our migration laws are administered. Attention should especially be paid (but not limited) to assessing the consequences and impacts of the following measures:

- The Migration Reform Act and a range of other amendment Bills from 1992 which introduced mandatory detention into immigration law, along

with a number of other restricting measures, including the introduction of the insidious practice of billing of people for their detention costs.

- The Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998, which toughened the existing provisions in the Migration Act enabling the refusal or cancellation of visas on character grounds. Specific warnings were made at that time about what these changes could mean for the culture of how our immigration law would be administered.[1]
- Amendments to Migration Regulations, Statutory Rules 109 of 1997 which imposed the 45 day rule severely restricting support for many asylum seekers in the community, as well as a $1,000 fee for unsuccessful appeals to the Refugee Review Tribunal.
- The Migration Amendment Regulations in Statutory Rules No. 210 of 1998, which brought in the termination of work rights for asylum seekers with an unsuccessful RRT decision.
- The Migration Legislation Amendment Bill (No.2) 1998, which prevented legal advice or assistance from HREOC being offered to people in immigration detention unless a specific request is made by the detainee.
- The introduction of Temporary Protection Visas, contained in Migration Amendment Regulations 1999 (No. 12), Statutory Rules 1999 No. 243.
- The Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999, which created a class of visa known as a 'temporary safe haven visa' which prevented holders from applying for a protection visa or any other type of visa while in Australia, and from seeking merits review or judicial review of decisions by the Minister.
- The Migration Amendment (Excision from Migration Zone) Act 2001. This amendment created a separate visa application regime to apply to people who arrive in Australia at places that are excised from the migration zone.
- The Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001. This amendment further restricted the rights of people who arrive in areas excised from the Australian migration zone. It also amended the Migration Regulations to create a new restrictive class of refugee and humanitarian visa for dealing with temporary movements of persons seeking asylum.
- The Migration Legislation Amendment Act (No.1) 2001. This amendment restricted access to the courts for judicial review of

1 See Senate Legal and Constitutional Legislation Committee report into the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997 – additional comments by Australian Democrats and by Senator B.Cooney

migration decisions. It did this by preventing class actions in migration matters before the Federal and High Courts, by changing the requirements for standing in the Federal Court and by introducing time limits for original applications to the High Court in migration matters.

- The Migration Legislation Amendment Act (No.6) 2001, which re-defined certain key terms used by the Federal Court and the Refugee Review Tribunal (RRT) in determining refugee status, aimed at narrowing the eligibility for protection visas.
- The Migration Legislation Amendment (Judicial Review) Act 2001, which introduced a privative clause mechanism, intended to severely restrict access to Federal and High Court judicial review of administrative decisions made under the Migration Act.
- The Migration Legislation Amendment (Immigration Detainees) Act 2001 which introduced tighter restrictions on access to detainees.
- The Migration Legislation Amendment (Transitional Movement) Act 2002 enabled some non-citizens to be brought to Australia temporarily whilst preventing them from being able to apply for any form of visa, including a protection visa, while in the country.
- The Migration Legislation Amendment (Procedural Fairness) Act 2002 excluded the common law rules of procedural fairness, and attempted to make it explicit that the procedures set down in the statute are all that decision makers must comply with.
- The Migration Amendment (Duration of Detention) Act 2003 prevented and limited courts from issuing interim orders for the release of immigration detainees. The Bill was introduced to prevent interlocutory or interim orders for the release of detainees whether or not in the context of broader judicial review proceedings. This has been prompted by several cases where such release has been ordered by the Federal Court, for example Al Masri's Case.
- The Migration Amendment (Detention Arrangements) Act 2005 prevented the courts from issuing interim orders for the release of immigration detainees.

1.7 Numerous submitters to the inquiry also expressed concern at the unnecessary complexity of the legislation for migration agents and lawyers, let alone unrepresented asylum seekers and other visa applicants to navigate through.

1.8 There are currently 88 visa classes set up under the *Migration Act 1958,* [2] and contained within this are 147 Visa subclasses.

2 This includes 81 'standard' visa classes and another 6 "operation of law" visa classes (s.32 Special Category visa, s.33 Special Purpose visa, s.34 Absorbed Person visa, s.35 Ex-citizen visa, s.38

Complementary Protection

1.9 I strongly support the recommendation made by the Committee that a system of complementary protection be introduced into the Migration Act. I believe that it is essential that additional safeguards ensuring the protection of fundamental human rights are reflected in the Migration Act.

1.10 However, in absence of this I recommend the following:

Recommendation 1

1.11 That the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CROC) and the International Convention on Civil and Political Rights (ICCPR) be enshrined into domestic law to give legally enforceable protection to asylum seekers and others at risk of being deported or returned to unsafe situations.

Differences from the majority report

1.12 I have a divergence in views with the following Committee recommendations:

Temporary Protection Visas (TPVs)

1.13 The Democrats moved in the Senate in 1999 to prevent the introduction of TPVs, but did not get support from others. I believe the concerns we expressed then have clearly been vindicated. The TPV has been shown to be unjust to refugees, prolonging the state of limbo they are subjected to and significantly affecting their ability to settle and rebuild their lives.

1.14 The lack of access to family reunion is particularly harsh and harmful to refugees, and also is against the interest of the wider Australian community, as it makes it far more difficult for refugees to be able to settle, adapt and contribute effectively to their new country.

1.15 Once asylum seekers have been granted refugee status, they should have permanent protection rather than having to present their cases again. This is especially cruel and unjust for those caught under the 7 day rule, who have to live with the prospect of potentially never being eligible for permanent protection.

Bridging Visa E (BVEs)

1.16 People on this visa face conditions that force them to rely solely on private charity, with NGOs, churches or ad-hoc community groups often providing the basic needs such as food and shelter.

Criminal Justice visa, s.38A Enforcement visa) and also a Special Circumstance visa, which do not have the usual identifier like other visa classes.

1.17 The committee has recommended that work rights be given to those on BVEs. I support this, but are concerned that there is no mention of provisions for Medicare. Numerous submitters have noted that those on BVEs are often in urgent need of medical attention and medication. This applies particularly for those who have been released from detention, as many have been heavily reliant on medication while in detention in order to cope in the environment. To then be denied Medicare assistance when they are released on BVEs is a counter-productive and irrational policy.

1.18 It is reprehensible that the system which caused their dependence on medication does not provide for continuing medical entitlements, which is often enough very expensive and needed on a regular basis.

Recommendation 2

1.19 Abolish Temporary Protection Visas, the 7-day rule, the 45-day rule and the prevention of access to assistance which currently applies for Bridging Visa Es.

Humanitarian settlement

1.20 I support the committee's recommendations in regards to resettlement issues particularly with respect to the increasing numbers of refugees from Africa and acknowledge the Government's increased uptake and funding in this area.

1.21 However, I believe the following should also be noted:

- Pre-embarkation information for Humanitarian intake: - there is a great inconsistency in understanding among people coming from different countries about the situation and services they will be offered in Australia, and information seems to vary greatly from country to country. It is evident that blanket processes do not work. Rather, information should be tailored to the situation and the people involved and it must dovetail with post-arrival information when they arrive. The information also needs to be provided in culturally appropriate ways to ensure that it is as meaningful as possible.
- Post-arrival issues: - under the SHP, settlement under the IHSS should be expanded further than just the initial 6 months. While recent improvements are welcome, more needs to be done, as 6 months is often an inadequate timeframe. Many migrants need more time to acclimatize to foreign system of education, health and life in Australia. The nature of changing demographics and countries of origin also mean there is often a significant lag before the service-providers can adapt to the new cultures they are dealing with – different languages, sensibilities and new cultures. A sub group within this group which are suffering a distinct lack of specialised response/services are women arriving under the Woman At Risk category. Many of these women have fled from oppressive situations where they have been systematically abused and raped.

Recommendation 3

1.22 There must be uniformity in information given as part of pre-embarkation orientation, as well as a proper system of ensuring that migrants fully understand the terms involved in their settlement.

Recommendation 4

1.23 That the initial settlement services provided under IHSS be extended to 12 months.

Recommendation 5

1.24 That service providers are given regular and updated cultural training session and briefings in order to cope with the divergence of cultures that they are servicing. Appropriate interpreters should also be available.

Recommendation 6

1.25 That current services for women arriving under the Women at Risk be reviewed immediately to ensure an adequate delivery of services.

Other assistance to migrants

1.26 An aspect of Australia's modern migration program is the huge increase in people arriving on temporary residency visas. Some of these visas apply for prolonged periods and can involve migrants whose level of English is not of a high level. [3]

Recommendation 7

1.27 Consideration be given by federal, state and territory governments to the long-term benefits of ensuring appropriate assistance is available to all people who are residing in Australian on long-term temporary visas, as well as those on permanent visas.

Senator Andrew Bartlett

Australian Democrats

3 For example, the subclass 457 visa for skilled temporary business entrants