These occasional papers outline policy proposals endorsed by the Ecumenical Migration Centre, as part of its continuing work for social justice and a Multicultural Australian society. In some instances the proposals are generated directly by the staff of E.M.C.; where this is not the case, the source of the proposals is indicated.
POLICY ACTION PAPERS
for a Multicultural Society

ILLEGAL IMMIGRANTS AND FAMILIES
by Mary Crock

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EMC is a non-denominational agency which
through its welfare, educational and
community work fosters the development of
Australia as a multicultural society. The
Centre has been working with immigrants
since 1962 and is one of the few agencies
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immigrants. Its work is diversified with a
strong emphasis on welfare work with a non-
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Workers provide a much needed welfare
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the Centre's community education
programme. The library holds 30,000
documents and 200 periodicals which are
used by students, teachers, government
departments and others seeking up-to-date
information or under-taking research.
In October 1985, the Department of Immigration and Ethnic Affairs introduced a new policy to combat illegal immigration into Australia. The main thrust of the policy is to drastically reduce the circumstances in which illegal immigrants within the country may be granted permanent resident status. It is causing a furore because the policy leaves little or no room for considering the personal circumstances of either the illegal immigrant or any Australian citizen or resident with whom he may have ties. Indeed 'Australians' are amongst those hardest hit by the changes. It is the purpose of this paper to examine the new government initiatives. It will be argued that the policy is, at worst, illegal and at best, inhumane and unreasonable. Beyond this, the grounds used to justify the changes are open to doubt, as is the effectiveness of the programme as a method of discouraging illegal migration.

I. The Policy

The policy statement presented to Parliament by the Minister in October 1985 begins by stressing the need for Australia to maintain selection processes that enable the orderly settlement of the right number of migrants in various categories. Illegal immigrants, as prohibited non-citizens, the statement says, threaten the management of the programme, and jeopardise Australia's attitude to accepting a large number of visitors. Illegal immigrants are
described as queue-jumpers who abuse Australia's immigration policy and laws "at the expense of those waiting overseas or at the expense of unemployed Australian residents". The statement continues:

"It is an accepted principle of justice and fairness that people should not derive benefit from an illegal act they have committed. Illegal immigration is no exception. Illegal immigrants simply by having succeeded in entering or remaining in Australia do not earn a right to special privilege under migration policy, nor does their act of being in Australia illegally earn them special rights of review which are not available to those who abide by the rules and wait overseas".

The most important paragraphs of the statement, for present purposes, read as follows:

"People who are in Australia illegally, whether they entered without authority or they overstayed their entry permits, will not readily be given permanent residence while they remain in Australia.

Their breaches of immigration law and requirements will weigh heavily against them."
In the case of applications made after apprehension it will be rare indeed that illegal immigrants will be granted permission to remain in Australia. 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."

"The Migration Act and migration policy provides eligibility concessions for foreign nationals who have married an Australian citizen or permanent resident or who have an Australian citizen child. But eligibility to apply for residence does not carry an automatic entitlement to residence. In such circumstances, the interests of the resident family or child are taken into account and are weighed, along with other factors, in the eventual decision.

Marriage to an Australian or the existence of an Australian citizen child do not confer upon illegal immigrants the right to choose their country of residence. Each case will be treated on its merits".

In conjunction with the minister's statement, a bill was tabled to amend the Citizenship Act 1949. The bill includes a provision
denying an automatic right to Australian citizenship to any child born in Australia to an illegal immigrant.

2. The Administration of the Policy

The rigidity with which the new policy is being administered is amply demonstrated by the cases that have begun to filter through for review by the Federal Court since October 1985. The first of these is the case of Khoi Tri Tang and Another v. Minister for Immigration and Ethnic Affairs (Full Court, unreported). Mr. Tang married the second applicant, Mrs. Tang, on 24 September 1985. The Minister accepted that the marriage was genuine, not one of convenience and not entered into for the purpose of avoiding Mr. Tang's deportation. Mrs. Tang is a naturalized Australian citizen and so too are Mr. Tang's parents and two siblings who now live in Melbourne. Mr. Tang made his application after he was arrested for overstaying his visitor's visa which lapsed on 27 May 1983. He did so on the basis of his marriage and of the support he gave his parents. His mother, it was revealed, had suffered a debilitating stroke in April 1984 and was assisted by her son with a daily physiotherapy and massage programme. The father was a diabetic and had been advised that a calcified lymph node on his neck may be cancerous and should be investigated by operation. Mr. Tang's two younger siblings are aged 15 and 13 years respectively, and an older brother in Sydney was shown to have been either unable or unwilling to assist the family in Melbourne. But for the new policy, there appears to be little doubt that the applicant would have succeeded in obtaining permanent resident status.
A second case is that of Li Guong Yo v. Minister etc. (unreported, 14/3/86). Here Muirhead J. granted a stay of the Minister's deportation order to enable the applicant, a gentleman from China whose visitor's visa lapsed on 24 April 1983, to marry his fiancée. The applicant was working as a cook in Kununurra and wished to marry an aboriginal girl at the remote North West town of Kalumburu. The girl has borne him a child. There appears to be no doubt that the intended marriage is a genuine one - the delay in marrying was due to the formal requirements of the Catholic church of which the fiancée was a member. Under the new policy, however, the outcome for the applicant appears to be inevitable.

The Sydney based Immigration Advice and Rights Centre has come across no case since October 1985 involving an illegal immigrant with family ties in this country, where permanent residence has been granted.

The case of the Kioa family further demonstrates the rigidity of the present administration. In spite of winning their case before the High Court where it was found that they had been denied natural justice, the Kioa family are still threatened with deportation. If forced to leave they will take with them their youngest child, who is an Australian citizen. On the facts of their case, Mr. and Mrs. Kioa did not succeed in showing that this child's interests had not been considered by the Minister's delegate in making his decision to deport the family. In spite of this it appears that Kioa's case was the driving motivation behind the decision to table
the recent amendment to the Citizenship Act, removing an infant child's right to acquire Australian citizenship where his parents are illegal immigrants.

3. The Legality of the Policy

a) The Migration Act 1958

It is now necessary to look more closely at the relevant provisions of the Migration Act ("the Act"). Section 6 provides for the grant of entry permits. Subsection 6(5) allows for the grant of an entry permit to a non-citizen either upon his arrival in Australia or, subject to Section 6A, after he has entered Australia. A permit can be for temporary purposes and subject to conditions or it can be for permanent residence. Under Section 7(1) the Minister has an absolute discretion to cancel a temporary entry permit. It is on the expiry or cancellation of such a permit - and the failure of the department to grant a further permit - that a person becomes an illegal immigrant or a "prohibited non-citizen". (See Sections 7(3) and 10 of the Act).

For present purposes, however, Section 6A is the most crucial section of the Act. This section places important restrictions on the discretion to grant or refuse a permanent entry permit to persons already within the country. The section begins as follows:

"6A(1) An entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say..."
There follow five categories of people who are eligible for consideration. This means that the Minister cannot grant a permit to anyone outside these categories but it does not mean that he has to grant a permit to people within the five categories. When the section is read as a whole, however, it is plain that Section 6A does place some obligations on the Minister to give special consideration to applications by eligible people.

The section makes special allowances for the spouse, child or aged parent of an Australian citizen or permanent resident. These people may apply for an entry permit under Section 6A(1)(b) even if they are illegal immigrants. By way of contrast, refugees (Section 6A(1)(c)) and those seeking permanent residence on employment grounds (Section 6A(1)(d)) or for 'special humanitarian reasons' (Section 6A(1)(e)) are required to be the "holders of a temporary entry permit which is in force". In other words, the Minister must consider the applications of all those who have proper family ties with Australians; if the Act does not do so, the Minister may not shut out applicants under Section 6A(1)(b) merely because they are illegal immigrants. In the way they are being administered, the new policy guidelines seem to do just this. As the cases already cited show, family ties with Australian citizens or residents have ceased to have much, if any, bearing on the result of an application by people who have been given the label "prohibited non citizen".

The benefits of having a guiding policy are not in issue. A policy gives the administration of a statute continuity by ensuring that cases with the same fact situations are decided in the same way.
However, to be legal, a policy must be consistent with the statute it purports to administer. The criteria for consistency were set out by Brennan J. in *re Drake and the Minister for Immigration and Ethnic Affairs no.2* (1979) (2 A.L.D. 634) His Honour said at p. 640:

"It (the policy) must allow the Minister to take into account the relevant circumstances, it must not require him to take into account irrelevant circumstances, and it must not serve a purpose foreign to the purpose for which the discretionary power was created."

On these criteria, the legality of the new policy is at least doubtful. As it is being administered, the policy seems to place illegal immigrants who have family ties with Australians in the same position as illegal immigrants who do not have such ties. As the defence argued in *Tang's case*, the policy "places the Minister's delegates in strait jackets, for practical purposes dictating to them in advance what their decision in any given application would be ... The policy supplants the provisions of the Act itself".

In *Tang's case*, the full Federal court were not prepared to say that the policy itself was illegal. However, the majority held that the way the policy was administered in that case was illegal. Their Honours said that the policy should be read so as to give special consideration to illegal immigrants who are eligible for permanent residency on family grounds. Because the Minister had not given special consideration to Mr. Tang's circumstances, the court held that the decision to deport was wrongly made.

This means the policy as presently administered is illegal. From the
point of view of illegal immigrants, however, it remains to be seen whether the court's ruling has any real effect. All the department has to show is that it has "considered" the family circumstances of an applicant. It is still free to say that these factors are outweighed by the illegal status of the applicant.

Even though the Federal Court was not prepared to go this far, it is at least arguable that the legal status of applicants under Section 6A (1)(b) is irrelevant to decisions under that section. If illegal immigrants are plainly allowed to apply under the section, their illegal status should not then be used as the deciding factor in their application.

b) Australia's humanitarian obligations

Another argument raised against the legality of the new policy in Tang's case was that the guidelines failed to heed the government's obligations under the Human Rights Commission Act 1981. The first schedule of that Act sets out the International Covenant on Civil and Political Rights which Australia has signed and ratified. The relevant article of the Covenant states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. In Tang's case it was argued that the new policy shows no respect for the family as it gives little weight to the strength of an illegal immigrant's ties with Australian citizens or residents who may be described properly as 'family'. In Tang's case, as in Kioa's case, it was held that the Human Rights Commission Act did not impose any legal obligations on the government to comply with the terms of the International Covenant. While the covenant
records the agreement reached between the nations who have signed and ratified it, it will not have any force in Australia until it is translated into our domestic law through a separate act couched in mandatory terms. The Human Rights Commission Act does not do this.

Although there may be no legal challenge available in this regard, the policy is very much at odds with Australia's image of itself as an humanitarian and freedom-loving country. It can only be described as shameful that the Government allow such an inhumane policy to continue.

4. Some further comments on the new policy

The Policy is unjust and unreasonable

If some justification can be found for disregarding the interests of illegal immigrants who stand to suffer loss on their deportation from the country, there is less justification for disregarding the interests of Australian nationals or residents. After all, the Australians involved are very much part of the society which the country's immigration laws are designed to foster and protect.

The first unjust and unreasonable aspect of the policy was canvassed in Tang's case in the argument that the guidelines leave little or no scope for officers to consider cases on their merits. Once an applicant is labelled a prohibited non-citizen her/his fate appears to be sealed. If the policy did not permit an exception being made in Tang's case, it is hard to see in what circumstances the policy would be relaxed. This is borne out in the practice of preparing and signing deportation orders before an illegal immigrant is even located.
This practice was criticized by the Human Rights Commission in its Report No.13 on the administration of the Migration Act. The criticism has gone unheeded, however, as the new policy encourages officers to "make moves to consider removing an illegal immigrant from Australia... as soon as his or her presence is known to the Department. It is not necessary for these processes to be activated only upon the arrest or physically locating the illegal immigrant".

The other major problem with the current policy as it affects Australian nationals and residents is the restrictions placed on illegal immigrants who leave the country and then seek to be reunited with their families by applying through the proper channels. Under the new policy, illegal immigrants who are deported are de-barred from returning for five years and for as long as the costs of their deportation are not paid. In many cases this will mean that deportees will never be able to return. Those who are detected and leave voluntarily are ineligible for re-entry for three years, and those who leave voluntarily before being detected are ineligible to return for one year.

The imposition of arbitrary terms of what in many cases will be enforced separation is disastrous to the health and wellbeing of the family unit. In cases where those involved cannot afford for the family to accompany a deportee departing member, it is clear that the punishment of those left in Australia will be at least as harsh as that of the person who leaves the country. In the light of all the discussion of costs, some thought could be given to the extra burden on the taxpayer when people such as Mr. Li's fiancée in Li Guong Yo's case are forced to look to social security for support. In view of
the uncontradicted evidence that the ties formed by the couple are genuine, it is surely in the society's interest to have this support provided by Mr. Li through his employment as a cook. (This is particularly so in Mr. Li's case as, ironically, cooks are said to be in short supply in this country and are actually favoured by the Department in the Employment Migration category of the Migration Programme).

In relation to the proposals to amend the Citizenship Act to remove a child's ability to acquire Australian citizenship as of right when his parents are illegal immigrants, much can be said. This practice is followed in some Asian and European countries which are concerned to protect the purity of their national identity. However, as well as being completely contrary to the time-honoured precepts of birthright that have been jealously protected in the British system of justice, the amendments will be particularly unhelpful to the Government's attempts to foster multiculturalism in the country. In many ways it is impossible to keep separate the two issues of legal and illegal migration. By denying nationality to newborn children purely on the basis of their parents' status, the government is making it harder for all 'ethnic' children who do not fit into the white anglo-saxon mould, to be accepted as 'truly Australian'.

The Policy is misconceived

As analyses of illegal immigrants who took advantage of the amnesties declared in the seventies show, family ties have been traditionally a strong driving force behind illegal immigration. Human relationships being as they are, it is safe to assume that there will always be
persons who come to Australia and wish to stay for family reasons. This being so, it is hard to see how the new policy will do anything but force underground those who have overstayed their permits and become technically illegal immigrants. The policy was declared in October 1985 and began operating from that date. There was no period of grace for those who became illegal immigrants before October and who might otherwise have been granted change of status under Section 6A (1)(b) of the Act. Without an amnesty of some kind, the new policy will only serve to drive these people deeper into the shadows. As Tang's case and Li's case show, the new policy offers little hope of success to applicants with even the strongest of family ties.

As already seen, there are grounds for arguing that illegal immigrants who fall within the "family" category should not be treated in the same way as other illegal immigrants. To begin with, the treatment of applications under Section 6A(1)(b) inevitably involve Australians. Beyond this, however, there is at least some evidence that the whole offensive against illegal immigrants in this country is an overreaction to a problem that is not as great as the Department would have us believe. In view of present economic difficulties there appears to be a tendency to use illegal immigrants as scapegoats for the failure of the Government's economic policies.

The claim is made, for example, that illegal immigrants take jobs that Australians would otherwise fill. This does not sit easily with the recent government report which concluded that immigrants as a whole create more jobs than they take because of their demands for consumer goods and other services. It is also directly contradicted by a report commissioned by the Minister from McNair Anderson and Associates which
he is now refusing to release.

It is not denied that illegal immigrants provide a cheap and compliant labour force for entrepreneurs who are willing to profit from their desire to preserve their anonymity. The exploitation of these people on the one hand, and the ill-feeling and tensions created by the existence of a clandestine work force are the chief reasons why it is desirable to eliminate illegal migration. According to at least one school of thought, however, illegal immigrants take the sort of work and endure the sort of conditions most Australians would not accept. At all events, as has already been argued, the way to eliminate illegal migration is not to close the door altogether on the immigrants' ability to regularize their status.

The Government's over-reaction to the problem of illegal migration is borne out further when one examines more closely the size of the 'illegal' population in Australia.

In 1976, when the first major amnesty for illegal immigrants was called, the number of illegals was assessed at between 50,000-60,000 (see D. Storer "Out of the Shadows: A Study of Amnesty Experience in Australia"). The shadow population was quoted as having a growth rate of 10,000 per annum. At the time of the October 1985 policy statement, very similar figures were cited. The Entry Regulation branch of the Immigration Department estimate that there are currently about 50,000 illegal immigrants in the country. The rate of increase is given at 12,000-16,000 as a gross figure. What the Department does not make public is that about the same number each year leave or have
their status regularized. The figures kept are now much more accurate than those of the 1970's, as the Department has since been computerized. Even so, it is clear that the nett gain of illegal immigrants per annum does not even approach the ten thousand mark quoted. On the Department's own figures, its claims appear to be exaggerated. The result of this is a policy which not only fails to address the problem, but also threatens to aggravate it.

There are other reasons, too, for rejecting the policy as misconceived. The policy is a waste of public money as it means that immigration staff have to deal with 2 or 3 times the amount of paperwork for illegals than was required before October 1985. Staff must process the initial application to stay, the appeals when that application is rejected, applications for the ban on re-application from overseas to be waived and the eventual migration application from overseas. On top of this are the costs for detention and deportation as well as the loss to the community when the deportee is taken away from his or her employment. Again, in many cases dependants are forced to become recipients of social security benefits.

5. Towards a satisfactory change of status policy for families

The area of change of status on the basis of family relations is one of particular difficulty. On the one hand it is undesirable to have a policy that intrudes too much into the family circle. On the other, it is unsatisfactory to shy away from assessing the family unit and to decide an application on other policy grounds. To date the Department has consistently failed to find a middle path.
An example of the Department walking rough-shod quite literally over the marital bed was seen in the case of Prasad v. Minister for Immigration and Ethnic Affairs [see (1985)6 FCR part 1]. In an attempt to assess whether Mr. Prasad's marriage in Tonga to his Australian resident wife was genuine, as the consular officials in Suva originally conceded it was, the department put the couple through a series of interviews, alone and together. When Mrs. Prasad's description of the marital bedroom did not match her husband's, the conclusion was reached that she did not reside with the applicant, but with her mother. On review before the Federal Court, it was revealed that Mrs. Prasad's description, in fact, was more accurate than that of her spouse. The couple's story was also supported by affidavits sworn by friends and neighbours as well as by their solicitor. All this material had been ignored.

In spite of this, it is arguably preferable to have the Department assess a relationship rather than disregard it in determining an illegal immigrant's entitlement to change his status. Judging from cases such as Tang's case and Li's case, this appears to be the effect of the new policy. It is not within the purview of this paper to discuss the relative merit of tests for the validity or viability of marriages. Suffice to say, that as long as there are fraudulent marriages contrived to gain entry into Australian society, it is probably inevitable that some requirement for validity of a relationship will be required. This inevitably will involve some intrusion into a family's privacy.
Cases such as that of Prasad can be overcome through proper departmental guidelines. It is quite another thing, however, to have a policy that makes the validity or otherwise, or even the existence of a marriage or permanent relationship irrelevant. As a matter of law, humanity and plain common sense, the importance of the family in Australia must be recognised irrespective of the origins and race of its members.