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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

MIGRATION LEGISLATION AMENDMENT BILL (No. 2) 1996

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Immigration and Multicultural Affairs,
the Hon. Philip Ruddock MP)



MIGRATION LEGISLATION AMENDMENT BILL (No. 2) 1996

OUTLINE

Overview

1 The Migration Legislation Amendment Bill (No. 2) 1996 ("the Bill") seeks to amend the *Migration Act 1958* ("the Migration Act") in response to the recent decision of the Federal Court in *Human Rights and Equal Opportunity Commission and Another v Secretary of the Department of Immigration and Multicultural Affairs* (unreported, 7 June 1996, Lindgren J, NG 268 of 1996).

2 Section 256 of the Migration Act establishes that a person in immigration detention has a right to access legal advice only when requested.

3 In the case, the Human Rights and Equal Opportunity Commission (HREOC) successfully challenged the refusal of the Department of Immigration and Multicultural Affairs to deliver sealed envelopes to persons who are in immigration detention, having been detained as unlawful non-citizens on arriving in Australia. The Federal Court held that paragraph 20(6)(b) of the *Human Rights and Equal Opportunity Commission Act 1986* ("HREOC Act") operates to give a person in immigration detention the right to have delivered to him or her a sealed envelope, even though that person had not made a complaint to HREOC. Paragraph 7(3)(b) of the *Ombudsman Act 1976* ("Ombudsman Act") makes similar provision for the delivery of a sealed envelope to a detainee.

4 The proposed amendments to the Migration Act seek:

to ensure that these provisions of the *Human Rights and Equal Opportunity Commission Act 1986* and the *Ombudsman Act 1976* do not apply to persons who are in immigration detention, having arrived in Australia as unlawful non-citizens, unless such persons themselves initiate a complaint in writing to HREOC or to the Ombudsman; and

to clarify the duties of the Minister and officials concerning advice relating to applications for visas and on access to legal and other advice.

5 The proposed amendments would commence on 19 June 1996.

FINANCIAL IMPACT STATEMENT

6 The amendments to the Migration Act will have no financial impact.

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NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short Title

1 This clause provides that the Act may be cited as the *Migration Legislation Amendment Act (No. 2) 1996*.

Clause 2 Commencement

2 This clause provides that the Act is taken to have commenced on 19 June 1996.

Clause 3 Amendment

3 This clause provides the Migration Act is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule is to operate according to its terms.

SCHEDULE 1

MIGRATION ACT 1958

Item 1 Subsection 193(2)

4 This amendment to subsection 193(2) makes it clear that apart from the rights contained in section 256 (Persons in immigration detention may have access to certain advice, facilities etc.), there is no obligation on the Minister or any officer to provide to a person who is in immigration detention, having been detained as an unlawful non-citizen when arriving in Australia:

- . an application form for a visa;
- . any advice as to whether the person may apply for a visa;
- . any opportunity to apply for a visa; or
- . access to advice (legal or otherwise) in relation to an application for a visa.

Item 2 Section 193

5 This item inserts subsections (3) and (4) into section 193.

6 The effect of proposed subsection (3) is to provide that paragraph 20(6)(b) of the HREOC Act and paragraph 7(3)(b) of the Ombudsman Act do not apply to those persons covered by subsection 193(1), i.e. those persons who are in immigration detention having been detained as unlawful non-citizens on arrival in Australia, unless these persons themselves initiate a complaint in writing to HREOC or to the Ombudsman.

7 Paragraph 20(6)(b) of the HREOC Act and paragraph 7(3)(b) of the Ombudsman Act both provide that persons detained in custody are entitled to have delivered to them any sealed envelopes which have been sent by either HREOC or the Ombudsman respectively.

8 Proposed subsection (4) makes it clear that section 193 is to apply to persons covered by subsection (1) while ever the person remains in immigration detention.

Note: A notation is made after the proposed amendment to section 193 to provide that the heading to section 193 (Sections do not apply) is to be replaced with "Application of law to certain non-citizens while they remain in immigration detention".

Item 3 Subsection 198(4)

9 This item repeals subsection 198(4) of the Migration Act. This subsection is no longer necessary in view of the amendments in this Bill to subsection 193(2) and the clarification provided by new subsection 193(4).

Item 4 Section 256

10 This item amends section 256 to provide that the custodian must give visa application forms to a person in immigration detention if that person so requests.

SCHEDULE 2

Item 1 Effect of Schedule 1 amendments

11 This item provides that the amendments made in Schedule 1 are not intended to alter the effect of any orders made by a Court before the commencement of this Act.





