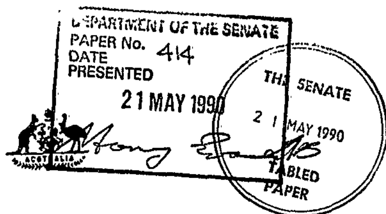

JOINT SELECT COMMITTEE ON MIGRATION REGULATIONS

SECOND REPORT TO THE
MINISTER FOR IMMIGRATION,
LOCAL GOVERNMENT AND ETHNIC AFFAIRS

12 DECEMBER 1989

JOINT SELECT COMMITTEE ON MIGRATION REGULATIONS

SECOND REPORT

TO

THE MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

SENATOR THE HON ROBERT RAY

12 DECEMBER 1989

JOINT SELECT COMMITTEE ON MIGRATION REGULATIONS

Terms of Reference

The committee is to inquire into the extent to which draft regulations and tabled regulations under the Migration Act 1958, which relate to decision criteria for the grant of visas and entry permits -

(a) reflect current and announced policies in relation to the grant of visas and entry permits as at 1 June 1989; and

(b) are likely to achieve the goals of the policies referred to in paragraph (a).

COMMITTEE MEMBERSHIP

Dr Andrew Theophanous, Chairman
Ms Kathy Sullivan, Deputy Chairman
Senator Bob Collins
Senator Jean Jenkins
Senator Jim McKiernan
Senator Baden Teague
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CHAPTER 1

GENERAL OBSERVATIONS

Introduction

1.1 This is the second report of the Joint Select Committee on Migration Regulations.

1.2 This report comments on:

- restrictions on the grant of visas;
- restrictions on those who may apply for permits;
- restrictions on the grant of permits;
- change of status and extension of stay;
- illegal entrants.

General observations

1.3 The Committee has a number of general observations to make on the scheme as a whole. Although the Committee has already commented in its first report on some of the issues raised below, it is sufficiently concerned to restate those issues. These general observations are amplified in the body of this report.

Potential for over-administration

1.4 The Committee is concerned at the potential of the scheme as outlined in the Act and regulations to increase the administrative workload of the Department. Each visa application will apparently be assessed and/or checked at least three times before entry: on the initial application, on receipt (or non-receipt) of information about the applicant's changed material circumstances and on entry. Those in the independent or concessional visa classes may be assessed a further three times if the applicant meets the pool entry but not the priority mark.

1.5 Temporary entry permit holders extending their stay or changing their status will be assessed and may be given a processing permit, assessed further and given their permit. If they apply for residence and have an entry visa or permit subject to the condition in S11D(4)(a) or S11P(4)(a) of the Act, the applicants will be assessed, may be given a processing permit, assessed further, given an extended eligibility permit, assessed again and then given their residence permit.

1.6 Such overadministration seems to be a persistent feature of the scheme. The Department's masterplan for conversion to entry visas will reduce some of the administration before entry but the workload of departmental officers is still significantly increased. There will be probable delays in decision making and uncertainty and confusion created for applicants who await a final decision on their application and may be unaware of the distinctions between the different permit types.

Complexity

1.7 A number of factors continue to make the scheme overly complicated. These include:

- the formalised 'positive candour' system imposed before entry;
- the imposition and differential classification of visa and permit conditions qualifying entry or stay;
- the restrictions which make certain applicants ineligible for any visa or permit;

- the mechanisms for extending stay or changing status from within Australia - including the 'extended eligibility' scheme; and
- the varied ways of becoming illegal entrants and the strictures on their capacity to regularize their immigration status.

These are dealt with in detail in the later chapters of the report.

The extent of applicants' knowledge

1.8 The scheme assumes applicants will have or must acquire a working knowledge of the regulations. Applicants are required to disclose 'material particulars' defined in the draft Procedures Advice Manual as 'any particular which has the potential to influence a decision to grant entry, a visa or an entry permit'. The manual continues: 'It is not relevant whether a false statement did or did not influence the decision, but whether it had the potential to do so.'[1] Given that one becomes an illegal entrant either by deliberate deception as to a 'material particular' or by neglecting to inform the officer of such particulars, it will be seen that the imputation of knowledge to the applicant is very broad.

1.9 Applicants will now need to know not just the terms of the conditions imposed upon their visas/permits but whether a qualification is a 'terminating condition' and the effects of a breach of conditions.

1.10 The Department of Immigration, Local Government and Ethnic Affairs (DILGEA) was asked how it planned to advise applicants of terminating and other conditions and the effects of any breach of such conditions.[2]

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1. Procedures Advice Manual "Status of Illegal Entrant", Topic 1, 4.4.6.1
2. Letter from Committee to DILGEA, 1 Dec 1989, Attachment

1.11 The Department responded that in the short term advice on which conditions are terminating conditions and the effect of a breach of conditions will be in the letters of approval of visa/entry permits or where no letter of approval is provided the visas will be accompanied by a leaflet indicating conditions attaching to the visa and the effect of a breach of conditions.

1.12 The Committee is not satisfied that these measures will be sufficient in some instances to inform intending migrants of the substance and effect of these conditions. The Committee is concerned that the advice to applicants, whether it is in the form of a leaflet or a letter, is made available to all applicants in plain English and the relevant principal language of the applicant.

1.13 Applicants will also now need to know which visa or permit class to apply for. This is particularly important for those applying from within Australia. Those applying for the wrong permit and refused may be caught by S11S of the Migration Act and will be unable to reapply for any permit from within Australia.

1.14 The Committee therefore asked the Department:

(a) how it proposed to advise applicants on which visa or permit class to apply for, given that under S11S those applying for the wrong permit and refused may be unable to reapply for any permit from within Australia; and

(b) if it would be possible to provide people with at least a limited opportunity not to be immediately excluded, if in the first instance they chose the wrong category?[3]

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3. Letter from Committee to DILGEA, 1 Dec. 1989, Attachment

1.15 The Department responded that:

- there are information leaflets for all visa and entry permit classes, which are cross-referenced;

- application forms have extensive explanatory notes provided with them;

- the application forms themselves contain warnings and cross references to try to ensure that applicants apply for appropriate classes of visas and entry permits;

- counter staff will be trained to advise prospective applicants on the course of action appropriate to their current immigration status;

- the Procedures Advice Manual states that an applicant who is clearly eligible for a class of Extended Eligibility TEP for which s/he has not applied should be given the opportunity to amend their application to include that class of Extended Eligibility TEP;

- officers may provide counselling to applicants about the appropriate type of visa or entry permit for their circumstances but officers are cautioned to stress that their advice is opinion only and not a decision.[4]

1.16 The Committee is not satisfied that giving an applicant the opportunity to amend his/her application as described will alleviate all the problems. In particular it does not provide appropriate advice for those applicants who mistakenly apply for a Permanent Entry Permit when they should be applying for their Extended Eligibility/Temporary Entry Permit.

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4. Letter from DILGEA, 5 Dec. 1989, pp. 1-2

1.17 The Committee is of the view that Departmental officers should be required to advise applicants of the requirement for an Extended Eligibility Temporary Entry Permit prior to applying for change of status. The Committee therefore recommends that:

- **the Procedures Advice Manual states that Departmental officers must advise applicants who are applying for change of status that they may in the first instance need to apply for an Extended Eligibility Temporary Entry Permit.**

1.18 The Department further advised the Committee that it is proposing to amend the regulations to create a special class of entry permit to provide an opportunity for a person to make a further application where, while they were lawfully in Australia, they made an error in applying for an entry permit for which they were not eligible, and during the course of the processing they became an illegal entrant for more than 28 days.

1.19 The additional special class of entry permit may allow individuals an opportunity to make a further appropriate application. The Committee welcomes the Department's attempts to deal with this problem. However, the solution proposed by the Department may not be the best one. The Committee:

a) *is concerned that the Department is adding another* permit category to an already over complicated and cumbersome regulatory system; and

b) wishes to know the fee arrangements to be made in such circumstances.

1.20 If the imposition of an additional category is the only *possible way of addressing* the problem, then the Committee agrees that the Minister should proceed, with the additional category. However, the Committee recommends that:

- **the Minister investigates less cumbersome and complicated alternatives to deal with the problem.**

1.21 There is a requirement in regulation 23 that entry permit applications are not just 'in' but 'in accordance with the approved forms'. Examining officers are not required to consider applications which are not 'in accordance with' the forms.

1.22 When queried about the interpretation of the words 'in accordance with the approved forms' the Department replied that:

> the Minister will approve forms for the purposes of the Act and applicants will be required to use those forms.[5]

1.23 The Committee was concerned about two problems arising out of this form of words:

(a) what is meant by 'in accordance with the approved forms'; and

(b) what is the status of not being considered, ie. is it a refusal?

1.24 When queried about this, the Department replied that they would consider every application and that applications on photocopied forms would also be considered even though such applications made processing more difficult. The Department also denied that incomplete forms would disqualify applicants from consideration. In the light of the Department's comments the Committee considers that there should be no difficulty in amending Regulation 23(a) to ensure that there is no ambiguity or uncertainty as to the application requirements.

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5. Letter from DILGEA, 5 Dec. 1989, p. 3

1.25 The Committee therefore recommends that:

- the words 'in accordance with' be removed from Regulation 23(a).

1.26 There is no doubt that applicants will need advice and assistance, even in this area of 'form filling' and visa selection. It is possible that applicants will be seriously disadvantaged if they do not get such assistance.

1.27 The Committee has noted submissions which stress the need for a funded advice service for immigrants, given the complexity of the scheme and the disadvantages attaching to incorrect decisions taken by applicants and officers. The Committee urges the Minister to favourably consider any applications for funding of such centres.

Potential for injustice

1.28 The various problems in this scheme indicate there could be the unintended consequence of increased numbers of illegal entrants. There are over 25 ways in which non-citizens can now become illegal entrants. The Committee in no way supports people deliberately flouting the rules. However, the Committee is concerned that people will be unable to comply with or will be ignorant of the complicated machinery for the grant of visas and permits and will therefore innocently become illegal entrants.

1.29 Unless the issues the Committee has identified are addressed the scheme will produce injustice which cannot be redressed or righted. The Committee has already addressed the inflexibility of the selection scheme before entry. However, the Committee considers that there is also a considerable rigidity in the control after entry model which will mean that compassionate, deserving cases will not be accommodated.

1.30 While the additional class of entry permit discussed earlier in paragraphs 1.18 and 1.19 may deal with some of the cases which might arise, the Committee believes the provision

should be extended to include all cases in which, because of procedural errors, a person has innocently become an illegal entrant.

CHAPTER 2

RESTRICTIONS ON THE GRANT OF VISAS OR ENTRY PERMITS

Introduction

2.1 The Migration Act and draft regulations impose various restrictions on the grant of visas and entry permits, many of which constitute new policies. The Minister can suspend processing of particular classes of visas and permits and during the suspension period no new visas or permits in that class can be processed or awarded (S11J; S11W). Certain of the restrictions are general such as the prohibition on the grant of particular types of permit to specific applicants. There are also restrictions imposed after entry which prevent certain individuals from reapplying for any further permit while in Australia. It is important to note that the restrictions identified here are not excluding or disqualifying factors, such as the prescribed criteria, but restrictions such that, even if the person satisfies all the prescribed criteria for a permit, they cannot apply for or be granted that permit.

General restrictions

2.2 The new scheme changes existing policy in certain significant ways which are rather more than 'the clarification of policy due to the structural difference between a regulatory scheme and policy guidelines', as described by the Department.[1]

2.3 No visa or permit is to be granted to persons formerly deported from Australia who owe to the Commonwealth their detention or deportation costs unless the Minister is satisfied that appropriate arrangements for repaying the debt have been made (S11F; S11ZB). This has changed existing policy which allowed entry or stay in "urgent or compassionate" cases even

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1. Letter from DILGEA, 3 November 1989

where the debt was considered to be irrecoverable.[2]

2.4 No visa or permit is to be granted where a deportation order is in force in respect of the person. A deportation order is made when signed by the Minister and it remains in force unless or until it is revoked by the Minister or a visa or entry permit is granted to the deportee. A deportee in Australia may be given an entry permit if the deportation order made under S18 is revoked. Deportees outside Australia will be restricted or banned from reentry by the provisions of regulation 36.

2.5 Reentry restrictions under R.36 apply to:

- former sponsored or subsidised students who arrived in Australia after 22 August 1979, restriction term - 2 years;
- former deportees, restriction term - permanent or 5 years;
- former illegal entrants who departed voluntarily, restriction term - 3 years;
- former illegal entrants who departed voluntarily before the end of their period of grace, restriction term - 12 months; and
- former temporary entry permit holders who breached a condition of their leave and who departed voluntarily, restriction term - 12 months.

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2. Procedures Advice Manual, 3.26.1

Exceptions to reentry restrictions - Regulation 36

2.6 For certain illegal entrants who were deported or who left voluntarily or temporary permit holders found to have breached a visa/permit condition, the restriction bar does not apply at all if, after their departure from Australia, they:

- are granted refugee status; or
- satisfy the prescribed criteria for in-country special humanitarian or a global special humanitarian visa; or
- the Minister determines the person to be a special need relative or orphan relative.

2.7 In cases of family reunion the term of the restriction ban may be reduced by half. Therefore a former deportee banned from reentry for five years could obtain a 'priority' visa after 30 months. A 'priority' visa is defined in Regulation 36(5) as:

- spouse visa;
- dependent child visa;
- aged parent visa;
- homosexual partner visa;
- aged dependent relative visa.

2.8 The two year restriction term does not apply if the former sponsored or subsidised student satisfies the prescribed criteria for one of the following visa classes:

- a student visa or entry permit;
- a visitor visa or entry permit;
- a temporary resident visa or entry permit;
- a humanitarian visa or entry permit;
- a labour agreement visa or entry permit;
- an employer nomination visa or entry permit;

- a spouse visa or entry permit;
- a dependent child visa or entry permit; or
- a preferential family visa or entry permit.

2.9 The scheme as outlined above represents a considerable modification to existing policy.

2.10 The existing policy is as follows:

a) in relation to students, current policy has allowed for a waiver of the readmission ban where:

   - the objectives of Australia's overseas student policies will not be undermined; or

   - there are compassionate or other factors inherent in the individual case which merits its approval; and

(b) in relation to other cases current policy has allowed for waiver in accordance with the following factors:

   - a genuine relationship with an Australian resident or citizen (e.g. spouse);

   - evidence of dependency on an Australian resident or citizen (e.g. aged relative);

   - impact on a relative resident in Australia if entry is denied (e.g. special need relative);

- significant economic benefit to Australia resulting from approval (e.g. substantial business migrant);

- other strong compassionate or humanitarian circumstances;

- gravity of offence in Australia or other evidence of bad character.[3]

2.11 The Committee agrees that if this broad waiver provision which currently exists had been incorporated into the draft regulations it might have opened up a potential entitlement far broader than is intended by Government or achieved under the current scheme.

2.12 However, the Committee is of the view that there should be a carefully structured waiver of the readmission restriction. The proposed regulations already allow for waiver of the 'good character' rules, partial waiver of the health criteria and for a satisfactory arrangement to be effected for those indebted to the Commonwealth.

2.13 If there is no waiver, cases such as the following cannot be accommodated. There may be an illegal entrant who departed voluntarily from Australia 6 months ago. S/he may have a child, spouse, parent in Australia who is seriously, perhaps terminally ill following an accident. Under the proposed regulations the Minister could not grant entry, even as a visitor, before a period of 12 months had expired and, if the case concerned an illegal entrant who had been deported, that period would be 30 months.

2.14 The Committee therefore recommends that:

- a carefully structured discretion to waive the readmission restriction in Regulation 36 be provided for along similar lines as the waiver for 'good character' and 'health'.

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3. Migrant Entry Handbook 3.2.6

Criminal Deportations

2.15 The most significant effect of Regulation 36(1)(b) concerns those people deported from Australia in relation to the commission of a crime or for security reasons. These people are now to be permanently barred from reentry to Australia. However, the Department has advised the Committee that this is an accurate reflection of existing policy.

2.16 The ban has particularly serious consequences not just for the deportee but often for the Australian spouse and family of that person who, if they are poor, may not see the deported spouse or parent again. Such a ban may breach certain international conventions, in particular the proposed Convention on the Rights of the Child yet to be accepted or ratified.[4] Given this case and given the consequences of a criminal deportation order, one might expect the Administrative Appeals Tribunal to be reluctant to recommend deportation where the person has close or ongoing family ties in Australia.

2.17 The Committee is concerned at the wording 'in relation to the commission of a crime'. The drafting here is ambiguous. Overstaying is a crime, working in breach of a permit condition is a crime, evading or deceiving an immigration officer is a crime and all such illegal entrants could be taken to be deported 'in relation to the commission of a crime'. If it is meant to apply only to those people convicted of a criminal offence the draft should reflect this. The Department, in discussions with the Committee, has undertaken to do this.

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4. A decision in the Berrehab Case delivered by the European Court of Human Rights is apposite here (B/1987//126/177). In this case, the deportation of a Moroccan national from the Netherlands and his enforced separation from his estranged Netherlands wife and child was held to constitute a breach of Article 8 of the European Convention - 'the right to respect for family life.' The case has had a marked impact abroad and is relevant to Australia given our existing and contemplated international obligations and because the applicant did not live with, but only had access to, his daughter. It has arguably extended the notion of what constitutes 'family life'.

2.18 In the light of the Department's undertaking, the *Committee recommends that:*

- **the words 'in relation to commission of a crime' in Regulation 36(1)b be replaced by a phrase indicating that this part of the Regulations applies only to those deported pursuant to Sections 12 and 14 of the *Migration Act 1958*.**

Specific restrictions

2.19 Under existing policy there are no restrictions on extending stay in Australia and the only restriction imposed on change of status is the prohibition on 'prescribed non-citizens', *i.e. students, diplomatic or consular representatives and* dependents who cannot get resident status on employment grounds.[5] All temporary entrants, including 'prescribed non-citizens' can apply to change status on any other ground.

2.20 The Grant of Resident Status, Integrated Departmental Instruction Manual (GORS manual) even allows for the grant of *resident status to those who do not hold a valid temporary entry* permit but who satisfy the policy guidelines for the eligible categories under Section 6A(1) of the Migration Act (Vol 1, No 1 General Processing Procedures, Part 2). This law and practice is significantly changed by the new regulations and is discussed below.

Conditions prohibiting a *further entry permit*

2.21 Section 11P(4)(b) allows a temporary entry permit or visa to have a condition attached to it so that the holder cannot be granted a further entry permit of any class while the holder remains in Australia. This condition will be imposed on all 'tourist (special arrangement)' visas and permits (Schedule 5) and could be *imposed on any other temporary permits. The Act and* the regulations are silent on this administrative arrangement. There is no right of review if the condition is wrongly or

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5. S6A(1) of the Migration Act

inappropriately imposed on a particular permit. The draft manual simply notes: 'This condition will be used in limited circumstances.'[6]

2.22 The Committee asked the Department:

> What instructions had the Department issued concerning the imposition of the condition set down in Section 11D(4)(b) and Section 11P(4)(b); and Would the condition be imposed on individual *temporary permits where an officer determines it* would be unsatisfactory for that individual to extend his/her stay in Australia?[7]

2.23 The Department assured the Committee that they intended the condition to apply only to the tourist (special arrangement) visa and further acceded to the Committee's request to amend the Regulations *so as to ensure that the condition cannot be imposed* on any other visa or permit class.

2.24 The Committee recommends that:

- **the regulations be amended to ensure that the condition in Section 11P(4)(b) only applies to *tourist (special arrangement) visas.***

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6. Permanent Entry Permits After Entry, Topic 2, 4.2
7. Section 11 P(4)(b) states:
   The conditions subject to which temporary entry permits may be granted pursuant to regulations made under paragraph (1)(a) include, but are not limited to:
   (a) ...
   (b) where the temporary entry permit is granted to the person before entry into Australia - the condition that in spite of anything else in this Act, the holder of the temporary entry permit will not after entering Australia be entitled to be granted another entry permit while s/he remains in Australia ...

Conditions invalidating temporary entry permits for the purposes of S11ZD

2.25 Section 11P(4)(a) of the Act provides for a condition to be placed on temporary entry permits to the effect that they are not valid for the purposes of Section 11ZD of the Act (the Grant of Resident Status provision). As in Item 1, Schedule 5, this condition will be imposed on almost all temporary visas or permits, including on executive, working holiday maker, entertainment, media and film staff, student and visitor visas and permits. They are all prima facie ineligible for residence. Those holding such temporary permits who wish to apply for residence from within Australia must first apply for an Extended Eligibility T.E.P. which is valid for S11ZD. Some of them, notably students and visitors, will find they are ineligible to be awarded an Extended Eligibility permit and are therefore unable or restricted in obtaining residence. The holder of a temporary permit which is not valid for S11ZD cannot be granted permanent status directly on any grounds except that of asylee.

2.26 As the Immigration Advice and Rights Centre noted in their submission to the Committee, when S11ZD is read in conjunction with Schedule 5 and regulations 127 to 130, it represents 'a clear and most radical departure from existing law and policy'.[8]

Students

2.27 Under existing law and policy all students are 'prescribed non-citizens' and are unable to change their status to permanent residents on occupational grounds. In the regulations this structure is retained but the definition of 'prescribed non citizen' has been altered so that the term now *includes only assisted students and trainees and their* dependents. Full fee paying students attending formal courses are exempted from the provision and will be able to apply for residence status on work grounds. The change was apparently prompted by industry concern at the loss of students who had work skills which were in short supply. The Committee endorses the

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8. Immigration Advice and Rights Centre, Submission No 4, p. 7

change to the definition of prescribed non-citizens.

2.28 The specific restrictions imposed on students in these regulations are as follows:

- R.122/R123 - no student can change status to the temporary categories, working holiday maker or domestic worker (diplomatic or consular) - *this is a change in policy;*

- R.122 - only private students can change to the temporary resident work categories; and

- R.123 - assisted students wishing to change to another temporary category are restricted to visitor or another student category - this is a change in policy.

2.29 The Committee considers that there may be cases where such restrictions impose an unreasonable limitation and that those regulations making new policy may need to be amended at a later date.

Visitors

2.30 Under present policy there are no restrictions limiting or preventing visitors from changing status or acquiring residence in Australia. The regulations introduce the following restrictions which are potentially controversial:

- R.120 - visitors cannot be granted a working holiday or domestic worker (diplomatic or consular) permit after entry;

- R.120 - visitors can only change to a student permit if they establish 'exceptional reasons' for the grant [R.120(e)(viii)(B)].

- R.127 - visitors cannot be granted an extended eligibility (special circumstances) permit on marriage to an Australian citizen or resident; and

- R.128 - visitors cannot be granted an extended *eligibility (economic) permit.*

2.31 The Minister has justified the changes as a response to 'the steady growth in the number of GORS applications' and 'the scope for abuse...by supposedly 'bona fide' visitors'.[9] The changes mean that visitors can only acquire residence in Australia after entry on strong compassionate or humanitarian grounds.[10]

2.32 The changes will certainly cause hardship to some, for example, those visitors who genuinely marry Australians after entry. Many of these applicants will not have the means to leave Australia, apply and return again. For young couples the travel costs may blight their chances of establishing a home or starting a family. In particular family circumstances where the applicant has clearly satisfied the rules it may be unnecessarily harsh to force the applicant into the queue outside Australia. This provision could also be considered unjust insofar as it discriminates against those who are economically disadvantaged. It is not test of the genuineness of a marriage as to whether people are able to return to their country of origin. For those with the financial means it will be easy, for those without, it will be very difficult.

2.33 Some members of the Committee question whether the problems of the past justify this particular change in policy.

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9. Letter of 14 November 1989 from Senator Ray, p. 7
10. R.130 Extended Eligibility (Other) Permit

Those members believe that some provision should be inserted to allow, at least in certain circumstances, for people who marry to be able to change status.

2.34 The Department now has a series of measures which will catch applicants who are abusing the system and the Committee understands these will be strengthened further. Those who enter as visitors with the intention of acquiring residence in Australia and who neglect to inform officers of this before arrival or who deceive officers as to their intentions, will be illegal entrants, liable to removal and restricted from reentry.

2.35 Further, the change of status rules now state that the 'prescribed circumstance', the marriage or the qualification as aged parent, must have occurred or been satisfied after entry. In the circumstances it may be something of an overreaction to add these additional strictures on change of status for visitors.

Temporary residents

2.36 There are certain other temporary residents who are now unable to obtain an Extended Eligibility (family and economic) permit namely those excluded from the following criteria at R.129(d)(iii) if the person:

- has held one or more than one temporary entry permit permitting temporary residence in Australia for an aggregate period of more than 12 months (other than a retirement, working holiday, domestic worker (diplomatic or consular) or expatriate entry permit) and has permission to work under an entry permit in force at the time of the application; or

- has held one or more than one student (formal course) entry permit permitting temporary residence in Australia for an aggregate period of more than 12 months and has permission to

work under an entry permit in force at the time of the application; or

- is the holder of a working holiday entry permit.

2.37 The Committee asked the Department the following questions:

- What is the meaning and effect of Regulation 129(d)(iii)?

- Why is the current holder of a working holiday permit eligible for this permit but an earlier term of residence as a working holiday maker is discounted in assessing the applicant's aggregate period of more than 12 months?

- Is the inclusion of the working holiday permit holder in this provision a change in policy?

2.38 The Department agreed that there did not seem to be any sound policy reason why a past term as a working holiday maker should be discounted and agreed to delete the words "working holiday" in the first paragraph of Regulation 129(d)(iii).

2.39 The Committee recommends that:

- **in accordance with the Department's undertaking the reference to 'working holiday' in Regulation 129(d)(iii) be deleted.**

CHAPTER 3

RESTRICTIONS UPON THOSE WHO MAY APPLY FOR ENTRY PERMITS

Introduction

3.1 The act sets down the circumstances in which a person may be restricted from making a further application for a temporary or permanent entry permit after entry. These provisions are in Sections 11S, 11T and 64C.

3.2 The effect of these sections of the Act is that if a person has made an application for any class of entry permit in Australia, and that application has been refused, a further application for any class of entry permit can only be made if:

- the person is the holder of a current TEP and

  - s/he has not applied for a review of the original decision to refuse the application for the entry permit; or

  - s/he applied for a review of the decision under the Regulations and the review authority has not invited the person to make a further application; or

  - s/he has applied for a review of the original decision under the Regulations and the new application is lodged within 10 days of the review authority inviting submission of a further application; or

- s/he has applied for a review of the original decision under the Regulations after the 10 days and there has been a 'prescribed change in circumstances'; or

- the person is not the holder of a current TEP (ie is an illegal entrant) and

  - there has been a prescribed change in circumstances; or

  - s/he has applied for a review of the original decision under the Regulations and the new application is lodged within 10 days of the review authority inviting submission of further application.

3.3 The aim of these provisions, as with the 'positive candour' system, the illegal entry rules, the restrictions upon the grant of permits after entry and the change of status regulations, is to ensure that applicants provide all the information which is relevant to their situation on their initial visa or permit application.

3.4 However, the concern of the Committee is the effect of these provisions in practice. A typical example would be that of a young woman student who marries an Australian citizen and wishes to obtain residence in Australia. The woman applies for her residence permit just before her student permit is set to expire. Owing to a misunderstanding she applies for the Spouse (After Entry) Permit instead of an Extended Eligibility (Special Circumstances) permit. The Act, regulations and draft manual are quite clear that in such circumstances the application is to be refused. When the women student receives the refusal notice, her existing student permit has expired.[1] The woman is now an overstayer, an illegal entrant. She is unable to appeal the refusal decision (R.23 of the Review Regulations) and as an

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1. The draft Procedures Advice Manual indicates that processing permits extending temporary stay are only issued to those applicants who appear on an initial assessment to satisfy the prescribed criteria for their chosen permit class.

illegal entrant can only apply for the appropriate Extended Eligibility Permit if the prescribed change of circumstances, i.e. her marriage, occurred after the refusal decision (S11T). As she was married before she first applied for residence she cannot obtain residence from within Australia and is unable to regularise her unlawful status. If she voluntarily leaves to reapply for entry from outside Australia she will be unable to reenter for 12 months (R.36).

3.5 It is in this context that the Committee makes the general observations that the regulations are too complicated, that those without access to appropriate and accurate advice will be seriously disadvantaged and that the system of control will create the very illegal entrants it was designed to deter. The Committee reiterates the need for applicants to be given appropriate advice.

3.6 The Committee was extremely concerned at the potential implications of the Regulation as it was drafted. Questions concerning this were put to the Department and in subsequent discussions the Department undertook to do the following:

- amend Regulation 23 of the Review Regulations to reflect the Department's intention, which is to allow a right of review to all those lawfully in Australia at the time their primary application was lodged; and

- create a special class of entry permit (see paragraph 1.17).

3.7 However, the Committee reserves its right to comment further on this when the regulations are gazetted.

3.8 The Committee hopes and expects that the illegal entrant given such further chance to apply will not be classified as an illegal entrant when making that subsequent application. The Committee is particularly concerned that, in situations similar to that outlined in paragraph 3.4, applicants who become illegal entrants by error in their second application would not be treated as an illegal entrant and caught by the strictures of S11T, R127 or R129, which do not allow change of status on the basis of marriage.

CHAPTER 4

EXTENSIONS OF STAY

4.1 Given its tight timetable for reporting the Committee will not comment on each of regulations 120 to 142 in turn but will deal with certain general features of the extension of stay and change of status scheme. This is not to say that the individual regulations would not benefit from closer scrutiny at a later date.

Acquiring resident status

4.2 There was no hint in the substance of the Act (Section 11ZD) of the extent of the changes wrought by these regulations to the acquisition of residence rules. Section 11ZD is substantially a reenactment of Section 6A of the Migration Act. The sections provide that permanent entry permits can only be issued after entry to the following:

- the spouse, child or aged parent of an Australian citizen or permanent resident;
- persons, not "prescribed non-citizens", authorised to work in Australia;
- persons granted asylum or determined by the Minister to have refugee status; and
- persons who satisfy the compassionate or humanitarian grounds.

4.3 There are differences between Section 11ZD and the old Section 6A which are shown by these regulations to have considerable significance. Section 6A requires those qualifying on refugee, occupational or compassionate humanitarian grounds to have a temporary entry permit. Section 11ZD requires all those qualifying for residence except those granted asylum, to have a 'valid temporary entry permit' and states that a temporary permit granted subject to the Section 11P(4)(a) or (b) condition is not, for these purposes, a 'valid temporary entry permit'.

4.4 Schedule 5 imposes the Section 11P(4)(a) condition on all temporary entry permits except the 'expatriate' and 'prospective marriage' permits. They are all prima facie ineligible for the grant of residence in Australia. Therefore most people applying for residence in Australia will be required to apply for an extended eligibility permit - their 'valid temporary entry permit' - before obtaining residence.

4.5 Visitors, some students; temporary residents and illegal entrants cannot be granted certain extended eligibility permits.

4.6 A spouse, aged parent or dependent child must show that the residence qualification, their marriage, turning 60/65, satisfying the 'balance of family' test, becoming a dependent child, occurred after entry to Australia (R.127; 129).

4.7 Those seeking residence on humanitarian grounds must show that the natural disaster or political upheaval which 'severely and directly affects them as an individual' occurred after their arrival in Australia and that the Minister has given formal recognition to the event by gazetting it. Even those granted an extended temporary stay on humanitarian grounds will be subject to this requirement.

4.8 Certain illegal entrants applying for residence must show that their dependence, the natural disaster etc. occurred since they last applied for an entry permit (S.11T).

4.9 Those refused an entry permit who were invited by a review authority to reapply for a permit but who neglected to apply within ten working days of the review authorities' notification, must show, on a later residence application, that the marriage, their dependency, the natural disaster etc. occurred after the expiry of those ten working days [S11S(1)(a)].

4.10 These changes represent a substantial modification to the Grant of Residence Status scheme. The change has been effected by the mandatory imposition of the S11P(4)(a) condition which has made almost all those persons who could or would seek residence within Australia prima facie ineligible for such grant. Visitors, certain students and temporary residents are prevented from qualifying for residence as spouse, or on occupational grounds, not by an amendment to the statute, but by regulations which exclude them from the extended eligibility categories.

4.11 Further, although the Act simply requires people applying for residence to be the spouse, child or aged parent of an Australian citizen or resident, the regulations only allow those who qualify as the spouse, aged parent or child on entry to be permitted to stay. One could certainly expect a legal challenge to the vires of this scheme.

Regulation 127 - Extended eligibility (*special circumstances*) entry permit

4.12 There was concern that the policy for those people seeking residence in order to remain in Australia with their spouse has been changed.

4.13 It was decided to request the Minister to review this change by recommending that:

- in Regulation 127(a) the words 'the holder of a visitor visa or entry permit' be deleted; and

- **Regulation 127(b)(ii) be deleted in its entirety.**

4.14 The Committee is concerned at the growing number of GORS applications and the abuse of the immigration control system by those who contrive a marriage or de facto union for immigration purposes. In order for appropriate controls to be maintained, the Committee suggests that:

> **(a) the criteria for testing the genuineness of a marriage be tightened (and could perhaps comprise the *same tests as those presently applied to de facto* relationships); and**
>
> **(b) sponsorship provisions be tightened.**

Regulation 140 - Compassionate grounds entry permit

4.15 The Committee notes that the compassionate/humanitarian category is now defined more restrictively than in existing policy. In particular it excludes the group currently given residence under this category whose claim is based on 'compassionate factors in their personal circumstances'.[1] The requirement that the applicant must be sponsored by an Australian citizen or resident 'whose mode of life would be seriously affected if the entry permit was not granted' is also new.

4.16 The Committee regards that this requirement is new policy which was not flagged by the Minister to be announced on 19 December. The requirement is a severe narrowing of the policy in this area and the Committee therefore recommends that:

- **in Regulation 140(c) the words 'whose mode of life would be seriously affected if the entry permit was not granted' be deleted.**

----
1. GORS Vol 1, No 6 para 2.4

4.17 The Committee is concerned about the ability of the Regulations to accommodate the following example:

> a visitor here may be involved in a car accident, and have a claim for damages. The visitor may be unable to or feel disinclined to return home and come back to Australia at some later point in time to litigate his claim. It would be disadvantageous in terms of cost, in terms of case preparation and possibly medical treatment.

4.18 The Committee made these observations to the Department. It was indicated to the Committee that the Department would consider the Committee's observations.

Regulation 141 - Humanitarian grounds entry permit

4.19 Regulation 141(1)(b)(iv) *requires that there is no other* country which could offer the applicant long term protection. The Committee is concerned that this would particularly disadvantage Jewish people and those people who could lay claim to German citizenship.

4.20 The Committee regards this as new policy and, although the possibility of another country being willing and able to offer long term protection should be a factor for consideration, the Committee does not agree that it should be an excluding criterion.

4.21 The Committee therefore recommends that:

- **Regulation 141(1)(b)(iv) be deleted and a paragraph inserted into the appropriate section of the Procedures Advice Manual stating that the probability or possibility of another country being able to offer the applicant long term protection be a factor for consideration.**

CHAPTER 5

PROCESSING ENTRY PERMITS

5.1 Regulation 131 prescribes the criteria for the grant of a processing entry permit and states that:

> 131. The following criteria are prescribed in relation to a processing entry permit:
>
> (a) the applicant has applied for a further temporary entry permit or a permanent entry permit;
>
> (b) on the day of the application, the applicant was the holder of a valid entry visa having effect as a temporary entry permit, or a valid temporary entry permit;
>
> (c) after that day and before the application has been determined, the entry visa or temporary entry permit has expired;
>
> (d) the Minister is satisfied that it would be unreasonable to require the applicant to leave Australia before the application is determined.

5.2 The permit appears designed to extend applicants' temporary stay while their claims to stay or change status in Australia are being processed. It has the significant additional effect of preserving their lawful status so that they do not become illegal entrants during this processing or in the subsequent appeal term. Problems become apparent when R.31 is read in conjunction with Review Regulation 23 which presently states at 23(1)(a) that:

> 23(1) A person is not entitled to apply for review unless the person:
>
> (a) is lawfully present in Australia at the time of the application for review;

5.3 The processing permit, which is not included amongst the classes in Schedule 3, is issued at the discretion of the examining officer and not in response to a request from an applicant. Regulation 131 does not oblige an officer to issue the permit when, during processing, the applicant's permit is set to expire. Indeed, the officer has the discretion to refuse a processing permit if it would be reasonable to require the applicant to leave Australia before the application is determined.

5.4 The draft manual appears to suggest that it is reasonable to refuse the processing permit and thereby require the applicant to leave during processing if, on an initial assessment, it appears that the applicant does not satisfy the prescribed criteria for the permit class applied for.

5.5 Those who do not satisfy the prima facie case who are refused a processing permit will be overstayers, i.e. illegal entrants.

5.6 Those applicants not given a processing permit may be unaware of the perils of overstaying, assuming that because their passport is with the Department they are legal, while others might be unable to afford to travel outside Australia to await a decision. Because it usually takes several months to process a claim with the Department and most people make their applications towards the end of their current permit term, most will almost certainly become illegal entrants by the time the decision granting or refusing their application is made. The person refused as an illegal entrant will have no right to seek review of the refusal decision. As noted in the example given earlier in this report, they will have limited opportunities to regularise their status in Australia, they will be restricted

from re-entry, liable to deportation and will have acquired a quasi-criminal status which must be disclosed and will prejudice their travel rights in most other countries.

5.7 The Committee is also concerned that the processing permit arrangement is open to abuse by the examining officers. An officer might delay making a refusal decision in a case until after a person's existing permit has expired. This would mean that there was then no right of review. The regulation gives officers no incentive to process applications quickly. Few officers enjoy having their decisions subject to scrutiny and possibly overturned by a review authority.

5.8 This problem was raised with Departmental officers, who were unaware of the effect of Review Regulation 23 as it was then written. They expressed surprise as the intention in the drafting instructions was that the date of review was to relate to the date of the primary application. The Department undertook to amend Review Regulation 23 immediately to reflect this original intention.

5.9 The Committee therefore recommends that:

- **Regulation 131 be amended as follows:**
  - **paragraph (d) be deleted and a mandatory requirement be imposed on officers to issue processing permits if, prior to their determination, the applicant's existing permit is set to expire; and**

  - **the processing permit should cover the time period up to and including the final determination date before the review authorities or, if no appeal is lodged, expires on the final day set down for lodging the appeal.**

5.10 This preserves the person's lawful status until an appeal is lodged or his/her final domestic appeal is determined. It ensures that those complying with the migration regulations who apply for an extension or change of status are not converted into illegal entrants, with all the restrictions and adverse consequences relating to that status simply because of processing delays which are beyond the applicant's control.

CHAPTER 6

ILLEGAL ENTRANTS

6.1 An illegal entrant is a non-citizen who has entered Australia illegally or who has entered legally but no longer has authority to remain. A person ceases to be an illegal entrant once s/he departs from Australia or is granted an entry permit. For some illegal entrants this must be a 'properly endorsed' permit.

6.2 A person can become an illegal entrant in a variety of ways *including:*

- obtaining entry or stay by deception, by submitting bogus documents, by making false or misleading statements to immigration officers;

- by withholding material information before, at, or after *entry, i.e. the 'positive* candour' system which is set to make illegal entrants of those who fail to disclose facts which have 'the potential' to influence decisions by an immigration officer;

- entry into Australia, in breach of Section 11A(1)(d) by a person suffering from a prescribed disease, physical or mental condition, by a person convicted of certain crimes or acquitted of a crime by reason of insanity or by persons deported or excluded from Australia or another country;

- by overstaying the term of their temporary leave;

- by cancellation of entry permits; (The Minister has no authority to cancel a permanent entry permit but if the holder of the permanent permit secured entry or stay by deception, the permit is deemed to have been cancelled on entry or on the grant of the permit. The Minister has absolute discretion to cancel any temporary entry permit (S11R));

- the invalidation of a temporary entry permit by breach of a terminating condition;

- a non-citizen infant born in Australia where neither parent is lawfully in Australia becomes an illegal entrant at birth (Australian Citizenship Act, S10, as amended by No 70, 1986; and Act S5D);

- cessation of exempt status where the person does not depart and is not granted an entry permit, for example if a consular official was dismissed or quit his/her embassy staff and remained in Australia without securing an entry permit.

6.3 The culpability of individual illegal entrants varies enormously. Some of them deliberately and dishonestly breach immigration laws. Others who deliberately breach the rules can plead mitigating circumstances, such as the private overseas student who works full time for a short period because his/her family has not sent tuition fees or an allowance. Some people become illegal entrants because of dilatoriness or a lack of care, for example by neglecting to check the expiry date of their temporary permit. Others are entirely innocent of wrong doing. Parents may have falsified the birth records of their young child and presented these to immigration officers on arrival. The child then is the illegal entrant, even though the deception was

not his/her own.

6.4 Under present policy illegal entrants can apply for an entry permit from within Australia. Those outside Australia who are restricted from reentry can ask to have the reentry ban waived. Immigration officers assessing such cases look to see if the legal preconditions for entry or the grant of residence are satisfied and consider the merits of the case including the illegal entrant's failure to observe migration laws and his/her conduct in Australia. If the permit is granted the person's unlawful status is cured.

6.5 The Act and regulations have made significant changes to this arrangement as follows.

The Deportation Order

6.6 Section 17A of the Act states that an illegal entrant is liable to deportation if the period of grace (28 days after s/he became an illegal entrant) has ended. Where the Minister is satisfied that a person is liable to deportation the Minister shall in writing order the person's deportation and such order may not be revoked. Section 18 states that the Minister may order the deportation of an illegal entrant but such order shall not be executed before the end of the period of grace and is revocable. The Compliance Regulations will no doubt indicate how these deportation powers will work.

6.7 The Committee assumes that a Section 18 deportation order will be made as a matter of course against all illegal entrants coming to the Department's notice and a S17A deportation order made only if the Minister is satisfied that the person has no outstanding or unresolved claims or applications before the Department. If an irrevocable Section 17A deportation order is made the illegal entrant cannot be granted an entry permit in Australia. S/he must be deported from Australia. Other illegals may be granted entry permits in Australia but only if and after their S18 deportation order is revoked.

Restrictions on those Applying for Entry Permits

6.8 S11T of the Act prevents certain illegal entrants from applying for entry permits in Australia. Thus an illegal entrant in Australia who has applied for and been refused an entry permit while in Australia can only apply for a further permit if there has been 'a prescribed change in circumstances', eg. marriage, qualifying as an aged parent or dependent child, since the last entry permit application. Illegal entrants who have not been refused an entry permit application since they last entered Australia are not caught by this provision.

Restrictions on the Grant of Entry Permits

6.9 The draft manual makes it clear that all illegal entrants applying for permanent entry permits in Australia must first apply and qualify for extended eligibility permits. This is not a regulatory requirement but appears to be a policy decision. An extended eligibility permit is certainly a valid temporary permit for the purpose of Section 11ZD, but the Committee questions whether it is the only valid temporary permit for such purposes. Illegal entrants are ineligible for the extended eligibility (special), the qualifying permit for the spouse of an Australian citizen or resident and the extended eligibility (economic) permit. They can only qualify as family or under the strong compassionate or humanitarian rules.

6.10 Regulation 26 sets down a further restriction to the grant of entry permits to illegals. It provides that an illegal entrant is not to be granted an entry permit where s/he has:

(a) lodged an application for an entry permit more than 2 working days after being arrested under Sections 38 or 39 of the Act; or

(b) not being a person who became an illegal entrant because of subsection 6(2) of the Act, lodged an application for an entry permit more than 12 months after becoming an illegal entrant.

6.11 The subregulation does not apply to those who have not been granted refugee status.

6.12 The provision appears to make an unusual distinction. Illegal entrants who are overstayers are expected to apply to regularize their status within 12 months of becoming an illegal entrant (Part (b)). Although the aim of discouraging illegal entrants from 'going to ground' is laudable, it may in fact have exactly the opposite effect and encourage illegals who cannot qualify under the Regulation to stay underground.

6.13 Part (a), which appears to apply to all illegal entrants regardless of the time they have spent unlawfully in Australia, gives those illegal entrants who have been arrested two days in which to lodge their application. It appears though that the drafting of the regulation is somewhat unclear, that this two days is given to arrested illegal overstayers even if they have been in Australia in excess of 12 months. Those who are in Australia over 12 months, who surrender to the Immigration Department and who are not arrested may be unable to obtain an entry permit. The Committee questions why those arrested should obtain this particular advantage over those who voluntarily come forward to the Department.

6.14 This matter was taken up with the Department and the Committee was advised that the Regulations were being redrafted

a) so as to indicate that the 12 month time limit applied to all illegal entrants, i.e. overstayers and those evading entry or entering by deception;

b) to indicate that the time limitations for lodging applications was a maximum of 12 months. Those illegal entrants arrested within the time limit would have two days to lodge an application.

6.15 The effect of the regulations may be to tie the Department into a rigid structure and prohibit the grant of a permit to certain deserving illegal entrants who are caught by these time constraints, or by the restrictions in the extended eligibility categories if these apply. The following cases may illustrate these points. They are all likely to be given residence in Australia under existing policy but may fail the strictures of the draft regulations.

6.16 Regulation 26 will make it almost impossible for innocent illegals to regularise their status given the time limit imposed. These are a lot of people who are here illegally but who do not know it, e.g. because they did not disclose information at entry, or for some other reason. People become illegal entrants not from the date of determination but from the date of entry.

6.17 Case 1 is a young 12 year old girl smuggled into Australia 10 years ago by her 'parents'. She has had no contact with her natural parents, does not know their address, is apparently well settled with the 'family' in Australia. She is an illegal entrant for 10 years. If she is required to get an 'extended eligibility family' permit she cannot show that she became a dependent child after entry. If she is not granted a permit, she is liable to mandatory deportation and will be unable to re enter for 12 or 30 months.

6.18 Case 2 is a British citizen, an illegal entrant for 6

years. He lives in a de facto relationship with an Australian woman. They began living together soon after he entered Australia. He applied to stay at the end of his first year. That application was rejected. He remained here unlawfully. He and his 'wife' have two small children. He is employed and is the sole support for the family. The mother is addicted to tranquillisers. School and medical opinion suggests that the mother could not cope alone if he was deported. He cannot be granted an entry permit (Regulation 26). He is also caught by Section 11T. He became a spouse before his previous entry permit application. He is therefore liable to deportation and restricted from reentry.

6.19 Case 3 an illegal entrant in Australia for 4 years. He owns and manages a factory which employs twenty workers. The factory would have to be closed and the jobs would be lost if he was deported. Again he is caught by Regulation 26 and is likely to be outside the 'extended eligibility economic' category.

6.20 Whatever one might decide in these cases the caselaw does illustrate the need for discretion not just on entry. None of these illegal entrant cases are assisted by Section 64U. They do not have a right of review under Regulation 23 of the Review Regulations against the decision refusing them residence and the Minister is merely empowered by Section 64U to set aside a Tribunal decision and substitute a more favourable one for the applicant.

6.21 The Committee sees the need for some means of accommodating those people who are illegal entrants through no fault of their own.

6.22 The matter should be reviewed. The time limit runs for twelve months and we accept the assurance of the Department that this matter of innocent illegals will be reviewed before any action is taken.

6.23 The Committee therefore recommends that:

- no deportation order is executed against innocent illegal entrants who, because of Regulation 26, are unable to regularise their status within the twelve month period while the Department of Immigration, Local Government and Ethnic Affairs reviews the operation of the Regulations.

Conclusion

6.24 The Committee has not yet been able to adequately address such aspects of the draft regulations as the review regulations and those relating to refugees. However, these and other issues will be more fully addressed when the regulations are gazetted on 19 December.

6.25 The Committee plans to call for public submissions on the final regulations and will hold public hearings in late January and early February, prior to reporting to Parliament later in February 1990.

APPENDIX 1

Letter to DILGEA from Committee

1 December 1989

PARLIAMENT OF AUSTRALIA

JOINT SELECT COMMITTEE ON MIGRATION REGULATIONS
PARLIAMENT HOUSE, CANBERRA A.C.T 2600
TEL (062) 77 4564
FAX (062) 77 2067

Mr Wayne Gibbons
First Assistant Secretary
Development and Systems Division
Department of Immigration, Local
Government and Ethnic Affairs
P O Box 25
BELCONNEN ACT 2616

Dear Mr Gibbons

At its last meeting the Committee requested that I clarify with you a number of issues currently under discussion within the Committee. Specific questions are in the attachment to this letter.

I would appreciate your reply by c.o.b. Monday 4 December in order that the Committee can further consider the issues raised at its next meeting on Wednesday 6 December 1989.

Yours sincerely

ROBINA MILLS
Secretary

1 December 1989

Attachment

1. a) What are the purposes of the processing permit and the extended eligibility permit?

   b) What differences in assessment procedures are there for the processing permit, extended eligibility permit and residence permit?

   c) Would it be possible for the extended eligibility permit and the residence permit to be granted at the same time?

2. a) How does the Department propose to advise applicants on which visa or permit class to apply for, given that under S11S those applying for the wrong permit and refused will be unable to reapply for any permit from within Australia?

   b) Will it be possible to provide people with at least a limited opportunity not to be immediately excluded if in the first instance they choose the wrong category?

3. The Committee is concerned that visa holders will need to know not just the terms of the conditions imposed upon their visas/permits but also whether the qualifications are "terminating conditions" and the effect of a breach of conditions. How does the Department plan to advise applicants of such conditions and the effects any breach might have?

4. How are the words in R.23 "in accordance with the approved forms" to be interpreted?

5. There is no doubt that applicants will need advice in the area of form filling and visa selection. Will it be possible for departmental officers to provide the advice to applicants about which category they would most advantageously apply under or will officers be prohibited from providing such advice?

6. Sections 17 and 18 of the amended Migration Act deal with mandatory deportation of illegal entrants and deportation of illegal entrants respectively.

   Under which regulations will departmental officers determine whether an illegal entrant is to be deported under S17 or under S18? How will those officers decide between deportation under S18 of the Act or mandatory deportation under S17 of the Act?

7. The Act sets down the circumstances in which a person may be restricted from making a further application for a temporary or permanent entry permit after entry in Sections 11S, 11T and 64C.

   The effect of these sections is that if a person has made an application for any class of entry permit in Australia, and that application has been refused, a further application for any class of entry permit can only be made if:

   * the person is the holder of a current TEP and

     - he/she has not applied for a review of the original decision to refuse the application for an entry permit; or

     - he/she applied for a review of the decision under the Regulations and the review authority has not invited the person to make a further application; or

     - he/she has applied for a review of the original decision under the Regulations and the new application is lodged within 10 days of the review authority inviting submission of a further application; or

     - he/she has applied for a review of the original decision under the Regulations and there has been a 'prescribed change in circumstances'

   * the person is not the holder of a current TEP (ie is an illegal entrant) and

     - there has been a prescribed change in circumstances (see Part 4 below); or

     - he/she has applied for a review of the original decision under the Regulations and the new application is lodged within 10 days of the review authority inviting submission of further application.

The Committee's concern is the effect of these provisions in practice. For example, take the instance of a young woman student who marries an Australian citizen and wishes to obtain residence in Australia. The woman applies for her residence permit just before her student permit is set to expire. Owing to a misunderstanding she applies for the Spouse (After Entry) Permit instead of an Extended Eligibility (Special Circumstances) permit. The Act, regulations and draft manual are quite clear that in such circumstances the application is to be refused. When the woman student receives the refusal notice, her existing student permit has expired. The draft Manual indicates that processing permits extending temporary stay are only issued to those applicants who appear on an initial assessment, to satisfy the prescribed criteria for their chosen permit class.

The woman is now an overstayer, an illegal entrant. She is unable to appeal the refusal decision (R.43 of Review Regulations) and, as an illegal entrant can only apply for the appropriate Extended Eligibility permit if the prescribed change of circumstances - her marriage - occurred after the refusal decision (S11T0. As she was married before she first applied for residence she cannot obtain residence from within Australia and is unable to regularize her unlawful status. If she voluntarily leaves to reapply for entry from outside Australia she will be unable to reenter for 12 months (R.36). It is in this context the Committee is concerned that the regulations are too complicated, that those without access to appropriate and accurate advice will be seriously disadvantaged and the very illegal entrants it was designed to deter will be created.

How does the Department plan to deal with such situations?

APPENDIX 2

Letter from DILGEA to Committee

5 December 1989

Department of Immigration, Local Government and Ethnic Affairs
Benjamin Offices
Chan St Belconnen, A.C.T. 2617

Ms Robina Mills
Secretary
Joint Select Committee
on Migration Regulations
Parliament House
CANBERRA ACT 2600

Dear Ms Mills

I write in reply to your letter of 1 December 1989 requesting clarification of a number of issues specified in the attachment to your letter.

The responses to the respective questions are attached.

Yours sincerely

W J GIBBONS
First Assistant Secretary
Development and Systems Division
5 December 1989

P O Box 25, Belconnen, A.C.T. 2616. Telephone (062) 64 1111. Telex 62037

ATTACHMENT

Question 1

(a) A processing permit may be granted to an applicant, who has applied for a Permanent Entry Permit After Entry (ie a permanent residence permit where the criteria in s.47 are met) or a further Temporary Entry Permit, and who has been assessed as having a prima facie claim or for whom it would be unreasonable to require them to leave before the application is determined, and who at the time of application held a valid entry permit. It ensures that the applicant retains his/her legal status while the application is being determined.

An Extended Eligibility Entry Permit enables an applicant who holds an entry permit which is not valid for s.47 and who meets all prescribed criteria, to be granted a temporary entry permit which is valid for s47 or to be granted a temporary entry permit which permits an extended stay in Australia.

(b) Processing of applications for a Permanent Entry Permit After Entry (a permanent residence permit where the criteria in s.47 are met) includes an assessment of all claims against the regulatory requirements, including health and character checking. The processing for a Extended Eligibility Entry Permit involves assessment of claims against regulatory requirements which in most cases does not require full health and character checking. The Processing Temporary Entry Permit is intended to be issued at the point where an assessment of the substantive claims for a Permanent Entry Permit After Entry have been made, and health and character processing is to commence.

(c) No. To be granted a Permanent Entry Permit After Entry an applicant is required to be the holder of a temporary entry permit valid for s.47. An Extended Eligibility Entry Permit is therefore a pre-requisite to a Permanent Entry Permit in most instances.

Question 2

(a) There are information leaflets for all visa and entry permit classes which set out the requirements for the different classes. These are cross referenced to each other. The application forms for the visa and entry permit classes have extensive explanatory notes provided with them. The application forms themselves contain warnings and cross references to try to ensure that applicants apply for appropriate classes of visas and entry permits. Counter staff will be trained to advise prospective applicants on the course of action appropriate to their current immigration status. Attached is an example of a proof application form for Extended Eligibility Temporary Entry Permit.

(b) In respect of applications for visas, an applicant who selects the wrong class is entitled to make a further application.

In respect of entry permits, the Procedures Advice Manual on Extended Eligibility Temporary Entry Permits Topic 2, Section 6 states

". . . an applicant who is clearly eligible for a class of Extended Eligibility Temporary Entry Permit for which he/she has not applied should be given the opportunity to amend their application to include that class of Extended Eligibility Temporary Entry Permit."

And the Procedures Advice Manual on Permanent Entry Permits after Entry Topic 3, Section 5 has a similar provision.

In addition, a applicant who is the subject of a reviewable decision, any, by virtue of s121 of the Migration Act as amended, at the instance of the review authority, make another application for an entry permit.

We are also proposing to amend the Regulations to create a special class of entry permit. This would provide an opportunity for a person to make a further application where, while they were lawfully in Australia, they made an error in applying for an entry permit for which they were not eligible, and during the course of the processing they became an illegal entrant for more than 28 days.

Question 3

In the short term, the principal method of informing holders of visas/entry permits of the conditions which are attached to the visa/entry permit, which of those conditions are "terminating conditions", and the effect of a breach of conditions will be in the letters of approval of visa/entry permits. The application forms will progressively indicate classes and conditions.

In appropriate cases, for example in the case of visitor visas where no approval letter is provided the visas will be granted together with a leaflet indicating conditions attaching to the visa and the effect of breach of conditions. Such a leaflet will also be provided, in appropriate cases, at time of entry at airports and seaports.

In the medium term, visa/entry permits will bear on their face the applicable conditions. This is not possible in an abbreviated form at this stage, as it will require changes in the departmental computer systems (some of which are in a critical stage of their progressive reconstructions).

In due course, departmental pamphlets and other briefing material will chart the classes of visa/entry permits, the criteria of decisions, the applicable conditions and fees.

Question 4

The Minister will approve forms for the purposes of the Act and applicants will be required to use those forms.

Question 5

In addition to the information provided in the client information leaflets, forms and explanatory notes, officers may provide counselling to applicants about the appropriate type of visa or entry permit for their circumstances. In particular, instruction is included in the Procedures Advice Manual on Extended Eligibility Temporary Entry Permit Topic 2, Section 7. Specifically Section 7.7 states

"... an officer can provide advice as to whether or not the person appears to meet the legal and policy conditions necessary for approval and if they wish to apply, which application form or forms should be completed. It should be made clear that this advice is an opinion only. It should be emphasised that the advice given is not a decision nor an indication of the likely outcome of a decision."

Similar instruction is included in the Procedures advice Manual on Permanent Entry Permit After Entry Topic 4, Section 2. Specifically Section 2.4 states

"... an officer can provide counselling on requirements for different classes of entry permits, and advice on procedures to be followed. The advice on procedures may include advice on the type of entry permit which may be appropriate to an applicant's situation (eg that an application for an Extended Eligibility Temporary Entry Permit should be lodged, rather than a Permanent Entry Permit After Entry application), and which application form or forms should be completed. It should be made clear that this advice is an opinion only. It should be emphasised that the advice given is not a decision nor an indication of the likely outcome of a decision."

Question 6

Illegal entrants will come to the notice of the Department in a number of ways:
at the point of departure,
at departmental offices,
through examination of the Department's movement records,
through departmental compliance activities in the field, and
through arrest by Federal and State police.

In the ordinary course of business, compliance officers will prepare submissions to the more senior officers on the appropriate course for securing departure of the illegal entrants that came to their notice. The compliance officers will not have any powers to order deportation.

The approach of the compliance officers, in preparing their recommendations, will be influenced by three major considerations:

first, if an illegal entrant is a person accepted by Australia as a refugee then that person has the protection of Australia, and hence no expulsion from Australia is appropriate unless within the parameters permitted by the Refugee Convention;

second, whether there are any outstanding applications for entry permit or refugee status. As expulsion is a by-product of non-successful selection to remain in Australia, expulsion processes will only follow completion of non-successful selection processes; and

third, whether the illegal entrant is ready, willing and able to depart Australia. Obviously, as common sense suggests, where an illegal entrant is willing and able to depart there will no reason to invoke the expulsion powers of the Act.

Where a compliance officer is of the view that the processes requiring the person to depart should be invoked, an officer will prepare a submission setting out the circumstances of the illegal entrant and recommending one of the following courses:
(a) permission to depart voluntarily;
(b) supervised departure with/without direction to depart under s 31A of the Act;
(c) deportation.

The submission, in the ordinary course of business, will go to the Compliance Manager, who superintends departmental compliance activities in a State, Territory or Region. That Compliance Manager will have a delegation of powers under ss 31A and 18, but not under s 17A.

The Compliance Manager will consider the submission. He or she may decide that expulsion processes are premature in the circumstances. In that case, the submission is remitted to the compliance officers with instructions for resubmission at a future date.

On the other hand, the Compliance Manager may permit voluntary departure or supervised departure. He or she may, (after considering the matters prescribed in the regulations if the Consequential Amendments Bill presently before the Senate is enacted), decide to require the illegal entrant to depart Australia within a specified time.

Where a lesser remedy is not appropriate, the Compliance Manager may consider the question of deportation.

Where the case falls within a list of circumstances that non-revocable deportation order is inappropriate (which is listed in the footnote below) then the Compliance Manager may, (after considering the matters prescribed in the regulations if the Consequential Amendments Bill is enacted), order the deportation of the person under s 18. Otherwise, the Compliance Manager, in the ordinary course of business, submits the case to a very senior officer (a limited number of SES officers) or the Minister. These senior officers will have the delegation of power under s 17A of the Act.

Where the submission is placed before such a very senior officer by the Compliance Manager recommending deportation, and such a senior officer is satisfied that, first, the statutory criteria have been met (namely, that the subject of the submission is an illegal entrant and that the period of grace has ended), and the prescribed procedures in the regulations (if the Consequential Amendments Bill is enacted) have been followed, then he or she is required by the Act to order the deportation of that illegal entrant. Otherwise, if the senior officer is not so satisfied, the submission is not approved and the matter is remitted to the compliance officers for further work.

It will be seen from the above, that the power of deportation (whether under s 17A or s 18) is but one of the powers available under the Act for securing the departure of illegal entrants. Due and orderly administration of the Act requires the careful application of the appropriate remedy to the case. It will also be seen that only the Minister and a limited number of very senior officers will have the power under s.17A and below that level no delegate of the Minister will have powers of deportation under both s 17A and s 18, and hence officers in the field will not be required to exercise a choice as to which power to invoke.

footnote:
The list of circumstances where a non-revocable deportation order is inappropriate -

- the period of grace in respect of the illegal entrant has not yet ended;
- the illegal entrant's whereabouts is unknown and it is not possible from the details available to submit the full circumstances of his or her case;
- there is a strong indication that refugee status or territorial asylum may be applicable, although no application has yet been made;
- it is impossible in the present circumstances for the illegal entrant to leave Australia, and it is unlikely that execution of the deportation order will be possible in the foreseeable future;
- a s.31A requirement exists and the time within which departure must be effected has not yet expired;

- the illegal entrant appears to have a "prescribed change of circumstances" for purposes of ss 11S and 11U as defined in the regulations; or
- the illegal entrant may be specifically vulnerable to a difficult political situation in the country of destination which is currently assessed by the Department as being in a volatile state, and it is likely that the execution of the deportation order would be delayed for some time if a serious change occurred in that country's domestic situation before the order was implemented.

Question 7

There are a number of ways in which this type of situation arising from an error on the part of the applicant could be prevented or remedied:

- The Procedures Advice Manual provides specific advice to officers on counselling applicants on their rights, including providing them with information leaflets, forms and explanatory notes setting out in detail rights and entitlements under the Act and Regulations;
- The Regulations are being amended to provide that a person who has become an illegal entrant because of factors beyond their control and, where the Minister is satisfied that there are compelling reasons, may apply within 28 days of becoming an illegal entrant for an entry permit for which they would otherwise have been eligible.
- The proposal for a further amendment to the Regulations referred to in 2(b) would also provide an applicant, who makes an error in nominating the class of entry permit sought, with an opportunity to apply for an appropriate class of entry permit.