

**Human Rights and
Equal Opportunity Commission**

President
The Hon. John von Doussa, QC

Senator Marise Payne
Chair
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

FAXED
27.05.04

26 May 2004

Dear Senator Payne,

I refer to the Commission's appearance before the hearings of the Senate Legal and Constitutional Legislation Committee on 12 May 2004.

The Commission seeks to make the following additional submissions in response to issues raised in the hearing.

Discretion to Extend Time

As Mr Lenchan observed (at page 13 of the Hansard) the Commission's written submission did not include a specific proposal for a legislative provision conferring discretion on courts to extend the proposed time limits. Having had the opportunity to consider that issue further, the Commission puts forward the following suggested amendments to the Bill:

Item 3

(1AA) The Federal Court may, by order, extend that 28 day period if the Federal Court is satisfied that it is in the interests of the administration of justice to do so.

(1AB) For the purposes of subsection 1AA, in determining whether it is in the interests of justice to extend that 28 day time period, the Court must consider:

- (a) the extent of the delay in bringing the application;
- (b) the reason(s) for the delay in bringing the application;
- (c) the prospects of success of the application referred to in subsection (1); and
- (d) any other relevant circumstance.

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Human Rights and Equal Opportunity Commission

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(1AC) The person applying for an order under section (1AA) bears the onus of satisfying the Court that it is in the interests of justice to extend that 28 day time period.

Item 4

(1B) The Federal Magistrates Court may, by order, extend that 28 day period ~~if~~ the Federal Magistrates Court is satisfied that it is in the interests of the administration of justice to do so.

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(1C) For the purposes of subsection 1B, in determining whether it is in the interests of justice to extend that 28 day time period, the Court must consider:

- (a) the extent of the delay in bringing the application;
- (b) the reason(s) for the delay in bringing the application;
- (c) the prospects of success of the application referred to in subsection (1); and
- (d) any other relevant circumstance.

(1D) The person applying for an order under section (1B) bears the onus of satisfying the Court that it is in the interests of justice to extend that 28 day time period.

Item 11

(1A) The High Court may, by order, extend that 28 day period ~~if~~ the High Court is satisfied that it is in the interests of the administration of justice to do so.

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(1B) For the purposes of subsection 1A, in determining whether it is in the interests of justice to extend that 28 day time period, the Court must consider:

- (a) the extent of the delay in bringing the application;
- (b) the reason(s) for the delay in bringing the application;
- (c) the prospects of success of the application referred to in subsection (1); and
- (d) any other relevant circumstance.

(1C) The person applying for an order under subsection (1A) bears the onus of satisfying the Court that it is in the interests of justice to extend that 28 day time period.

These suggested amendments set out principles established by courts for dealing with applications for extensions of time. In doing so, the Commission seeks to balance the expressed desire of the legislature for certainty with the concerns

raised by the Commission and others making submissions to the Committee as to the potential injustice created by inflexible time limits. The Commission notes that there may be other ways of achieving the same result.

Evidence about 'unmeritorious claims'

The Commission also notes the evidence given by the Department of Immigration and Multicultural and Indigenous Affairs as to the 'set aside rate' upon judicial review of migration decisions was 'about 7.5 per cent' (at page 21 of the Hansard).

With respect, such a figure bears little, if any, relevance to the present issue. The proposed amendments do not prevent the commencement of 'unmeritorious' claims, only claims that are out-of-time. There is no evidence to suggest that claims brought out-of-time are necessarily unmeritorious. Indeed, the Commission referred the Committee in its evidence to the matter of *Barzideh v Minister for Immigration and Ethnic Affairs* (1997) 72 FCR 337 in which the application was 'meritorious' but nevertheless dismissed because of a failure to comply with procedural requirements.

In any event, the figure would appear to primarily reflect the very limited grounds of review available previously under the *Migration Act*. It may also be referable to the limited availability of legal advice and representation for persons seeking review of decision and the inability of persons to seek protection for claims in relation to refoulement under the ICCPR, the CRC and CAT, a matter to which reference is made in the Commission's substantive submission at paragraphs 28-30.

Requirement for Judicial Review

We also note the view expressed by Mr Walker of the Department of Immigration and Multicultural and Indigenous Affairs that 'the executive committee of UNHCR has indicated that one level of review is all that is necessary – be it merits review or judicial review' (at p 22 of the Hansard).

The Commission does not agree with the proposition that Australia's international obligations in relation to asylum seekers (which extend beyond the Refugees Convention) are necessarily met by anything short of judicial review.

In particular, Article 2 of the ICCPR requires Australia to provide an *effective* remedy to rectify current breaches of human rights and prevent future breaches of human rights. While State Parties have some degree of choice regarding the nature of any 'effective remedy', in some cases a formal judicial appellate system is the only remedy that will meet the requirement of effectiveness. The Commission's position is that decisions which go to questions of refoulement fall within this class of cases.

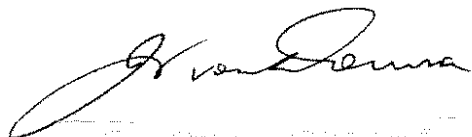
The Commission also takes the view that any retrogressive measure in relation to the remedies available to persons who believe that their rights have or will be

breached must be clearly justified (such justification going beyond mere matters of efficiency) to avoid that action being in breach of the obligations under the ICCPR.

The Commission's position on this issue is set out fully in paras 28-46 of the Commission's submission to the Migration Litigation Review. A copy of that submission is attached for the convenience of the Committee.

We thank the Committee for the opportunity to make these additional submissions.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John von Doussa', written in a cursive style.

John von Doussa, QC