SUBMISSION OF

THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

TO

THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

ON THE

MIGRATION AMENDMENT (JUDICIAL REVIEW) BILL 2004

Human Rights and Equal Opportunity Commission

Sydney

Introduction

1. The Human Rights and Equal Opportunity Commission ('the Commission') has been invited by the Senate Legal and Constitutional Legislation Committee ('the Committee') to make submissions on the Migration Amendment (Judicial Review) Bill 2004 ('the Bill').

2. The Commission welcomes the opportunity to make this submission and thanks the Committee for its invitation. The Commission supports any measures to enhance the efficient management of migration cases consistently with Australia's international human rights obligations.

Summary of Commission's Submission

3. The Commission observes that care must be taken to ensure that measures which may be intended to promote the efficient management and disposition of migration claims do not come at the cost of the fundamental rights of those people involved.

4. The Commission's primary submission is that the imposition of strict procedural requirements, such as absolute time limits, in cases involving refugee claims creates an unacceptable risk of 'refoulement' (returning a person to a country where they face persecution) and may therefore lead to a breach of human rights.

5. The Commission has previously expressed its concern that the current system for the disposition of claims relating to migration status may be in breach of Australia's international obligations.[1] The proposed amendments

[1] See, for example, the Commission's submission of 21 November 2003 to the Migration Litigation Review: http://www.humanrights.gov.au/legal/submissions/migration.html. See also the Commission's submissions as intervener in a range of litigation involving the *Migration Act 1958* (Cth): http://www.humanrights.gov.au/legal/intervention_info.html.

to the *Migration Act 1958* (Cth) ('the *Migration Act*') do not address those concerns, although the opportunity is presented to do so.

The Human Rights and Equal Opportunity Commission

6. The Commission is a body constituted under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('the HREOC Act'). The Commission's functions are set out in section 11 of the HREOC Act and include:

    - inquiring into acts or practices which may be inconsistent with, or contrary to, any human right;
    - promoting an understanding and acceptance of human rights in Australia;
    - undertaking research to promote human rights;
    - examining laws relating to human rights; and
    - advising the federal Attorney-General on laws and actions that are required to comply with Australia's international human rights obligations.

7. 'Human rights' are defined for the purpose of the HREOC Act to include, relevantly for this submission, the rights and freedoms recognised in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).

8. The Commission also notes that there are other international instruments which are relevant to the Committee's considerations, namely:

    - The Universal Declaration of Human Rights (UDHR);
    - The Convention relating to the Status of Refugees (1951) and Protocol relating to the Status of Refugees (1967) (together 'the Refugees Convention); and

- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Non-refoulement

9. A system concerned with deciding whether or not a person is entitled to protection as a refugee must ensure that such claims are fairly determined. The prohibition on the forced return of a refugee – 'refoulement' - is recognised as one of the most fundamental principles in international refugee law. Article 33 of the Refugees Convention states that no State 'shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'[2]

10. The prohibition of refoulement extends, however, beyond the limited terms of the Refugees Convention. The United Nations Human Rights Committee has held consistently that a State will contravene its obligations under the ICCPR if it removes a person to another country in circumstances in which there is a real risk that their rights under the ICCPR will be violated.[3]

11. This responsibility for foreseeable breaches of the ICCPR in a country of return follows, in part, from the primary obligation of each State party, pursuant to article 2 of the ICCPR, 'to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant'. It contravenes the obligation owed to all those within the

[2] See also article 14(1) of the UDHR which provides that everyone has the right to seek and to enjoy in other countries asylum from persecution.
[3] See: *GT v Australia*, Communication No 706/1996, UN Doc CCPR/C/61/D/706/1996; *C v Australia* Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999; *Kindler v Canada*, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991; *Ng v Canada*, Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991; *Cox v Canada,* Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993.

territory of a State party to deliver a person by compulsion into the hands of a third party who might inflict harm proscribed by the ICCPR.

12. General Comment 20 to the ICCPR confirms that States parties 'must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.[4]

13. The same approach should, by analogy apply to the rights of children. Article 4 of the CRC obliges Australia to undertake all appropriate legislative, administrative and other measures to implement the rights recognised in that convention. That international obligations extend to indirect contraventions of a convention is also a principle that has also been accepted in domestic law.[5]

14. Article 3 of CAT also imposes an obligation of non-refoulement.[6] It provides:

> 1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

15. In general terms, therefore, the Commission submits that any model of management and disposition of migration cases must contain adequate

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[4] At paragraph 9.
[5] R *v Secretary of State for the Home Department; Ex parte Bugdaycay* [1987] AC 514 cited with approval in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543, 558-559 (von Doussa J).
[6] The article was found to have been breached by Australia in *Elmi v Australia,* Communication No 120/1998, UN Doc CAT/C/22/D/120/1998.

procedural safeguards. The Commission's submission is that a system which fails to do so will create an unacceptably high risk of refoulement. Such refoulement would obviously have consequences of the highest significance for the individual involved. It would also place Australia in breach of its obligations under the Refugees Convention as well as ICCPR, the CRC and CAT.

Time Limits under the Bill

16. Particular to the Bill before the Committee, the Commission is most concerned that judicial review rights not be denied absolutely on the basis of a failure to comply with time limits. Clauses 3, 4 and 11 of the Bill propose the imposition of a time limit of 28 days which may be extended by up to 56 days if the relevant court 'is satisfied that it is in the interests of the administration of justice to do so'.

17. There is no provision for any further extension, in any circumstances, even where 'the interests of the administration of justice' may require an extension to be allowed.[7] While the Commission acknowledges that the Bill allows for discretion to extend time within this additional 56-day period, an improvement on the current time limits in the *Migration Act*, the fundamental problem remains. As the Federal Court has observed: 'absolute, one size fits all, time limits are capable of giving rise to injustice in particular cases'.[8]

18. It must be remembered that persons making claims under the *Migration Act* may have little familiarity with Australian legal processes, and may face linguistic and cultural barriers to effectively managing their application and

[7] The Commission does not comment on whether or not the time limits, in as far as they purport to apply to the High Court, raise any validity issues under the Constitution.
[8] *W281 v Minister for Immigration and Multicultural Affairs* [2002] FCA 419, [40]. See also *Barzideh v Minister for Immigration and Multicultural Affairs* (1997) 72 FCR 337 in which Hill J observed that he was 'constrained', by virtue of the strict statutory time limit, 'to sit idly by while injustice is done' (341).

advocating on their own behalf. This is particularly the case with asylum seekers who may be fleeing from torture and trauma.

19. There is also the risk of non-compliance with procedural rules occurring through no fault of the asylum seeker, thereby denying them rights of review which may be essential to their protection from refoulement.

20. For example, in the matter of *Kucuk v Minister for Immigration & Multicultural Affairs*,[9] a facsimile was sent by detention centre staff to the wrong number resulting in the application being lodged out of time and being found to be incompetent. Another example would be where, through the inadvertence or incompetence of legal representatives, a person who has a valid claim to protection as a refugee is lead to believe that their application for judicial review has been filed, and only discovers that it has not after the time limit has expired. Such a person would be denied any right to seek judicial review.

21. That such as result could have been intended by the legislature was described by the Federal Court in *Salehi v Minister for Immigration and Multicultural and Indigenous Affairs*[10] as being 'unfair and irrational'. In *WAFE of 2002 v Miniser for Immigration and Multicultural and Indigenous Affairs*,[11] the Full Federal Court also expressed 'strong disquiet' over the 'manifestly unjust' operation of the absolute time limits existing in the *Migration Act*. The Court noted that such time limits have 'the potential to visit gross injustice upon persons who are in immigration detention' and that the time limit had done so in the case before them.

22. The Commission does not suggest that there be no time limits or that time limits be ignored. The Commission notes that courts have repeatedly held that it is a prima facie rule that proceedings commenced outside a prescribed

[9] [2001] FCA 535.
[10] [2001] FCA 995, [50].
[11] (2002) 70 ALD 57, 62-3 [36].

period will not be entertained.[12] Time limits are not to be ignored and a Court will not grant an application for an extension of time unless it is positively satisfied that it is proper to do so.[13] Furthermore, the merits of the substantial application are to be taken into account when determining whether or not to grant an extension of time, such that clearly unmeritorious applications are likely to be denied an extension of time.[14]

23. Ultimately, however, there must be a discretion available to a court to grant an extension of time in appropriate (if only rare) cases to avoid injustice and, particularly in the context of protection visa decisions under the *Migration Act*, breaches of human rights.

Rights of children

24. Special consideration should be given to the rights of children seeking protection visas under the *Migration Act*.

25. One of the overarching requirements of the CRC is that in all actions concerning children (defined as being persons under the age of 18), the 'best interests' of the child shall be a primary consideration (article 3(1)).

26. Article 22 of the CRC makes specific provision for children asylum seekers. It provides:

> 1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person,

[12] *Lucic v Nolan* (1982) 45 ALR 411, 416; *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344, 348.
[13] *Ralkon Agricultural Co Pty Ltd v Aboriginal Development Commission* (1982) 43 ALR 535, 550; *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344, 348.
[14] *Lucic v Nolan* (1982) 45 ALR 411, 417; *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344, 349.

> receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

27. The Commission submits that the rights of children are of particular relevance when considering procedural requirements such as time limits. The vulnerability of children seeking asylum, particularly those who are unaccompanied, may require special flexibility in relation to rules and procedures. Any measure which denies children review rights on the basis of a failure to comply with specific provisions of the *Migration Act* should be very carefully scrutinised to ensure that it does not breach article 22 of the CRC and allows for a proper consideration of the best interests of the child, consistent with article 3(1).

Concerns about unmeritorious applications

28. The Commission notes the concerns expressed by the Minister for Citizenship and Multicultural Affairs in the second reading speech for the Bill about 'the growing number of unmeritorious judicial review applications being made'. The Bill is said to address these concerns.

29. As the Commission has previously observed,[15] an alternative measure which might both reduce the number of unmeritorious claims brought before the Courts and also enhance the protection of human rights would be to increase the availability of legal advice, assistance and representation available to individuals involved in migration litigation.

30. The Commission has also previously observed that risk of refoulement contrary to the ICCPR, the CRC or CAT is not presently a sufficient basis for a claim for a protection visa under the *Migration Act*, unless the breach of

[15] See the Commission's submission to the Migration Litigation Review, above n 1, [62].

rights feared also gives rise to Australia's protection obligations under the Refugees Convention.[16] This may mean that 'unmeritorious' claims for a protection visa are brought for want of another basis for seeking protection. The introduction of a system for dealing with claims in relation to refoulement under the ICCPR, the CRC and CAT may relieve some of the pressure on the system caused by those cases being brought as protection visa applications. [17]

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[16] Ibid.

[17] See the Commission's submission to the Senate Select Committee on Ministerial Discretion in Migration Matters: http://www.humanrights.gov.au/human_rights/migration_matters.html. While the discretion given to the Minister under s 417 of the *Migration Act* provides a form of protection from refoulement in contravention of the ICCPR, the CRC or CAT, the Commission has raised significant concerns about the adequacy of this as a form of protection. The Commission suggests that a more clearly defined system for the assessment of such claims, independent of protection available for those falling within the terms of the Refugees Convention, and including adequate provision for judicial review, is to be preferred: ibid, section 7.