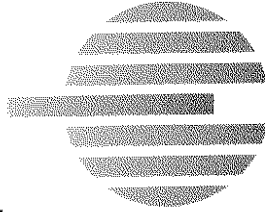


**Human Rights and
Equal Opportunity Commission**



Mr Alistair Sands
Secretary
Select Committee on Ministerial Discretion in Migration Matters
Parliament House
CANBERRA ACT 2600

Dear Mr Sands

I am replying to you on behalf of Stephen Duffield, Vanessa Lesnie and myself. Please find enclosed a corrected proof of the transcripts of evidence provided to us from the Public Hearing on 22 October 2003.

We also undertook to provide additional material to the Committee in response to questions on notice. Please find attached our response to these questions for the Committee's information, including a body of photocopied material from the UN Committees as discussed at the Public Hearing.

Yours sincerely

Susan Newell
Policy/Research Officer
Human Rights Unit

10 November 2003

Human Rights and Equal Opportunity Commission

Level 8 Piccadilly Tower 133 Castlereagh Street Sydney NSW 2000 GPO Box 5218 Sydney NSW 1042
Telephone: 02 9284 9600 Facsimile: 02 9284 9611 Complaints Info Line: 1300 656 419 Teletypewriter: 1800 620 241 (toll free)
Website: <http://www.humanrights.gov.au> ABN 47 996 232 602

Additional material for the Select Committee on Ministerial Discretion in Migration Matters in response to questions on notice

Complaints to UN Committees in relation to breaches of non-refoulement

The Committee inquired whether any complaints made to the United Nations on human rights relate to ministerial discretion in migration matters.

The Committee Against Torture, which monitors State Parties' compliance with the *Convention Against Torture*, and the Human Rights Committee, which monitors State Parties' compliance with the *International Covenant on Civil and Political Rights*, have mechanisms in place to hear complaints from individuals alleging that their human rights under these treaties have been breached.

Please find attached a number of communications sent to these Committees from individuals in Australia which allege that their non-refoulement rights would be breached if removed from Australia. While these communications do not specifically relate to the operation of ministerial discretion, they relate to the possibility that ministerial discretion has failed to protect these individuals from refoulement.

The Committee on the Rights of the Child, which monitors State compliance with the *Convention on the Rights of the Child*, does not have a procedure in place to receive individual communications about breaches of its articles.

Please also find attached for your information:

- *General Comment No.20* adopted by the Human Rights Committee in 1992, regarding the operation of article 7, including the non-refoulement obligations under this article
- *General Comment No.1* adopted by the Committee Against Torture in 1996 concerning non-refoulement obligations under article 3 of the Convention
- *Concluding Observations of the Committee Against Torture* in 2000 regarding Australia's Second Periodic Report under the Convention. This includes concerns about the lack of appropriate review mechanisms for ministerial decisions in respect of cases coming under article 3.

Please note that HREOC's submission also included further references to the jurisprudence of the Human Rights Committee with regard to non-refoulement.

Response from Australia to the findings of the Committees

The Committee asked whether there had been any response from Australia in respect of those UN committees. HREOC does not have any information on Australian government responses to the findings of UN Committees with regard to non-refoulement.

However, in terms individual communications, Australia's response to each allegation is considered by each Committee and is included in the written communications, as attached. The Committees usually ask the State party to outline what measures have been taken to implement their recommendations.

In terms of the Periodic Reports which Australia submits, the Commission is not aware of any further responses made by Australia in response to the Concluding Observations made by the Committees.

Complaints to HREOC alleging a breach of human rights with respect to ministerial discretion

On the data that is accessible we are advised that with regard to article 7 no complaints have been received.

Do women constitute a 'particular social group' under the Refugees Convention or do they fall outside of the definition of refugee under this Convention?

It has been established by the High Court in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574 that women may constitute a 'particular social group' under the Refugees Convention. In that case, Mrs Khawar alleged she was the victim of serious and prolonged domestic violence on the part of her husband and members of his family, that the police in Pakistan refused to enforce the law against such violence or otherwise offer her protection, and that such refusal is part of systematic discrimination against women which is both tolerated and sanctioned by the state. The High Court found that the RRT erred in finding that women in Pakistan did not constitute a particular social group and remitted the matter to the RRT.

Subsequent cases have applied the reasoning in *Khawar* to find, for example, that 'single mothers in Iran', and 'divorced women in Iran and/or women subjected to domestic violence in Iran' may constitute a particular social group; see *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 129 (13 June 2003).

Is anti-discrimination legislation generally applicable to the exercise of discretionary powers such as s417?

The *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992* render discrimination unlawful on specific grounds in certain areas of public life.

The *Racial Discrimination Act* and the *Sex Discrimination Act* are generally applicable to the exercise of discretionary powers in the administration of any laws and programs such as that contained in s 417 of the *Migration Act 1958*. However, s 52 of the *Disability Discrimination Act* provides that neither Division 1 nor 2 of that Act, (which deal with 'discrimination in work' and 'discrimination in other areas') "(a) affect discriminatory provisions in the *Migration Act* or any regulation made under the Act or (b) render unlawful anything done by a person in relation to the administration of that Act or those regulations".

Under Part II, Division 3 of the *Human Rights and Equal Opportunity Commission Act* the Commission may inquire into 'acts' or 'practices' of the Commonwealth that may be inconsistent with or contrary to any human right recognised in the following international instruments:

- International Covenant on Civil and Political Rights
- Convention on the Rights of the Child

- Declaration of the Rights of the Child
- Declaration on the Rights of Disabled Persons
- Declaration on the Rights of Mentally Retarded Persons, and
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.
- Declaration on the Rights of Disabled Persons

Under Part II, Division 4 of the *Human Rights and Equal Opportunity Commission Act* the Commission may inquire into 'acts' or 'practices' that may, in relation to certain specified grounds, constitute discrimination in employment.

Should the Commission be satisfied that an 'act' or 'practice' is inconsistent with or contrary to a human right, or constitutes discrimination in employment, and where there has not been settlement of the matters that gave rise to the inquiry or the matter has not been otherwise discontinued, the Commission will make a report to the Attorney-General and make recommendations as appropriate. Such 'acts' or 'practices' are not unlawful.

Generally, 'acts' or 'practices' would include the exercise of discretionary powers.

Does the exercise of a discretion made on the basis of whether a child is a biological child or a step-child amount to discrimination on the basis of marital status?

The *Sex Discrimination Act 1984* provides as a ground of unlawful discrimination, discrimination on the basis of marital status. Marital status is defined in that Act to mean "the status or condition of being:

- single;
- married;
- married but living separately and apart from one's spouse;
- divorced;
- widowed; or
- the de facto spouse of another person."

This definition would not appear to cover an exercise of a discretion made on the basis of whether a child is a biological child or a step-child. A complaint made to the Commission of unlawful discrimination on the ground of marital status will be investigated by the Commission and conciliation attempted, if appropriate. Ultimately, it is the Federal Court or Federal Magistrates Court that determines whether the alleged discrimination amounts to marital status discrimination.

Extradition and non-refoulement obligations

We would also like to clarify a reference made in the hearing to the *Extradition Act 1988*. Subparagraph 22(3)(b) of this Act prohibits the surrender of a person who has been found eligible for extradition by a domestic court unless the federal Attorney-General is satisfied that, upon surrender, the person will not be subjected to torture. The Australian Government considers that this meets Australia's obligations in relation to extradition under the Convention Against Torture.¹

¹ Australia's Second Periodic report to the Committee Against Torture, 15 May 2000, UN Doc. CAT/C/25/Add.11.