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# Issues raised by Regulation 4.31B

7.1 In addition to evidence on the three key issues which the Committee examined, a number of related issues were raised in submissions and evidence to the Committee.

7.2 The Committee examined these, some of which, as *italicised* below, had been raised during previous reviews of Migration Regulation 4.31B:[1]

- the fee as a tax;
- *the fee was a disguised penalty;*
- *the fee was in conflict with Australia's international obligations;*
- *there should be provision to waive the fee;*
- *creation of an onshore humanitarian stream; and*
- *Migration Agents' activities.*

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1 Issues considered in 2001 were: filtering of claims; more flexibility in responding to asylum seekers' concerns; increased resources for DIMA's compliance activities; relaxation of the grounds for removing some visa conditions; granting the RRT power to waive the fee; introducing an onshore humanitarian stream; reduction of processing times; providing procedural fairness at the primary determination stage; and strengthening the regulation of migration agents. Joint Standing Committee on Migration, *2001 Review of Migration Regulation 4.31B*, pp 21-29

## Fee as a Tax

7.3 LIV advanced some case law examples to argue that the fee could be said to meet the test defining a tax, because it could be considered as:

> a compulsory extraction of money by a public authority for public purposes, enforceable by law, and… not a payment for services rendered.[2]

7.4 If that was the case, LIV argued, then:

> there should be a separate act of parliament and it should not be hiding in a regulation.[3]

7.5 The Committee did not receive a view from DIMIA on this issue.

### Conclusion

7.6 The Committee considered that this matter was outside the immediate focus of the review. The Committee would, however, continue to pursue the issue with DIMIA.

## The fee a penalty

7.7 ACMRO raised the argument that the fee constituted "a fine on the process".[4]

7.8 Amnesty claimed that Regulation 4.31B imposed a penalty because the fee:

> creates a perceived and/or financial burden on all applicants, regardless of their *bona fides*[5]…
>
> simply penalises unsuccessful asylum claims without reference to the circumstances of the application... impeding and deterring asylum seekers from appealing negative primary decisions.[6]

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2 LIV, Evidence, p. 26, citing an unspecified High Court Judgement
3 LIV, Evidence, p.27
4 ACMRO, Submission No 5, p. 1
5 Amnesty, Submission No 7, p. 3
6 Amnesty, Submission No 7, p. 3

7.9 Amnesty's stance in its submission to the Committee was that:

> asylum-seekers with legitimate fears of being subjected to serious human rights violations upon forcible return may fall outside of the scope of the Refugee Convention…. should not be penalised.[7]

7.10 LIV also considered that the fee was a penalty. Fees, it contended, generally applied to all, but the Regulation 4.31B fee applied only to unsuccessful applicants, not to each applicant.[8] And, unlike other fees, it was levied only for a particular outcome.[9] This arrangement thus penalised:

> non-convention defined refugees who are validly and genuinely seeking asylum from persecution with legitimate fears of being subjected to serious human rights violations.[10]

7.11 Further, LIV contended that, on the basis of a case currently on appeal to the High Court, if the fee could be considered as a punishment, then it may not be able to be imposed under the migration act.[11]

7.12 DIMIA's view was that the fee was "a non-punitive partial cost recovery mechanism."[12]

### Conclusion

7.13 On the question of whether the fee was penalty, the Committee noted that no case had been resolved and therefore it could not form a view on this.

## International responsibilities

7.14 ACMRO, in its submission, simply stated that the fee "is out of character with the purposes and spirit of the Refugee Convention". [13] Amnesty International Australia developed the theme that the fee placed Australia in breach of Australia's international responsibilities because it:

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7 Amnesty, Submission No 7, p. 3
8 LCV, Submission No 8, para 1.1
9 LCV, Submission No 8, para 1.2
10 LCV, Evidence, p.25
11 LIV, Evidence, p. 28
12 DIMIA, Submission No 2, para 5.11.8
13 ACMRO, Submission No 5, p. 1

> effectively impedes the right of all applicants to seek and enjoy in Australia asylum from persecution, as stated in Article 14 of the Universal Declaration of Human Rights, by deterring asylum seekers from appealing negative primary decisions.[14]

7.15 LIV endorsed a statement by the Human Rights and Equal Opportunity Commission to the Committee (during the 1999 consideration of Regulation 4.31B)[15] that access to an effective procedure to determine asylum seekers' claims:

> cannot be made dependent upon the capacity of the applicant to pay. Nor can it be discouraged [by] being made subject to a penalty in the event the applicant has misapprehended his or her situation in light of the Refugee Convention or has been unable to muster the evidence require to establish his or her case.[16]

7.16 In evidence to the Committee Amnesty stated that:

> within the refugee convention and other human rights mechanisms, there is no provision for recouping costs in the asylum process.[17]

7.17 DIMIA, on the other hand, cited the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, which states that:

> the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status.[18]

7.18 DIMIA noted that, therefore it was for:

> signatory States to the Refugees Convention to develop and apply their procedures in accordance with their own legislative and administrative framework[19]... [and] Fees are by no means uncommon as part of the refugee determination processes in other countries.[20]

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14 Amnesty, Submission No 7, p. 3, as corrected in Evidence, p. 44

15 LIV, Submission No 8, para 3.1

16 LIV, Submission No 8, para 3.2

17 Amnesty, Evidence, p. 43

18 Office of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status*, January 1992, para 189, p45; quoted in DIMIA, Submission No 2, para 2.4.1

19 DIMIA, Submission No 2, para 2.4.2

20 DIMIA, Submission No 2, para 2.4.6

7.19 The only comparative payments of which DIMIA was able to advise the Committee were that New Zealand charged an up-front fee of $700 for review and that the USA charged $US110. [21]

7.20 The Committee observed that the imposition of fees by other countries indicated that Australia was not alone in maintaining that such measures did not breach international responsibilities.

7.21 DIMIA concluded that Australia's refugee review process is both fair and efficient, quoting in support a statement made by the Office of the Regional Representative of the UNHCR that:

> as a State party to the Convention, Australia fulfils its international obligations scrupulously and fairly. [22]

### Conclusion

7.22 In the Committee's view, the arguments alleging breaches of international responsibilities assumed that the fee had deterred *bona fide* claimants from applying for a review. This view, the Committee concluded, had not been demonstrated.

## Waiving the fee

7.23 IARC reiterated its earlier, 1999, contention that there should be discretion to waive the imposition of the post decision fee in "compelling circumstances".[23] A suggested mechanism was for:

> an unsuccessful applicant to be sent a letter asking them to give reasons why they think a post-decision fee ought not apply. [24]

7.24 MIA proposed that:

> countries where there is a well founded fear of persons being persecuted…would be gazetted whereby the… fee would not apply.[25]

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21 DIMIA, Evidence, p. 53

22 Office of the United Nations High Commissioner for Refugees in - Senate Legal and Constitutional References Committee *Submissions to Inquiry into the Operation of Australia's Humanitarian and Refugee Program, Volume VII,* 1999, Submission No. 83, p 1432, quoted in DIMIA, Submission No 2, para 2.4.3

23 IARC, Submission No 6, Recommendation 2

24 IARC, Evidence, p. 18; pp 22-3, suggests that the appropriate agency is DIMIA

25 MIA, Submission No 9, p.2

7.25 When asked, LIV specifically rejected the concept of a waiver because it would "unnecessarily complicate the system" and was at odds with the Institute's firm view that the fee should be abolished.[26]

7.26 Amnesty, too, raised the issue of adding "another costly element to the system", but thought if the fee was to continue, then a waiver should be available to those in detention. [27]

7.27 DIMIA's view of a provision to waive was that it raised a range of issues:

> questions of review of the decision, complexity, imposing an additional decision-making step on the process, the dilution of the role of the RRT and an outcome that provides more opportunity and encouragement to people who are not refugees to seek to prolong their stay in Australia.[28]

### Conclusion

7.28 The Committee concluded that the evidence presented to it did not raise any considerations not addressed in its previous report and, as DIMIA suggested, would add further opportunities for exploitive use of any arrangement in order to prolong residence in Australia. Therefore the Committee reiterated its previous decision[29] not to endorse the proposal to permit waiving of the fee.

## Introducing an onshore humanitarian stream

7.29 Amnesty recommended an unspecified arrangement to protect those not recognised as refugees but who may face serious human rights violations if they returned to their country of origin.[30]

7.30 The Committee noted that arrangements existed in the 1980s which permitted entry if there were"strong compassionate or humanitarian

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26 LIV, Evidence, p. 31

27 Amnesty, Evidence, p. 43

28 DIMIA, Submission No 2, para 5.11.9

29 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*, pp 25, 40; *2001 Review of Migration Regulation 4.31B*, p. 37

30 Amnesty, Submission No 7, p. 61

grounds". These provisions had, however, been difficult to interpret and apply and had been repealed in 1987.[31]

### Conclusion

7.31 As in its 1999 and 2001 reports, and in the absence of a clear alternative proposition, the Committee concluded that the problems associated with a previous onshore 'humanitarian' visa system were such that this was not merited.[32]

## Migration Agents' activities

7.32 The Committee, having considered evidence concerning some migration agents in 2001, recommended that:

> the activities of migration agents be brought under closer continuing scrutiny by DIMA and the Migration Agents Registration Authority.[33]

7.33 During the current review, the Committee's attention was drawn to continuing concern about the activities of some migration agents. RCOA mentioned:

> unethical and unregistered agents who seek to gain financially from those who may be vulnerable and poorly informed… a significant problem requiring continued attention.[34]

7.34 RCOA identified a number of practices by some migration agents which operated to the detriment of applicants. These included agents who:

- promise a "work visa" (i.e. a PV application) to people who have sought their advice and who have no reason to remain in Australia other than a desire to extend their stay;[35]

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31 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*; pp. 30-32; DIMA, Submission No 18 (2001), pp 45-6

32 Joint Standing Committee on Migration, , *Review of Migration Regulation 4.31B*; p. 41; *2001 Review of Migration Regulation 4.31B*; p. 25

33 Joint Standing Committee on Migration, *2001 Review of Migration Regulation 4.31B*, Recommendation 2, para 3.47

34 RCOA, Submission No 3, p. 3

35 RCOA, Submission No 3, p. 2

- misinform their clients that -
  - ⇒ payment of the fee will ensure that the Minister will consider their case;
  - ⇒ a favourable decision by the Minister under s417 is dependent upon payment of the fee; and
  - ⇒ if the fee is not paid and a 'debt to the Commonwealth' is incurred then this will lead to a criminal charge;[36]
- do not inform their clients of the regulation and add $1000 to typically exorbitant fees;[37] or
- inform their clients of the fee, offer to administer the payment on their behalf, but fail to forward payment to the RRT, regardless of the decision.[38]

7.35 The Committee was aware that migration agents were under pressure from clients (sometimes with limited *bona fides*) who were themselves eager to take advantage of the PV process.

7.36 JMVS added that:

> it is well-known… one can pay A$200 for a [PV] form 866 to be filled out and submitted[39]

7.37 The Migration Institute of Australia acknowledged that it was aware of complaints through the Migration Agents Registration Authority:

> regarding protection visa applications from applicants where there is absolutely no way of concluding that that person meets the definition of a refugee.[40]

7.38 DIMIA indicated that, following a review of the industry in 2001/2, it is anticipated that legislation will be introduced to give the MARA increased powers to take action against the small but unscrupulous end of the industry that lodges a high number of vexatious applications.[41] DIMIA also stated that since 1 March 2003 registered

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36 RCOA, Submission No 3, p. 4

37 According to RCOA "Many applicants only become aware of the existence of the fee when they receive a letter from the RRT affirming the DIMIA's primary decision." RCOA, Submission, 3, pp 4-5

38 RCOA, Submission No 3, p. 5

39 JMVS, Submission 4, para 4

40 MIA, Submission No 9, p. 1

41 DIMIA, Evidence, p. 52. Migration Legislation Amendment (Migration Agents) Act No. 35, 2002, provides for barring former registered agents from being registered for up to 5 yeas (s311A) http://scaleplus.law.gov.au/html/comact/11/6492/pdf/0352002.pdf

migration agents were required to give new clients information about what they can expect from the industry and there may be moves to provide more information to consumers.[42]

## Conclusion

7.39 The Committee noted that the regulation of migration agents was subject to impending legislation, and therefore did not wish to make any recommendations on the subject.

7.40 The Committee will, however, continue to monitor future developments in this area.

42 DIMIA, Evidence, pp 54-5