3

Proposals for administrative changes

3.1 The Committee concluded during its 1999 review of regulation 4.31B that the alternatives suggested then were not appropriate.[1] In the course of the current review the Committee was presented with a number of new proposals involving:

- filtering of claims;
- more flexibility in responding to asylum seekers' concerns
- increased resources for DIMA's compliance activities; and
- relaxation of the grounds for removing some visa conditions.

3.2 In addition a number of submissions revived some of the 1999 proposals:

- 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.

3.3 This chapter examines both the new proposals and those from the 1999 review which were raised during the current review.

---

1 JSCM, Review of Migration Regulation 4.31B, p. 37.

Filtering of claims

3.4 MIA recommended:

> a review system whereby a preliminary hearing is held at which the parties could attend and outline their case…(soon after the application is lodged) would 'weed out' the spurious applications.[2]

3.5 The Committee considered that a preliminary hearing would duplicate the existing 'weeding out' undertaken during the DIMA primary decision process. In addition, such a hearing would add further delay to the process, rather than expedite it, because to be effective it would need to consider the issues currently raised at the RRT review itself. In addition, the Committee considered that inserting an additional layer in the review process could potentially open more grounds for litigation.

Conclusion

3.6 The Committee concluded that the proposed early filtering of applicants was not likely to improve the overall review process and therefore does not believe that the proposal should be adopted.

More flexibility in responding to asylum seekers' concerns

3.7 The Federation of Ethnic Communities' Councils of Australia (FECCA) drew the Committee's attention to the range of asylum-seekers' concerns including:

> a person['s]… well held fear of persecution…is often complicated by political, religious, economic and other considerations;…and…
>
> a bureaucratically driven approach to… how their status is determined.[3]

3.8 FECCA believed that the government should therefore be more flexible in responding to the asylum seekers' concerns in reviewing decisions.[4]

3.9 The Committee noted that the existing process involving primary assessment, the opportunity to appeal a negative decision to an independent body which took first hand evidence from the applicant, and

2 MIA, Submissions, p. 45.
3 FECCA, Submissions, p. 73.
4 FECCA, Submissions, p. 73.

access to ministerial review. These arrangements provided a range of opportunities for the particular individual's circumstances to be specifically addressed.

Conclusion

3.10 The Committee concluded that the existing system, which focuses on case-by-case assessment, provided the proposed flexibility.

Increased resources for DIMA's Compliance activities

3.11 MIA argued that people who come to Australia and work illegally would not be deterred by the fee when applying for a PV. The MIA urged that appropriate resources should be allocated to DIMA's Compliance activities:

> to enable them to seek out PV applicants who work illegally[5]

3.12 The Committee's view was that people working illegally was but one of the issues confronting DIMA and that the focus of the current review made it inappropriate to examine broader departmental priorities.

Conclusion

3.13 The Committee concluded that DIMA was charged with managing its priorities and resources and did not consider that it was appropriate to use this report to examine how DIMA met the demands made on it.

Relaxing grounds for removing some visa conditions

3.14 Some visitors' visas are issued on the condition that the holders do not make an application for any further visa while in Australia, although they may apply for a PV. MIA considered that this lack of alternatives may encourage people to apply for a PV in order to extend their stay in Australia. MIA argued that relaxing the grounds available for on-shore removal of visa conditions would lessen the temptation to 'use the system'.[6]

3.15 The Committee welcomed this constructive suggestion aimed at lessening the structural incentives to abuse the PV system. However, its adoption

5 MIA, Submissions, p. 45.

6 MIA, Submissions, p. 45.

would erode the concept of placing specific conditions on some persons who wished to enter Australia.

Conclusion

3.16 The Committee concluded that making onshore exemptions from visa conditions easier would undermine the intent of the arrangement, which was to permit access to Australia under well-understood and consistent conditions.

Granting the RRT power to waive the fee

3.17 YLLRC argued that if the regulation was continued the fee should be applied at the discretion of the RRT:

> in the context of guidelines and safeguards for the exercise of the discretion.[7]

3.18 MIA provided some examples of how this discretion might be applied, submitting that the fee:

> should be imposed on those applicants who do not submit any valid claims to be refugees, who do not attend their RRT hearing or who are found by the Tribunal to have had no basis for submitting an application for review.[8]

3.19 DIMA indicated that imposition of a fee on only vexatious or manifestly unfounded applications made the fee appear to be a penalty, when its role is not punitive.[9]

3.20 ICJ urged that, should the regulation be continued, there should be provision for the fee to be waived in cases of hardship.[10] This, in the Committee's view, opened an undesirable prospect of further grounds for appeal and an incentive for *mala fide* applicants to use this as grounds to extend their stay in Australia.

3.21 The Committee considered that these proposals fell within the broader context of discretionary application of the fee. The Committee had not endorsed this when it examined the concept previously.[11]

---

7 YLLRC, Submissions, p. 70.
8 MIA, Submissions, p. 46.
9 DIMA Submissions, p. 106.
10 ICJ, Evidence, pp. 31-32.
11 JSCM, *Review of Migration Regulation 4.31B*, pp. 25-27, 40.

Conclusion

3.22 The Committee concluded that the evidence presented to it did not raise any new considerations and therefore reiterated its 1999 decision not to endorse the proposal to permit waiving of the fee.

Introducing an onshore humanitarian stream

3.23 Amnesty renewed its 1999 recommendation for 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.[12]

3.24 The Committee considered that this issue had been addressed in its previous report,[13] and that the problems associated with a previous onshore 'humanitarian' visa system were such that its reintroduction was not merited.[14]

Conclusion

3.25 In the absence of any new argument, the Committee, as in 1999, is not persuaded that such a proposal should be followed.[15]

Reduction of processing times

3.26 FECCA reiterated its 1999 submission urging, in the case of claims which are:

> manifestly unfounded,… a… process of review which can be conducted in a relatively short period of time.[16]

3.27 The Committee considered that the identification of 'manifestly unfounded' applications would emerge from the process of review, not precede it as was implied in the submission. Both DIMA and the RRT have indicated that they have made administrative arrangements which

12 Amnesty, Submissions, p. 61.
13 JSCM, *Review of Migration Regulation 4.31B*; pp.30-32.
14 DIMA, Submissions, pp. 119-20.
15 JSCM, *Review of Migration Regulation 4.31B*; p.41.
16 FECCA, Submissions, p. 73.

may minimise advantages which unmeritorious applicants might otherwise receive from processing delays.[17]

3.28 In 1999/00, DIMA claimed that the average time taken for a primary processing was 64 days.[18] Decisions by the RRT take on average 40 weeks, but the RRT aims to finalise non-detention cases in 118 days.[19] In its 1999 report the Committee agreed with the aim of reducing processing times for primary and review decisions.

Conclusion

3.29 The Committee reiterates its 1999 view that DIMA and the RRT should continue their efforts to process applications in a reasonably short time.[20]

Providing procedural fairness at the primary determination stage

3.30 The ICJ reiterated its 1999 contention that 'the primary determination has become relatively meaningless'.[21] In 1999 DIMA observed that if the primary determination process were as meaningless as suggested, then more people might be expected to challenge the decision, ie the 'take-up' rate would rise.[22]

3.31 The Committee observed in its previous report that 'this does not appear to have occurred'.[23] However, updated data in the two years since the Committee's report shows that the take-up rate is increasing, and DIMA indicated that the 1999/00 take-up rate was expected to be greater than was apparent from the current data.[24]

17 DIMA has given priority to "straightforward" applications, DIMA, Submissions, p. 79; the RRT has given priority to applications from low refugee producing countries, *Annual Report 1998/99*, pp. 1-2; *Annual Report 1999/2000*, p. 9.

18 DIMA, Submissions, p. 89.

19 RRT, Evidence, p. 21; *Annual Report 1999/2000*, p. 11. In 1998/99 the average time from application to decision was about 40 weeks, RRT website, *Frequently Asked Questions.*

20 JSCM: *Review of Migration Regulation 4.31B*; p. 42.

21 ICJ, Exhibit 1, p. 3; Evidence pp. 33-34; DIMA, *1999 Evidence, p. 22.* RRT, Submissions, p. 144.

22 *DIMA, 1999 Evidence, p. 22.*

23 JSCM, *Review of Migration Regulation 4.31B*, p. 43.

24 DIMA, Submissions, p. 94: ' "All Nationalities Average"… will be higher when more of the primary applications have been finalised.'

Table 3: Take-up rates (proportion of all unsuccessful primary applicants proceeding to RRT)[25]

	1995/6	1996/7	1997/8	1998/9	1999/00	2000/1
1999 data	*80.4%*	*84.35*	*84.8%*	*79.6%**	No data	No data
2001 data	*80.61%*	*84.53%*	*85.73%*	*88.03%*	*89.4%*	No data

Source ** first six months. DIMA,* 1999 Submissions, p. 80*; 2001 Submissions, p. 94.*

3.32 The Committee noted that, at the same time as the proportion of unsuccessful applicants appealing DIMA's primary decision (the take-up rate) was rising, the proportion of those succeeding in convincing the RRT to overturn DIMA's primary decision ('set aside' rate) appeared to have halved.[26]

3.33 As the Committee outlined in Chapter 2, there have been many changes in the migration environment. There was therefore not necessarily any straightforward link between the observed increase in take-up rates and the introduction of DIMA's strategic processing to deal with unmeritorious claims expeditiously.[27]

Conclusion

3.34 It was clear to the Committee that the new information concerning take-up rates affected the basis of the Committee's 1999 conclusion. However, the inquiry into regulation 4.31B did not focus on the primary determination stage, but on the fee and its impact on review applicants.

3.35 The Committee was therefore not in a position to pronounce upon allegations that DIMA had failed to fulfil its obligations to accord procedural fairness under the Migration Act. However, the apparent trend for the RRT to uphold DIMA's primary assessment raised doubts about the claim that the primary determination process was unfair.

Strengthening the regulation of migration agents

3.36 Between 1 July 2000 and 31 March 2001 the RRT finalised 2,606 appeals with which the applicant had apparently received assistance. Of these, two thirds (1,769) had contact with migration agents, and a further quarter (720) with legal representatives.[28]

25 Cohort data showing the proportion of applicants refused in a specific year who have appealed in ***any year*** since.

26 DIMA, Submissions, p. 90, from 12.28% in 1997/8 to 6.44% in 1999/00.

27 DIMA, Submissions, p. 88.

28 RRT, Submission, p 169.

3.37 Submissions to the Committee in the course of its reviews of Migration Regulation 4.31B in 1999 and of the Migration Legislation Amendment Bill (No 2) 2000, raised the issue of firmer oversight of migration agents.[29] ICJ reiterated its 1999 submission on the subject.[30] NCCA, JMVS, and KLC raised similar issues of 'unscrupulous' and 'unethical' migration agents and those making 'inappropriate' applications respectively.[31]

3.38 Morris Migration Services (MMS) proposed review of the renewal of the licenses of migration agents who accepted:

> cases which they know have no chance of successful outcome.[32]

3.39 MIA urged that the RRT take a more active role in reporting agents in breach of the Migration Agents Code of Conduct to the Migration Agents Registration Authority (MARA).[33]

3.40 DIMA is satisfied that MARA's complaints handling process is 'robust and accountable'. Between 1 July 2000 and 31 March 2001 MARA received 118 complaints against registered migration agents, mostly in relation to the standard of professional conduct. A further 268 complaints were on hand. Of the 98 cases finalised in the same period, there was no further action in 52 because the complaint could not be substantiated or further action was inappropriate.[34]

3.41 In its evidence, the RRT confirmed that it had raised some matters with MARA.[35] The Committee notes that there is continuing concern by many involved in migration issues about the unethical behaviour of some migration agents and that DIMA has proposed a further tightening of the regulatory framework to enable investigation of complaints against unauthorised agents.[36]

3.42 The Committee notes that there is continuing concern by many involved in migration issues about the unethical behaviour of some migration agents.

---

29 JSCM: *Review of Migration Regulation 4.31B*; pp.40-41; *Review of Migration Regulation Amendment Bill (No 2) 2000*, pp. 26-27, 42.

30 ICJ, Exhibit 1, pp. 2-3; Evidence, pp. 33-34.

31 Submissions, NCCA, p. 35; JMVS, p. 38; KLC, p. 125.

32 MMS, Submissions, p. 10.

33 MIA, Submissions, p. 45.

34 The main categories of complaint concerned professional conduct (85%) and fees/charges (7%). DIMA, Submissions, p. 181.

35 RRT, Evidence, p. 25.

36 DIMA, Submissions, p. 181.

3.43 In its 1999 review the Committee foreshadowed that it could recommend changes to strengthen the regulation of migration agents,[37] and in another migration review in 2000 recommended that:

> the activities of migration agents be brought under closer scrutiny by DIMA and the Migration Agents Registration Authority.[38]

Conclusion

3.44 The Committee concluded that concern about the activities of some migration agents remained an issue.

Summary

3.45 The Committee considered a range of proposals to revise aspects of administration in the migration jurisdiction. It also re-examined, in the light of any additional information which had become available since the previous review, those proposals made in 1999 and which had been raised again during the current review,

3.46 In view of continuing concern with the activities of migration agents, the Committee reiterates the recommendation it made in the context of the Migration Legislation Amendment Bill (No 2) 2000.

Recommendation 2

3.47 **The Committee recommends that the activities of migration agents be brought under closer continuing scrutiny by DIMA and the Migration Agents Registration Authority.**

37 JSCM: *Review of Migration Regulation 4.31B,* pp.41.

38 Recommendation 4, Joint Standing Committee on Migration, *Review of Migration Regulation Amendment Bill (No 2) 2000*, p. 42.