The Parliament of the Commonwealth of Australia

2001 Review of Migration Regulation 4.31B

Joint Standing Committee on Migration

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Contents

Foreword

Migration Regulation 4.31B imposes a $1,000 fee on those whose claim for refugee status has been refused and whose appeal to the Refugee Review Tribunal for refugee status under the United Nations Refugee Convention and Protocol is again refused. The purpose of this fee is to deter non-genuine applications for review, that is, applications by people who know that they are not refugees and who may simply wish to extend their stay in Australia.

In 1999 the Committee reviewed the operation of Migration Regulation 4.31B and reported its conclusions and recommendations to Parliament on 30 May 1999. At the time of the review, the regulation had been in operation for a relatively short time (23 months).

The Committee concluded that the regulation may have been effective in reducing abuse, but that this was difficult to gauge, given the short time the regulation had been in place.

The Committee recommended that a sunset clause apply to the regulation and the sunset clause date adopted by the Government was 30 June 2001.

With this date approaching the Committee undertook, at the Minister's request, a further review of the regulation in March and April 2001.

The review was advertised in the daily press in each capital city on 10 February 2001 and the 18 individuals and organisations which had made submissions in 1999 were contacted about the 2001 review.

Nine of those contacted made renewed submissions, and the Committee received a total of 28 submissions from 21 organisations and individuals. These are listed in Appendix A. The Committee held public hearings in Sydney and Canberra and took evidence from five organisations. Details of the hearings and witnesses are in Appendix B.

Mrs Margaret May MP
Chair

Membership of the Committee

Chair	Mrs Margaret May MP (Chair from 6/3/2001)	
	Mrs Chris Gallus MP (until 30/1/01)	
Deputy Chair	Senator Jim McKiernan	
Members	Hon Dick Adams MP (from 12/8/99)	Senator Andrew Bartlett
	Hon Bruce Baird MP	Senator Alan Eggleston
	Mr Petro Georgiou MP (from29/3/2001)	Senator John Tierney
	Mrs Julia Irwin MP	
	Mr Bernie Ripoll MP	
	Hon Dr Andrew Theophanous MP (until 9/8/99)	

Committee Secretariat

Secretary	Mr Richard Selth
Inquiry Secretary	Dr Steve Dyer
Admin/Research Officer	Mr Vishal Pandey

Terms of reference

The Hon Philip Ruddock, Minister for Immigration and Multicultural Affairs wrote to the Chair of the Joint Standing Committee on Migration:

I am writing to you in relation to the review of Migration regulation 4.31B which imposes a $1,000 Refugee Review Tribunal post-decision fee on persons who unsuccessfully seek review of a decision to refuse the grant of a Protection Visa…

I asked the Joint Standing Committee on Migration on 6 January 1999 to review Regulation 4.31B

In its report which was tabled on 31 May 1999 in the House of Representatives, the Committee recommended the retention of regulation 4.31B and, to allow for a more thorough assessment of the regulation's effectiveness, the Committee also recommended that it be subject to a three year sunset clause commencing on 1 July 1999. The Government accepted the Committee's findings contained in the majority report and decided to implement the recommendation for a three year extension to the sunset clause.

However, following negotiations arising from a disallowance motion relating to the regulations, the Government agreed to reduce the sunset clause to a period of two years to 30 June 2001. The Government also expressed its intention to seek a further review of Regulation 4.31B by the Committee prior to the expiry of the sunset clause on 30 June 2001…

I am referring the further review of Regulation 4.31B to the JSCM at this time to enable the Committee to consider and report on this matter in sufficient time for necessary regulations amendments to be made should they be necessary.

List of abbreviations

Amnesty	Amnesty International Australia
ACMRO	Australian Catholic Migration and Refugee Office
DIMA	Department of Immigration and Multicultural Affairs
FECCA	Federation of Ethnic Communities' Councils of Australia Inc
ICJ	International Commission of Jurists Australia section
JMVS	Justice Migration & Visa Services
KLC	Kingsford Legal Centre
MAL	Movement Alert List
MARA	Migration Agents Registration Authority
MIA	Migration Institute of Australia
MMS	Morris Migration Services
NCCA	National Council of Churches in Australia
Net I PR	Network for International Protection of Refugees
PV	Protection Visa
RACS	Refugee Advice and Casework Services (Australia) Ltd
RRT	Refugee Review Tribunal
TPV	Temporary Protection Visa
YLLRC	Young Lawyers Law Reform Committee

List of recommendations

Chapter 2 Regulation 4.31B and deterrence

Recommendation 1

The Committee recommends that DIMA systematically examine the full range of existing migration processing and review arrangements with a view to further streamlining them.

Chapter 3 Proposals for administrative changes

Recommendation 2

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

Chapter 4 Continuation of Migration Regulation 4.31B

Recommendation 3

The Committee recommends that Migration Regulation 4.31B be retained, subject to a two-year sunset clause commencing on 1 July 2001, and that its operation be reviewed by the Committee early in 2003.

1

The Refugee Determination Process

Overview[1]

1.1 Australia provides protection to people who meet the United Nations definition of a refugee. This definition is contained in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (collectively referred to as the Refugees Convention). Broadly speaking, the Refugees Convention defines refugees as people who are:

- outside their country of nationality or their usual country of residence; and
- unable or unwilling to return or to seek the protection of that country due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

1.2 Asylum seekers in Australia are assessed against the Refugees Convention. Those who entered Australia legally on genuine documents and also meet Australia's health and character requirements (or if the requirements to meet health and character checks are waived by the Minister), are granted Protection Visas (PV) that allow them to remain permanently in Australia. Those who enter illegally or on fraudulent documents and are found to be owed protection, are granted Temporary Protection Visas (TPV), which give them residence for three years.[2]

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1 This chapter is based on the Committee's previous report on Migration Regulation 4.31B.

2 DIMA Fact Sheet 42, *Assistance for Asylum Seekers in Australia,* (updated 26/10/00).

Primary Stage

1.3 At the primary stage, the asylum seekers apply for a PV and pay a $30 fee unless they are not immigration cleared and in immigration detention. The fee applies to each application, whether there is only one applicant or a whole family. With the exception of those detained as unauthorised arrivals, asylum seekers receive a bridging visa upon lodging a PV application. If those who receive a bridging visa had been in Australia for fewer than 45 days in the 12 months prior to lodging the PV application, they are permitted to work in Australia until their PV application is finalised.

1.4 When the PV application is lodged a Department of Immigration and Multicultural Affairs (DIMA) case officer (the *primary decision maker*):

> acting as a delegate of the Minister for Immigration and Multicultural Affairs, decides if the applicant engages Australia's obligations under the UN Refugees Convention. This is done by assessing the claims against the definition of a refugee set out in that Convention.
>
> All applications are assessed on an individual basis. Where further clarification is required, the officer may interview the applicant using an interpreter if necessary.
>
> The interviews are conducted in a non-adversarial environment, using all available and relevant information concerning the human rights situation in the applicant's home country. Applicants are given opportunities to comment on any adverse personal information, which is taken into account when considering a claim.
>
> Submissions made on behalf of the applicant by migration agents can also form part of the material to be assessed.
>
> Applications are treated in confidence. No approach is made to a home government (including that country's embassy in Australia) about an individual asylum seeker.
>
> A DIMA officer then makes the decision on the application for a PV. Applicants who are found to meet the UN Convention definition, and meet Australia's health and character requirements are granted a PV.[3]

3 DIMA Fact Sheet 41, *Seeking Asylum in Australia* (updated 14/12/00).

1.5 A PV confers on an asylum seeker:

- the right to remain permanently in Australia;
- access to welfare benefits;
- permission to work;
- permission to travel to and enter Australia for five years after grant; and
- eligibility to apply for citizenship after two years of permanent residence.

1.6 If the case officer finds that an applicant does not meet the criteria for grant of a PV, the officer must provide the person with a written record of the decision. This should specify the visa criterion that the applicant has failed to meet, the provision in the Act or Regulations which prevents the grant of the visa, and the reasons why the criterion has not been met.[4] The applicant must also be advised of the right of review.[5]

Review Stage

1.7 Those who fail to be granted a PV or TPV by DIMA can appeal to the Refugee Review Tribunal (RRT).[6] It also assesses the application against the Refugees Convention, and can accept any new information not previously available to the primary decision-maker. The RRT can decide to affirm, vary or set aside the original decision, depending on the merits of the case.

1.8 If the RRT cannot make a decision favourable to the applicant on the written evidence available, it must give the applicant the opportunity of a personal hearing. This hearing is non-adversarial and is held in private for the applicant's benefit.[7] The applicant may be accompanied by an adviser.[8]

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4 In 1999/00 DIMA took an average of 64 days to complete this primary processing. DIMA, Submissions, p. 90.

5 *Migration Act 1958*, s.66.

6 Not every refusal to grant a Protection Visa (PV) in Australia is reviewable by the RRT. Under s.500 (1)(c) of the Act, a refusal to grant a PV because of Articles 1F, 32 or 33 of the Refugees Convention can only be reviewed by the Administrative Appeals Tribunal (AAT). Articles 1F and 33 make exceptions to the protection obligations owed to refugees. No obligations are owed to a person who has committed a serious non-political crime before being admitted to a country. Likewise, a country can refuse to admit a refugee who can reasonably be regarded as a danger to national security, or who has been convicted of a particularly serious offence and who constitutes a danger to the community.

7 *Migration Act 1958*, s.429.

8 A registered migration agent or person assisting the applicant may come to the hearing. A person appearing before the Tribunal to give evidence is not entitled to be represented before the Tribunal by any other person or to cross-

1.9 The Tribunal must provide the applicant with written notice within 14 days of making a decision. The notice must set out the decision, the reasons for the decision, findings on material questions of fact, and the evidence on which those findings were based.[9]

1.10 If the Tribunal rejects the PV visa application, an applicant with a bridging visa typically has 28 days to depart Australia upon being notified of the decision.

Ministerial power of intervention

1.11 Where the RRT rejects a review application, s.417 of the *Migration Act 1958* gives the Minister the power to overturn that decision and to substitute a favourable decision if the Minister is satisfied that it is in the public interest to do so. Each case where the RRT affirms the DIMA decision is assessed against the Minister's guidelines to identify unique or exceptional cases that he or she may wish to consider.

1.12 Unique or exceptional cases may involve Australia's obligations under the Convention Against Torture, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child. They may also involve strong compassionate circumstances, such as hardship to Australian citizens.

1.13 A copy of the guidelines is at Appendix D.

Judicial review

1.14 The Act also permits people who are refused a PV by the RRT to seek judicial review of the decision in the Federal Court. Such judicial review is concerned only with the lawfulness of the decision-making and does not involve an inquiry into the merits of the case.

examine any other person appearing before the Tribunal to give evidence…The applicant is entitled to give evidence and present arguments in support of his or her claims…[and] The Tribunal may invite an adviser to make oral submissions at the conclusion of the hearing and/or in writing following the hearing. *RRT Practice Directions 8.4*; RRT Website.

9 *Migration Act 1958*, s.430.

Bridging visas

1.15 DIMA will grant asylum seekers bridging visas enabling them to remain lawfully in Australia until their PV application has been processed. A bridging visa typically ceases 28 days after DIMA notifies the person of the decision to refuse the PV. If a person appeals to the RRT within that time, the bridging visa continues to operate. It will then cease either on the grant of the PV by the RRT or 28 days after notification by the Tribunal that the person is not a refugee.

1.16 Applicants, with some exceptions granted by ministerial discretion, must apply for a PV within 45 days of their arrival in Australia if they are to be granted a bridging visa with work rights. This rule applies to all applications lodged on or after 1 July 1997.

Background to Regulation 4.31B

1.17 On 20 March 1997, the Minister for Immigration and Multicultural Affairs, Hon Philip Ruddock MP, announced extensive changes in the refugee determination process.[10] The changes affected the framework for work rights, the review application periods, and the review application fee for refugees. They also included a more strategic approach to PV applications, with DIMA to give greater priority to straightforward applications and to use more streamlined methods, such as reduced documentation. The Minister explained that:

> What we are seeking to do is to remove the incentives that are now current in the system that make it wide open to this form of abuse.[11]

1.18 Statutory Rules 109 of 1997 (SR 109 of 1997) contained many of the changes. These included measures:

- imposing a new 14 day period for RRT applications;
- restricting access to work rights to refugee applicants who applied within 14 days of entering Australia; and
- imposing a $1,000 fee on unsuccessful applicants to the RRT.

10 Minister for Immigration & Multicultural Affairs, Media Release 28/97, *Sweeping Changes to Refugee and Immigration Decision Making*. www.immi.gov.au/media_releases.

11 *Hansard*, House of Representatives, 19 June 1997, p. 5858.

1.19 DIMA had explained the objective of the $1,000 fee as follows:

> [T]he fee was intended to operate as a means of containing the number of review applications made by people without genuine claims, rather than as a means of cost recovery, per se. The fee was imposed 'post decision' to ensure that it did not present a barrier to people who had a subjective fear (albeit perhaps not a well founded fear) of persecution making an RRT application.[12]

1.20 As with the other changes in SR 109, the fee was scheduled to take effect on 1 July 1997.

1.21 Before any changes could come into effect Senator Margetts (Greens, WA) gave notice of a motion in the Senate to disallow parts of the Statutory Rules. After negotiations with the Opposition, the Government decided to alter some parts of SR 109 of 1997. The alterations were made in Statutory Rules 185 of 1997. They included:

- extending the 14 day application period for the RRT to 28 days;
- ensuring that refugee applicants could have access to work rights if they applied within 45 days of entering Australia, as opposed to the original 14 days;
- enabling the Minister to remove groups of people from the restriction on work rights where circumstances in their home country had changed since their arrival; and
- imposing a two year sunset clause on the $1,000 post-decision fee for unsuccessful RRT applicants.

1.22 The sunset clause for the $1,000 post-decision fee commenced on 1 July 1997 and was accompanied by the Government's undertaking to ask the Joint Standing Committee on Migration to review the issue in 1998. The Committee tabled its review in May 1999, and recommended that Regulation 4.31B continue, but be subject to a three year sunset clause commencing on 1 July 1999.

1.23 Subsequently the duration of the sunset clause was reduced to two years, expiring on 30 June 2001.

Operation of Regulation 4.31B

1.24 Regulation 4.31B provides that unsuccessful applicants to the RRT must pay the $1,000 fee within seven days of receiving notice of the RRT

12 *DIMA, 1999 Submissions, p.72.*

decision. Where RRT applications have been combined, however, only one fee per family is imposed, irrespective of the number of applicants.

1.25 There are two exceptions where the fee is to be refunded or waived. Regulation 4.31C provides that the fee must be refunded or waived if:

- the applicant seeks judicial review, the case is subsequently remitted to the RRT, and the Tribunal finds in the applicant's favour; or
- the Minister substitutes a favourable decision for that of the RRT by using the power under s.417 of the Migration Act.

1.26 Where an applicant cannot pay the fee within seven days, the fee becomes a debt payable to the Commonwealth, and an entry is placed in the Movement Alert List (MAL). If the person leaves Australia and later seeks to return, officers processing visas would be alerted to the existence of a debt through the MAL record. This may prevent the person from returning, for it is a prerequisite for the grant of offshore visas that applicants meet public interest criterion 4004 of the Migration Regulations. That provision states:

> The applicant does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment.

1.27 Applicants who later seek to return to Australia but who have not paid or made arrangements to pay the $1,000 fee would therefore have their applications refused. In the three full financial years since the introduction of the fee $1,318,455 has been collected.[13]

13 DIMA, Submissions, p. 102.

2

Regulation 4.31B and deterrence

Introduction

2.1 In its previous review in 1999, the Committee concluded that:

> the fee should be retained, but it should be subjected to a further sunset clause to allow for a thorough assessment to be made of its effectiveness.[1]

2.2 Regulation 4.31B was:

> Introduced primarily to address the growing misuse of the PV process by people lawfully in the community.[2]

2.3 In its previous report, the Committee had concluded that:

> there is a significant amount of abuse from protection visa applicants.[3]

2.4 In this chapter, the Committee re-examines the question of misuse of the PV system, specifically:

- abuse of the Protection Visa (PV) system;
- whether the fee is reducing abuse; and
- whether the fee is deterring *bona fide* applicants.

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1 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*, Parliament of the Commonwealth of Australia, 1999 (JSCM, *Review of Migration Regulation 4.31B)*, p. 37.

2 Department of Immigration and Multicultural Affairs (DIMA), Submissions, p. 81.

3 JSCM, *Review of Migration Regulation 4.31B*, p. 37.

Is there abuse?

2.5 The fee is based on the presumption that there is abuse of the PV which requires redress. If there is no abuse, there is no rationale for the regulation. In its 1999 report the Committee concluded that:

> there is a significant amount of abuse from protection visa applicants.[4]

2.6 Amnesty International Australia (Amnesty) noted that asylum determination systems anywhere are subject to abuse.[5] However there is a further question of whether any abuse detected is deliberate, or inadvertent. The Department of Immigration and Multicultural Affairs (DIMA), in common with a number of submissions, pointed out that unsuccessful applications to the Refugee Review Tribunal (RRT) are not all *mala fide:*

> there are people from most countries in the world who may genuinely believe that they are refugees, or otherwise engage Australia's protection under its international obligations.[6]

2.7 Unsuccessful PV applicants include those who may harbour genuine fears for their safety if they return to their country of origin. The Young Lawyers' Law Reform Committee (YLLRC) pointed out that applicants:

> cannot know before seeking a review whether or not the review will be successful.[7]

2.8 The Australian Section of the International Commission of Jurists (ICJ) argued that because the primary determination process was 'relatively meaningless'[8] and that because the RRT was often the first opportunity for substantial examination of their claims,[9] most applicants would:

> apply for review by the RRT notwithstanding the possible imposition of the $1,000 post decision fee.[10]

2.9 Unsuccessful applicants are those who have not been able to convince DIMA or the RRT that they fitted the Refugee Convention definition of refugees.[11] Both the National Council of Churches in Australia (NCCA) and the Kingsford Legal Centre (KLC) describe that definition as

4 JSCM, *Review of Migration Regulation 4.31B*, p. 37.
5 Amnesty, Submissions, p. 60.
6 DIMA, Submissions, p. 92.
7 YLLRC, Submissions, p. 69.
8 ICJ, Exhibit 1, p. 3.
9 ICJ, Exhibit 1, p. 2.
10 ICJ, Exhibit 1, p. 3.
11 Submissions: RACS, pp. 17-20; NCCA, p. 35; Amnesty, p. 60.

'narrow'.[12] Other applicants whose RRT appeals are rejected may have made honest, but ultimately unmeritorious, claims. Or as YLLRC noted, the RRT may have erred in its refusal.[13]

2.10 There is, however, evidence of abuse. Each year the RRT concludes that DIMA, in 90 per cent of its decisions, has correctly rejected a PV application. The low proportion (10 per cent) of DIMA decisions set aside by the RRT strongly suggests, and the Migration Institute of Australia (MIA) argues that, there are 'spurious applications' for refugee status.[14]

2.11 When the RRT is contemplating supporting DIMA's refusal of a claim for refugee status, it offers the applicant an opportunity to attend a hearing. The failure of one in three to take this opportunity[15] to present their case in person is evidence that they know that the claim cannot be sustained.

2.12 These behaviours indicated to the Committee that there is deliberate abuse of the PV process.

2.13 The Committee thought it significant that most of those who applied for PVs and who had been rejected by the RRT were still in Australia, and that nearly one in three of those remained without a current visa. This suggested that one motivation for the initial application and subsequent appeal was a desire to prolong their stay in Australia.[16]

2.14 It also indicated to the Committee that there were likely to be other areas in the migration jurisdiction where more streamlined procedures might reduce the time taken to resolve cases and thus diminish the temptation to use the system to gain more time in Australia.

Conclusion

2.15 The Committee concluded that there is significant abuse of the PV and other migration processes.

Recommendation 1

2.16 **The Committee recommends that DIMA systematically examine the full range of existing migration processing and review arrangements with a view to further streamlining them.**

12 Submissions: NCCA, p. 35; KLC, p. 123.

13 YLLRC, Submissions, p. 70.

14 MIA, Submissions, p. 43.

15 DIMA, Submissions, p. 99. RRT, Evidence, p. 26, indicates that between 1/7/00 and 28/2/01 only 20 of 380 appellants from the PRC appeared at the hearing.

16 DIMA, Submissions, pp. 103, 196. A sample of DIMA records indicated that 29 per cent did not have current visas.

Is the fee effective in reducing abuse?

2.17 In its previous report, the Committee concluded that:

> there is evidence to suggest that regulation 4.31B may have been effective in reducing that abuse, although this is difficult to gauge given the short time that the fee has been in place.[17]

2.18 The current review was undertaken two years after that report, and some 45 months after the regulation came into effect. The Committee therefore reviewed the evidence relevant to the question of 'abusive' (or *mala fide*, or unmeritorious) claims by visa applicants.

2.19 There was a strong division of opinion concerning the effectiveness of the fee which was introduced:

> primarily to address the growing misuse of the PV process by people lawfully in the community;[18]

and to reduce

> abuse / misuse of the protection visa system by people lodging applications for visas or review knowing their claims to be unfounded, simply to gain benefit of extended stay in Australia during the processing period.[19]

2.20 A number of submissions argued that the fee was not having an effect on unmeritorious applications. The ICJ, for example, queried:

> whether in fact the imposition of the post decision fee has had any direct impact on the number of applications appealed to the RRT.[20]

2.21 KLC thought it was 'questionable' whether the fee met its aim,[21] while the Refugee Advice and Casework Service concluded that 'the fee appears to have had no impact'.[22] YLLRC and Amnesty went further submitting that, respectively:

> there is no evidence that the fee has been effective in deterring abuse of the refugee application process;[23]
>
> and

17 JSCM, *Review of Migration Regulation 4.31B*, p. 37.
18 DIMA, Submissions, p. 81.
19 *DIMA 1999 Submissions, p.70.*
20 ICJ, Exhibit, p.4.
21 KLC, Submissions, p. 122.
22 RACS, Submissions, p. 19.
23 YLLRC, Submissions, p. 67.

> yet to see any evidence that would suggest that it has had any impact on those making vexatious claims… if anything, those seeking to "abuse" the asylum determination system…are often in the best position to afford $1000.[24]

2.22 The MIA maintained that 'the regulation is failing to achieve its purposes',[25] and identified a number of categories of applicant to illustrate why it argued this:

- legal temporary arrivals applying for a PV within 45 days would be able to work while their RRT appeal was pending, and so would find the fee no deterrent;
- legal temporary arrivals not applying for a PV within 45 days who wanted to work and did so illegally could continue to do so while their RRT appeal was pending, and would find the fee no deterrent;
- legal temporary arrivals wishing to remain for family / personal reasons and who were ineligible for another onshore visa except a PV would find the benefit to themselves or their family outweighed the deterrent effect of the fee;
- legal temporary arrivals fearing to return home (whether for a refugee convention reason or not) would not be deterred because for them 'time is a precious commodity'[26]; and
- persons detained when their visa has expired may be unable to return soon to Australia because of the visa breach and may therefore not be deterred by the fee.[27]

2.23 More narrowly, NCCA claimed that the fee may not have the desired impact on 'economic migrants… [who] have a greater capacity to pay the debt'.[28]

2.24 A few submissions, such as those of Justice Migration and Visa Services (JMVS) argued that the fee was indeed reducing abuse of the PV system.[29] Mr Robert Downy, in a private submission, described the regulation as:

> sound as a disincentive to those who have little or no cause to be considered for the very generous United Nations classification of refugee.[30]

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24 Amnesty, Submissions, pp. 58, 61.
25 MIA, Submissions, p. 43.
26 MIA, Submissions, p. 44.
27 MIA, Submissions, p.45.
28 NCCA, Submissions, pp. 35.
29 JMVS, Submissions, p. 38.
30 R. Downey, Submissions, p. 2.

2.25 DIMA indicated that abuse had been reduced, rather than eliminated,[31] and argued that the fee:

> as a discrete measure, is having an effect as a disincentive to *mala fide* applicants proceeding to the RRT.[32]

2.26 However, YLLRC also pointed out that, if there was any deterrent effect, the fee:

> does not distinguish between abusers of the system and a bona fide applicant who may fear that their application may not succeed.[33]

2.27 In support of its claim that the fee was a disincentive to *mala fide* applicants DIMA provided statistical information. The data came from identifying refugee applications made in specific financial years by applicants not in detention, and following their subsequent appeal activities. This 'cohort' approach provides data which:

- enables comparison of the activities of applicants who sought PVs prior to the regulation coming into force with those applying later;

but

- is not comparable with RRT data which includes applicants in detention and covers applications dealt with in each financial year (independent of the year in which they were begun).[34]

2.28 In assessing the data provided by DIMA, the Committee was aware that statistics offer no clear guide to the motivation of the applicants. The relevance of the fee to any observed changes in the data for 'abuse' was therefore open to interpretation.

2.29 The significance of changes revealed in the data was further clouded by other developments in the migration field which may have affected people's behaviour, and hence the data. Changes in the migration environment in the recent past include:

- limitation of rights to work and access to Medicare from July 1997 to those who made a PV application within 45 days of arrival;
- forewarning of the imposition of the fee, which may have prompted a surge of applications to the RRT in 1996/97;
- the adoption by the RRT from 1996/97 of a practice of giving priority to consideration of appeal from 'low set aside/high volume application

31 Eg DIMA, Submissions, pp. 90, 92, 95,

32 DIMA, Submission, p.110.

33 YLLRC, Submissions, p. 69.

34 DIMA, Submissions, p. 80, footnote 2.

countries' and those where applicants rarely attend for hearing.[35] This was to reduce backlogs and discourage abuse of the PV process[36] and may have affected the level of applications from low refugee-producing nationalities;

- the reduction in DIMA's average primary processing times from 268 days in 1995/96 to 151 in 1997/98 to fewer than 85 days thereafter,[37] potentially reducing the duration of an applicants stay in Australia;
- debate in 1997 over the period for which the sunset clause would apply,[38] which may have influenced possible *mala fide* applicants;
- the announcement in September 1996 by the Minister for Immigration and Multicultural Affairs, that interim appointments would be made to the RRT while its role was under Government consideration, may have led to uncertainty about the continuing access to the RRT;[39]
- a change in the mix of protection visa applications which could have affected the proportions of acceptances and appeals;[40] and
- a significant increase in unauthorised arrivals by boat, which raised the profile of asylum issues in Australia.[41]

2.30 DIMA said that:

> it is hard to disentangle which part of the package of measures that we have taken over the last eight or 10 years has uniquely contributed to deterring misuse of the asylum system… [but] the post-determination RRT fee…is an important part of the package.[42]
>
> Despite the scarcity of objective statistics on *mala fide* applications, the effect of the fee can be seen through study of specific groupings of applicants where the proportion of *mala fide*… can be expected to be higher.[43]

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35 RRT, *Annual Report 1998/99*, pp. 1-2; *Annual Report 1999/2000*, p. 9. www.rrt.gov.au/

36 RRT, *Annual Report 1998/99*, pp. 1-2. www.rrt.gov.au/

37 DIMA, Submissions, p. 89.

38 JSCM, *Review of Migration Regulation 4.31B*, pp. 4-6.

39 Minister for Immigration & Multicultural Affairs, Media Release, 60/96. *Refugee Review Tribunal Appointments*. This followed an announcement in May that the RRT would be reviewed: Minister for Immigration & Multicultural Affairs, Media Release, 19/96 *Review of Immigration Decision Making.* www.minister.immi.gov.au/media_releases Subsequently the Attorney-General announced the future incorporation of the RRT into a new Administrative Review Tribunal: Attorney-General News Release, 20/3/97, *Reform of Merits Tribunal*. www.law.gov.au/aghome/agnews

40 Eg; the three main nationalities applying for PVs in 1996/97 were Indonesia (1,770); Philippines (1,731); and Sri Lanka (1,278). In 1997/98: Indonesia (1,585); PRC (1,091); and Philippines (689). DIMA, Submissions, p.157.

41 DIMA, Fact Sheet 81 *Unauthorised Arrivals by Sea and Air*. 1997/98 = 157; 1998/99 = 920; 1999/00 = 4,174.

42 DIMA, Evidence, p. 7.

43 DIMA, Submission, p. 92.

2.31 The relevant group of applicants was that from 'low refugee producing' nationalities. These were defined as nationalities from which, over the five financial years 1995/96 to 1999/2000, ten or more applicants had applied for PV and the grant rate was below 2 per cent.[44] That is, 98 per cent of those applications were assessed by the RRT as being without merit, and DIMA expected *mala fide* applicants to be concentrated in that group.[45]

2.32 DIMA argued that the deterrent effect of the fee would show up in the proportion of unsuccessful primary applicants who proceed to the RRT, specifically:

> the RRT take-up rate for 'low refugee producing' nationality from 1997/98 onwards.[46]

Table 1: RRT Take-up rates - 'low refugee producing' nationalities not in detention by year of Primary Application.

	1995/96	1996/97	1997/98	1998/9	1999/00
	%	%	%	%	%
Low refugee producing nationalities	75.25	82.52	83.19	85.55	90.25
All other nationalities	84.48	86.09	87.42	89.90	88.96

Source *DIMA, Submissions, p. 94.*

2.33 DIMA noted that the 1999/00 data did not reflect the true rate because not all primary applications have been decided and applicants refused in 1999/00 may have not yet applied to the RRT. However:

> the 'low refugee producing' rate… should remain around the same level.[47]

2.34 DIMA concluded that:

> the fee has had an effect on the numbers of *mala fide* applicants to the RRT… 'low refugee producing'… take-up rates were increasing by almost 10% per annum before the fee… Immediately after the introduction… dropped to less than 1% per annum.[48]

44 DIMA, Submissions, p. 93, footnote 17.

45 DIMA, Submissions, p. 93.

46 DIMA, Submission, pp. 93-94.

47 DIMA, Submissions, p. 94.

48 Take up rates: 1995/96 = 75.25 percent; 1996/97 = 82.52 percent. 1997/98 = 83.19 per cent; DIMA, Submissions, pp. 94-95.

2.35 Looking at the trend after 1997/98, DIMA contended that the:

> gentle increase in the rate of take-up of the review opportunities… is probably to be expected seven years or so after the RRT has been in place with people in the community networks becoming more and more aware of what it means and more comfortable in going to a review.[49]

2.36 DIMA also argued that:

> while the share of RRT applications made by people from low refugee producing countries has slowly risen since 1998-99, it has still not returned to its pre-fee level…the review take-up rate by low refugee producing countries has remained below and roughly parallel to, the take-up rate for all nationalities;[50]
>
> a drop would indicate a substantial effect, a reduction in the rate of increase is also arguably sufficient to show that the fee is deterring some applicants.[51]

Conclusion

2.37 The Committee considered that a decline in the take-up rate from 'low refugee producing counties' indicated that there was a deterrent effect for *mala fide* applicants.

Is the fee deterring *bona fide*[52] applicants?

2.38 In its previous review, in 1999, the Committee concluded that:

> there is no evidence to date that regulation 4.31B has deterred genuine refugees from applying for review.[53]

2.39 This issue was raised again during the current review in a number of submissions.[54] Neither YLLRC nor KLC were convinced that the fee was reducing *mala fide* applications, yet were concerned that, *if* the fee had any deterrent effect, it could prevent *bona fide* applicants from pursuing appeals to the RRT.[55]

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49 DIMA, Evidence, pp. 50-51.

50 DIMA, Evidence, pp. 46-47.

51 DIMA, Submissions, p. 159.

52 ***Bona fide*** is used in this report to indicate that the applicants have a genuine belief that they are refugees, whether or not they are eventually assessed to meet the refugee criteria.

53 JSCM, *Review of Migration Regulation 4.31B*, p. 37

54 Eg ACMRO, Submissions p. 64, and others cited below.

55 Submissions: YLLRC, p. 69; KLC, p. 123;

2.40 NCCA, which considered that the fee was not a deterrent to 'abuse', nevertheless claimed that because:

> aslyum seekers are rarely in a position to judiciously weigh up the merits of their own cases…the $1,000 fee only places them under more pressure to abandon their application.[56]

2.41 Similarly, ICJ, while ambivalent about the effectiveness of the fee in reducing abuse, considered that the fee was likely to cause concern and anxiety,[57] while Amnesty argued that the fee was:

> deterring asylum seekers from appealing.[58]

2.42 However, the Network for International Protection of Refugees (Net I PR), while describing the fee as 'an unnecessary and unfair burden', concluded that the fee:

> is not discouraging asylum seekers from appealing to the tribunal.[59]

2.43 Mr Gareth Kimberley, in a private submission, ICJ and RACS concluded that the fee appeared to have no impact on *bona fide* asylum seekers.[60]

2.44 DIMA argued that:

> the effect of the fee can be seen through study of specific groupings of applicants where the proportion of… *bona fide* applications can be expected to be higher.[61]

2.45 The relevant group of applicants was that from 'high refugee producing' nationalities. These were defined as nationalities from which, over the five financial years 1995/96 to 1999/2000, ten or more applicants had applied for PV and the grant rate was 50 per cent or above.[62] That is, at least half of those applicants were assessed by the RRT as meriting Australia's protection, and DIMA expected *bona fide* applicants to be concentrated in that group.[63]

2.46 If the fee was deterring *bona fide* applicants, DIMA argued that the effect:

> should be seen most readily in that group from 1997/98 financial year.[64]

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56 NCCA, Submissions, p. 36.
57 ICJ, Exhibit 1, p. 4.
58 Amnesty, Submissions, p. 60.
59 Net I PR, Submissions, p. 128.
60 G Kimberley, Submissions, p. 30; RACS, Submissions, p. 19; Evidence, p. 43; RACS, Evidence, p. 38.
61 DIMA, Submission, p. 92.
62 DIMA, Submissions, p. 93, footnote 16.
63 DIMA, Submissions, p. 97.
64 DIMA, Submission, p. 97.

Table 2: RRT Take-up rates - 'high refugee producing' nationalities not in detention by year of Primary Application.

	1995/96	1996/97	1997/98	1998/9	1999/00
	%	%	%	%	%
High refugee producing nationalities	84.98	87.53	93.27	92.95	90.05
All other nationalities	80.40	84.41	85.34	87.85	89.58

Source *DIMA, Submissions, p. 97*

2.47 DIMA noted that the 1999/00 data did not reflect the true rate because not all primary applications have been decided and applicants refused in 1999/00 may have not yet applied to the RRT. However:

> it is expected that the gap between the 'high refugee producing' group and the remaining nationalities will widen as the outstanding applications are finalised.[65]

2.48 DIMA concluded that:

> the RRT take-up rate for people of "high refugee producing" nationality has not been affected negatively by the introduction of the fee; and
>
> that people with a genuine fear of persecution, be it subjective or objective are not deterred from making a refugee application by the existence of a post decision fee.[66]

2.49 The Committee noted that the take-up rate appeared to have increased after the imposition of the fee, which indicated that it was not a disincentive. The Committee also noted, however, that the take-up rate may be declining slightly, but that this would not be clear until the data for 1999/00 was complete.

2.50 In addition, the Committee noted that no submission had provided an example of the fee discouraging an applicant from proceeding with an appeal. Nor could witnesses from ICJ and RACS, when directly questioned, provide evidence that the fee had discouraged *bona fide* applicants from seeking review.[67]

Conclusion

2.51 The Committee concluded that the available statistical information indicated that bona fide applicants were not being discouraged from

65 DIMA, Submissions, p. 98.

66 DIMA, Submissions, p. 98

67 Evidence: ICJ, p. 38; RACS, p. 43.

applying for review. This conclusion was reinforced by the fact that those closely involved with the appeals process could not provide any examples where a bona fide applicant had not pursued review because of the fee.

Summary

2.52 Overall, the Committee concluded that there was abuse of the PV process and that the fee played a role in reducing it, but it did not discourage *bona fide* applicants for RRT review.

4

Continuation of Migration Regulation 4.31B

4.1 In its previous review, the Committee concluded that:

> the fee should be retained, but it should be subjected to a further sunset clause to allow for a thorough assessment to be made of its effectiveness.[1]

4.2 The Committee's aims in this, its second, review were to examine the evidence presented to it to:

- consider whether, in the light of new information, the Committee's original conclusions still stood; and
- determine whether new issues had been raised which required Committee consideration.

4.3 Chapter 2 examined the impact of the fee prescribed in regulation 4.31B and Chapter 3 examined proposals for administrative changes. This Chapter reviews the debate about whether the regulation (and the fee) should continue.

4.4 Of the 21 organisations and individuals that made submissions to the Committee, 13 recommended abolition of the fee and five recommended its retention. In addition, a number of new considerations were brought to the Committee's attention. These were that some applicants should be exempt from the fee; that the fee could be increased; and that formal external reviews of the fee be discontinued with future reviews being undertaken in the normal course of government business.

4.5 DIMA's position was that:

> the data now shows that the fee is effective in controlling *mala fide* applications and providing for cost recovery without having a

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

> negative effect on *bona fide*[2] applicants… Accordingly, on all the evidence, the most appropriate course would be to remove the sunset provision from Regulation 4.31B.[3]

Removal of the fee

4.6 A number of submissions questioned whether a fee was an appropriate way of approaching the problem of abuse of the PV process. Many of the issues raised during the Committee's review of regulation 4.31B in 2001 were the same as those brought to the Committee's attention in 1999.[4]

4.7 Some objections raised with the Committee were directed at the concept of the regulation. These objections to underlying principles remained unaffected by the outcomes of the operation of the regulation in the two years since the Committee's last review. The objections were that:

- the fee was in conflict with Australia's international obligations;
- the fee was a disguised penalty;
- the fee had unfair consequences; and
- there were pragmatic grounds for discontinuing it.

Conflict with international obligations

4.8 In its 1999 review, the Committee concluded that:

> there is no evidence that regulation 4.31B breaches Australia's international obligations to refugees.[5]

4.9 This issue was raised with the Committee in its current review. The Australian Catholic Migrant and Refugee Office (ACMRO) held that the fee was:

> out of character with the spirit and purpose of the Refugee Convention.[6]

2 *Bona fide* is used in this report to indicate that the applicants have a genuine belief that they are refugees, whether or not they are eventually assessed to meet the refugee criteria.

3 DIMA, Submissions, p. 111.

4 The following submissions to the current review were the same as those in 1999: Amnesty (pp. 57-62); ICJ (pp. 39-40, Exhibit 1); RACS (pp. 15-22).

5 JSCM, *Review of Migration Regulation 4.31B*, p. 37.

6 ACRMO, Submissions, p. 64.

4.10 Amnesty argued (as in 1999), that the fee:

> impedes the right of all applicants to seek and enjoy … asylum from persecution as stated in Article 14 of the Universal Declaration of Human Rights.[7]

4.11 ICJ argued in more detail (as it had in its 1999 submission), that the fee:

> may well be in breach as it discriminates against persons seeking review before the RRT.[8]

4.12 KLC claimed that the fee 'constituted less favourable treatment of asylum seekers' than of Australian citizens appealing to a review tribunal, in apparent contravention of Article 29 of the Refugees' Convention, and that the fee appeared to breach Australia's non-refoulement obligations.[9]

4.13 YLLRC and NCCA supported the arguments made in the course of the Committee's 1999 review such as those made above by ICJ and Amnesty.[10]

4.14 The Committee considered the implications of regulation 4.31B for Australia's international obligations in its 1999 review and concluded then that the fee did not breach Australia's international obligations.

4.15 In its current review the Committee concluded that the fee had not discouraged *bona fide* applicants. This was significant because, if *bona fide* applicants were not discouraged from applying, then they were not being discriminated against by the fee. This effectively countered the argument that the fee put Australia in breach of its international obligations because it was discriminatory.

4.16 Further, the office of United Nations High Commissioner for Refugees stated in another forum that:

> Australia fulfils its international obligations scrupulously and fairly.[11]

Conclusion

4.17 The Committee considered that no new arguments had been advanced to cause it change its view that:

> there is no evidence that regulation 4.31B breaches Australia's international obligations to refugees.[12]

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7 Amnesty, Submissions, p. 60.
8 ICJ, Exhibit 1, p. 5.
9 KLC, Submissions, p. 124.
10 YLLRC, Submissions, pp. 66, 69; NCCA, Submissions, p. 36.
11 Quoted in DIMA. Submissions, p. 82.
12 JSCM, *Review of Migration Regulation 4.31B*, p. 37.

Fee is a disguised penalty

4.18 As in 1999, submissions claimed that the fee was in reality a penalty,[13] with KLC, describing it as:

> an unashamedly punitive change to our refugee system, which seeks to restrict displaced people's rights to stay in Australia and have their claims thoroughly considered.[14]

4.19 KLC highlighted how, in their view, the fee was inconsistent with tribunal charging arrangements both internationally and in Australia:

> countries historically categorised as similar to the Australian experience such as Canada and New Zealand [have] no fees in the determination of asylum seekers applications;[15] and
>
> in the RRT, just as in the Social Security Appeals tribunal and the Victims Compensation Tribunal there is no other party to compensate and accordingly …no application fees nor post decision fees.[16]

4.20 YLLRC described the fee as:

> a financial penalty imposed for an unsuccessful application, rather than a fee for review;[17]

4.21 In its 1999 evidence, DIMA had pointed out that the fee did not meet what they were advised was the legal definition of 'penalty'.[18]

4.22 With regard to practices elsewhere, DIMA contended that in other countries the costs of review are often borne by the applicant regardless of the outcome of the application.[19]

4.23 DIMA also set out the Government view that taxpayers generally should not have to take up an unfair burden of the cost of providing services from which they do not benefit and that:

> it is appropriate to recover costs of unsuccessful RRT applications from the applicants.[20]

4.24 The Committee addressed similar arguments in its previous review of regulation 4.31B and noted that they appeared to reflect the assumption

13 Mr A. Payne, Submissions, p. 14; RACS, Submissions, p. 16; NCCA, p. 35; Ms T Lesses, Submissions, pp. 54-55.
14 KLC, Submissions, p. 124.
15 KLC, Submissions, p.123.
16 KLC, Submissions, p. 124.
17 YLLRC, Submissions, p. 66.
18 *DIMA, 1999 Submissions, pp. 85, 120.*
19 DIMA, Submissions, p. 82.
20 DIMA, Submissions, p. 101.

that the fee must be a penalty if it is to be a deterrent. The Committee did not accept that view.[21]

Conclusion

4.25 The Committee concluded that the fee can deter unmeritorious applicants simply because they are aware of its existence. It need not be a penalty to achieve that result. The Committee therefore did not accept this argument as a reason to discontinue the fee.

Unfair consequences

4.26 A number of submissions argued that, quite apart from whether the fee deterred bona fide applicants, the fee imposed undesirable strains on applicants at a time when they already had heavy burdens such as surviving in strange country and grappling with an unfamiliar legal system which would determine their future.[22]

4.27 The RRT advised that applicants suffering financial hardship could be given priority in the Tribunal.[23] The Committee noted that there was no evidence that the fee had discouraged a person with a *bona fide* belief that they merited a PV from applying for an RRT review.

4.28 Both YLLRC and KLC raised the implications of failing to pay the fee.[24] In the words of YLLRC, the fee:

> operates to make it unjustly difficult for impecunious applicants who are once denied a protection visa from successfully applying to enter Australia by another lawful avenue.[25]

4.29 The Committee's view was that the restriction on re-entry was not unique to regulation 4.31B, and was not absolute. It was possible to re-enter Australia on another visa if the fee was paid, or arrangements had been made to pay the fee. DIMA could therefore grant a subsequent substantive visa to a person who still had a debt to the Commonwealth.[26]

4.30 Since mid-1997 some 715 people liable for the fee have returned to Australia, indicating that they have either paid the fee or made arrangements, acceptable to the Commonwealth, to do so.[27]

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21 JSCM, *Review of Migration Regulation 4.31B*, p. 40.

22 MIA, Submissions, pp 43-44; T Lesses, Submissions, pp. 54-55; ACRMO, Submissions, p. 64; ICJ, Exhibit 1, p. 4; RACS, Evidence, p. 40.

23 RRT, Evidence, p. 28.

24 KLC, Submissions, p. 122.

25 YLLRC, Submissions, p. 66.

26 DIMA, Submissions, p. 84.

27 DIMA Submissions, p. 180.

Conclusion

4.31 The Committee concluded that, because no evidence had been advanced that the fee had dissuaded *bona fide* applicants, there was no reason to remove it. The Committee considered that the restriction on re-entry until the fee had been paid (or arrangements made to pay it) was not unusual or unfair and because this long-term outcome affected only unsuccessful appellants, it was not grounds for removing the fee.

Pragmatic grounds

4.32 The chief pragmatic argument advanced against continuing regulation 4.31B was that that the fee was not (as DIMA claimed):

> a disincentive to *mala fide* applicants proceeding to the RRT.[28]

4.33 MIA itemised a range of *mala fide* applicants and the reasons why they would not be deterred by the possibility of paying the fee,[29] and concluded that:

> Migration Regulation 4.31B is clearly failing to prevent the abuse of the review system… should be repealed.[30]

4.34 As indicated previously, the Committee considered that the available evidence did not support that contention.

4.35 Both YLLRC and MIA contended that many people who become liable for the fee would be unable to pay it.[31] MIA argued that:

> a major consideration for the Government should be the fact that the costs of administering… will far outweigh the small likelihood that these fees will ever be paid.[32]

4.36 DIMA claimed that the Government sought not full:

> but at least partial cost contribution for unsuccessful RRT applicants;[33] and
>
> the amount of the fee…is a secondary question… the most important one is that the fee exists to provide a disincentive.[34]

4.37 Its evidence to the Committee showed that, to 30 June 2000, more than 14,000 people had become liable for the imposition of the fee. In that

28 DIMA, Submissions, p. 110.
29 See Chapter 2 under *Is the fee effective in reducing abuse?*
30 MIA, Submissions, p. 45.
31 YLLRC, Submissions, p. 69; MIA, Submissions, p. 43.
32 MIA, Submissions, p. 43.
33 DIMA, Submissions, p. 79.
34 DIMA, Evidence, p. 6.

period it appeared that the fee had been imposed in more than 4,281 cases and fees totalling $1,318,455 had been paid.[35]

4.38 During 1999/00 DIMA processing of information on 4,252 debts cost approximately $164,900, or $38.78 per debt. The total cost comprised direct costs of $149,900, an estimated $6,000 for Movement Alert List data input and removal, and $9,000 incurred by the RRT in processing information for provision to DIMA. During the same period DIMA recovered $832,600, or five times the cost of administering the fee recovery process.[36]

4.39 It was apparent from the DIMA data that the fee revenue exceeded the collection costs and was increasing rapidly, indicating to the Committee that it would be premature to conclude that the fee was not being paid.

Conclusion

4.40 The Committee concluded that the apparently pragmatic arguments for removing the fee (such as non-payment of the fee, and the cost of collection), could not be sustained.

Exemption of some applicants from the fee

4.41 MIA recommended that illegal arrivals should not be subject to the fee because the abuses it is designed to discourage are not going to be perpetrated by them. Illegal arrivals are in detention, unable to work, and not trying merely to prolong their stay in Australia.[37]

4.42 The Committee felt that this proposal, although similar to others urging that the RRT have discretion to waive the fee, went further by identifying a group who would not be subject to the fee at all. This apparently assumed that there were no *mala fide* applicants among those who arrived illegally, and this had not been demonstrated. The proposal also had the potential to open a loophole whereby *mala fide* applicants would seek to avoid the risk of a fee by arranging an illegal arrival.

Conclusion

4.43 The Committee considered that, as there was no evidence that the fee dissuaded *bona fide* asylum seekers from pursuing review, there was no need to grant exemptions.

35 1,179 fees paid, 3,102 debts outstanding: DIMA, Submissions, pp. 102-3.

36 DIMA, Submissions, p. 180.

37 MIA, Submissions, p. 44.

Retention of Regulation 4.31B (possibly raising the fee)

4.44 Five submissions urged that the fee should be retained. Migration agencies JMVS, MMS and MIA, and Mr Kimberley, in a private submission, recommended the retention of the fee and its possible increase.[38] Mr Downey, also in a private submission argued that it was:

> sound as a disincentive to those who have little or no cause to be considered for the very generous United Nations classification of Refugee.[39]

4.45 DIMA did not seek to increase the fee. However it argued that the sunset provision should be removed from regulation 4.31B because maintaining it, and thus causing the fee to cease to be applicable from 1 July 2001, would:

- send an inappropriate message about the Australian Government's intentions regarding abuse of the protection process to the Australian and international community and to potential *mala fide* applicants;
- result in a reduction in revenue of in excess of $830,000 per annum;
- remove an avenue for partial cost contribution; and
- remove the only element of the 1997 package that impacts at the review stage resulting in an increase in *mala fide* applications.[40]

4.46 DIMA claimed that a decision to maintain a sunset clause would:

> send a message to the Australian and international community that Australia was softening its attitude to misuse of the system;[41]
>
> seen by people smugglers as weakening our approach to these issues.[42]

4.47 The Committee's view was that if retention or abolition of the sunset clause was going to be exploited by people smugglers, then that would have been evident already because of the debate which had been generated by the Committee's previous review and the subsequent continuation of the sunset clause. The Committee was offered no evidence that this had occurred.

4.48 In weighing the revenue effect of the discontinuance of the fee the Committee recalled that the revenue received from fees had been

38 JMVS, Submissions, p. 38; MMS, Submissions, p. 10; G. Kimberley, Submissions, p. 30; MIA, Evidence, p. 63.
39 R. Downey, Submissions, p. 2.
40 DIMA, Submissions, p. 110.
41 DIMA, Evidence, p. 3.
42 DIMA, Evidence, p. 60.

increasing and was expected by DIMA to continue to do so.[43] However, the Committee was mindful that the total revenue over three years was still low, that DIMA had not sought to increase the fee, and that the actual revenue aim of the fee was not to recover costs but:

> at least partial cost contribution.[44]

4.49 The Committee also recalled that the decision to recover only $1000 of the estimated cost of $2,755 per applicant[45] was arbitrary. It was:

> related to the trigger point… for placing persons on our movement alert list…when a decision maker is faced with a further visa application from that person the visa will not be granted unless the debt has been repaid or adequate arrangements have been put in place.[46]

4.50 Further, the requirement to remove a person in Australia without a valid visa took priority over fee recovery, so that the payment of the fee may not be a crucial consideration for DIMA.

4.51 With this background in mind, the Committee did not consider that the revenue implication of removing the fee should be an overriding issue in its deliberations.

4.52 In relation to the expectation that removal of the fee would precipitate a rise in *mala fide* applications, the Committee considered that the evidence *to date* merited serious consideration.

Conclusion

4.53 The Committee noted that DIMA, the authority for collection of the fee, did not propose its increase. The Committee therefore did not pursue that suggestion.

4.54 Conversely, the Committee did not consider that the revenue implication of removing the fee should be a determining issue in the Committee's deliberations.

4.55 For the Committee the central issue was whether the fee had, as intended, acted as a deterrent to abuse of the PV system.

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43 $832,600,in 1999/00 compared with $104,000 in 1997/98, DIMA, Submissions, p. 102.

44 DIMA, Submission, p. 79.

45 DIMA, Evidence, p. 3. The RRT Tribunal is funded pursuant to a Resource Agreement with DIMA and the Department of Finance and Administration which provides funding…per case finalised. RRT, *Annual Report, 1999-2000*, p. 21. www.rrt.gov.au/

46 DIMA, Evidence, p. 4.

4.56 The Committee noted that, because it was considering cohort data, not all 1999/00 applications had been finalised.[47] The practical implication of this was that reliable take-up rates were available for only 'two and a half, maybe three' financial years of the nearly four during which the fee had applied.[48]

4.57 The Committee therefore returned to DIMA's assessment that:

> it is hard to disentangle which part of the package of measures that we have taken over the last eight or 10 years has uniquely contributed to deterring misuse of the asylum system… [but] the post-determination RRT fee…is an important part of the package;[49]
>
> and
>
> in five years time we will have a better idea.[50]

4.58 In the Committee's view, there was insufficient data to either confirm or refute DIMA's claim that:

> whatever the current level of misuse of the RRT is… it would be higher without the fee.[51]

Recommendation 3

4.59 **The Committee recommends that Migration Regulation 4.31B be retained, subject to a two-year sunset clause commencing on 1 July 2001, and that its operation be reviewed by the Committee early in 2003.**

Discontinuance of formal review

4.60 The Committee is aware that the recommendation to review the regulation again was at odds with DIMA's conclusion that future reviews should be undertaken in the normal course of government business. In the Committee's view this proposal did not take into account the Committee's

47 DIMA, Submissions, p. 94.
48 DIMA, Evidence, p. 51.
49 DIMA, Evidence, p. 7.
50 DIMA, Evidence, p. 51.
51 DIMA, Submissions, p. 110.

resolution of appointment , passed by both the House of Representatives and the Senate, which specifically authorises it *inter alia:*

> to inquire into and report upon:
>
> (a) regulations made or proposed to be made under the Migration Act 1958…[52]

52 House of Representatives, *Votes and Proceedings*, Thursday 3 December 1998.

Dissenting report

Introduction

The Committee's 1999 review concluded that:

> regulation 4.31B may have been effective in reducing… abuse, although this is difficult to gauge given the short time that the fee has been in place.[1]

and went on to recommend that a sunset clause be applied to the regulation:

> to allow for a more thorough assessment of its effectiveness.[2]

Subsequently a sunset clause of 1 July 2001 was placed on the regulation, and a further review announced, to take place prior to that date.

The 1999 dissenting report rejected this view because it was completely contrary to (i) the evidence; (ii) the overwhelming proportion of the submissions to the inquiry; (iii) a logical and sustainable refugee determination process; and, most importantly, (iv) justice and fairness for genuine refugee applicants.[3]

On those grounds it was recommended that:

> regulation 4.31B cease to operate after 1 July 1999.[4]

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

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

3 Dissenting Report**,** JSCM, *Review of Migration Regulation 4.31B,* p. 49.

4 Dissenting Report**,** JSCM, *Review of Migration Regulation 4.31B,* p. 59.

The 2001 Review

In 2001 nearly two-thirds of the submissions opposed the regulation and its associated fee. These ranged from private citizens to national and international bodies such as National Council of Churches in Australia (NCCA), the Federation of Ethnic Communities' Councils of Australia, Amnesty International Australia and the Australian Section of the International Commission of Jurists (ICJ). Organisations with expertise in refugee and migration matters such as the Australian Catholic Migrant and Refugee Office (ACMRO), Refugee Advice and Casework Service (Australia) Inc, the Migration Institute of Australia, and the Network for International Protection of Refugees, were opposed to the fee. So too were submissions from the lawyers' organisations, the Young Lawyers' Law Reform Committee and Kingsford Legal Centre (KLC), on behalf of NSW Combined Legal Centres Group.

Impact on genuine refugee applicants

As in 1999, many submissions raised the issue of the hardship caused to applicants by the 'financial intimidation' of the fee.[5] NCCA considered that the existence of the fee placed applicants under pressure to abandon their appeal.[6] ICJ was concerned that the fee added to the trauma of genuine applicants,[7] and the ACMRO argued that they:

> should not be deterred, discouraged, or psychologically impeded from making an appeal to the RRT because of fear of incurring the fee.[8]

KLC provided concrete evidence of the effect of the fee on an asylum seeker:

> from a South Asian country…the victim of a political persecution… an amputee whose disability arose out of an assault perpetrated by a gang of a rival political party. The client had been surviving on charity since arriving in Australia several years ago. Mr X asked the RRT for a one month adjournment as his primary witness was overseas collecting evidence on his behalf. The RRT refused to grant the adjournment stating that due to a high level of

5 Ms T. G. Lesses, Submissions, p. 55.
6 NCCA, Submissions, p. 36.
7 ICJ, Exhibit 1, p. 4
8 ACMRO, Submissions, p. 64.

> document fraud any evidence the witness produced would be the result of corrupt practices anyway. Subsequently the claimant's refugee application before the RRT was refused and a $1000 fee imposed. The claimant was devastated, firstly at the bias displayed by the Member and the lack of natural justice and procedural fairness in determining his refugee application and secondly at the prospect of having to find $1000 within seven days. Mr X was fortunate to have assistance in making an application to the Minister but the case highlights the plight of those who might not have access to legal or other support services and who are denied a "fair go". His reduced mobility, unfamiliarity with the English language, inability to support himself coupled with the treatment at the hands of Australia's immigration officials made a difficult situation worse and prolonged the angst that had begun in his home country when he was bashed for his political beliefs.
>
> In the above case if Mr X is not successful, he will have to pay the post decision fee but what would this be paying for? Would it be for the apparent efficient mode of determination where he has had to wait approximately two years for his case to be heard (all the while leading a hand to mouth existence and being dependent on charity) or would it be for the apparent "fair" and "unbiased" way his application was determined?[9]

The evidence is that the fee is oppressive and the majority should not brush such examples aside.

Conclusion

Regulation 4.31B is designed:

> primarily to address the growing misuse of the PV process by people lawfully in the community.[10]

On the evidence presented to the Committee it is not obvious that there is significant abuse.

In 1999 I was of the view that there was no clear evidence that the fee has contributed to a reduction of abuse in the system.[11]

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9 KLC, Submissions, p. 123.

10 DIMA, Submissions, p. 81.

11 JSCM, *Review of Migration Regulation 4.31B,* p. 54.

Now, two years later, the take-up rates show that the 'positive effects of the fee', which were expected to be:

> seen most clearly in the group of 'low refugee producing' nationalities,[12]

has not occurred.

As the fee is not clearly countering abuse, and has negative effects on applicants who are already under great strain, it should cease to operate.

Recommendation

I recommend that regulation 4.31 B cease to operate after 1 July 2001

Andrew Bartlett

Australian Democrat Senator for Queensland

June 2001

12 DIMA, Submissions, p. 93.

A

Appendix A: Submissions and exhibits

SUBMISSIONS

1 R. Downey

2 Morris Migration Services

3 D. Williamson

4 A. Payne

5 Refugee Advice and Casework Service (Australia) Ltd*

6 A. Herlihy

7 G. Kimberley

8 National Council of Churches in Australia

.9 Justice Migration & Visa Services

10 International Commission of Jurists – Australia Section*

11 Migration Institute of Australia*

12 Refugee Review Tribunal*

13 T. Lesses

14 Amnesty International Australia*

15 Australian Catholic Migration and Refugee Office

16 Young Lawyers Law Reform Committee

17 Federation of Ethnic Communities' Councils of Australia Inc*

18 Department of Immigration and Multicultural Affairs*

19 Kingsford Legal Centre*

* Provided submission in 1999

20 Network For International Protection of Refugees*

21 Refugee Review Tribunal* (Supplementary)

22 Department of Immigration and Multicultural Affairs* (Supplementary)

23 Department of Immigration and Multicultural Affairs* (Supplementary)

24 Refugee Review Tribunal* (Supplementary)

25 Migration Agents Registration Authority

26 Department of Immigration and Multicultural Affairs* (Supplementary)

27 Migration Institute of Australia* (Supplementary)

28 Department of Immigration and Multicultural Affairs* (Supplementary)

EXHIBITS

1 International Commission of Jurists – Australia Section*

* Provided submission in 1999

C

Appendix C: Migration Regulation 4.31B

Regulation 4.31B. Review by the Tribunal-fee and waiver

(1) The fee for review by the Tribunal of an RRT-reviewable decision is $1,000.

(2) The fee is payable:

(a) within 7 days of the time when notice of the decision of the Tribunal is taken to be received by the applicant in accordance with regulation 5.03; or

(b) if subregulation 5.03 (2) applies, within 7 days of the time when notice of the decision is received by the applicant.

(3) However, if:

(a) the Tribunal determines that the applicant for the visa that was the subject of the review is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol-the fee is not payable; and

(b) a fee has been paid under this regulation and, following the Tribunal's determination, the matter in relation to which the fee was paid is remitted by a court for reconsideration by the Tribunal-no further fee is payable under this regulation.

(4) If 2 or more applications for review are combined in accordance with regulation 4.31A, only 1 fee is payable for reviews that result from those applications.

(5) This regulation applies in relation to a review of a decision only if the application for review was made on or after 1 July 1997 and before 1 July 2001.

D

Appendix D: Ministerial guidelines for intervention

The following are the Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s.345/351/391/417/454 of the *Migration Act 1958*.

1 Purpose

1.1 The purpose of these Guidelines is to:

- inform Department of Immigration and Multicultural Affairs officers of the unique or exceptional circumstances in which I may wish to consider exercising my public interest powers under s.345,[1] 351, 391, 417 or 454 of the *Migration Act 1958*, as the case may be, to substitute for a decision of the relevant decision maker, a decision more favourable to the person concerned in a particular case;
- set out the unique or exceptional circumstances in which I may wish to consider exercising those powers;
- inform Department of Immigration and Multicultural Affairs officers of the way in which they should assess whether to refer a particular case to me so that I can decide whether to consider such intervention;
- inform people who may wish to seek exercise of my public interest powers of the form in which a request should be made.

2 Legislative Framework

2.1 I have power, but no duty to consider whether to exercise that power, under sections 345, 351, 391, 417 and 454 of the *Migration Act 1958* (the Act), as the case may be, to substitute a more favourable decision, for a decision of the

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1 Note: MIRO and the IRT will cease operations on 31 May 1999. All references to MIRO and the IRT and the relevant sections of the Act should be read as references to the Migration Review Tribunal (MRT) from 1 June 1999.

Migration Internal Review Office (MIRO),[2] the Immigration Review Tribunal (IRT), the Administrative Appeals Tribunal (AAT) in respect only of IRT or RRT reviewable decisions, or the Refugee Review Tribunal (RRT), if I consider such action to be in the public interest. For example:

2.2 Section 417. Minister may substitute more favourable decision.

417. *(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.* ***...***

The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

3 When the public interest power is not available

3.1 As my public interest powers only allow me to substitute a more favourable decision for a decision of MIRO, the AAT (in respect of an IRT or RRT-reviewable decision) IRT or the RRT, I am not able to use this power until the relevant review authority has made a decision in a particular case. I can not use this power to grant a visa when the review authority has not yet made a decision or when an application to the review authority has not been made.

3.2 Where a decision is quashed or set aside by a Court and the matter is remitted to the decision maker to be decided again, I am not able to use my public interest power as there is no longer a review decision for me to substitute.

3.3 Officers must advise me of the commencement and outcome of Court proceedings challenging a decision in relation to any case that has been referred to me.

3.4 It would not usually be appropriate to consider substitution of a more favourable decision for that of a MIRO officer while an IRT application were in progress. Unusual circumstances would need to be established to suggest that exercise of my public interest power should be considered prior to the IRT making a decision on the matter.

4 Unique or Exceptional Circumstances

4.1 The public interest may be served through the Australian Government responding with care and compassion to the plight of certain individuals in particular circumstances. My public interest powers provide me with a means of doing so.

2 See footnote 1 above.

4.2 Cases may fall within the category of cases where it is in the public interest to intervene if a case officer is satisfied that they involve unique or exceptional circumstances. Whether this is so will depend on various factors and must be assessed by reference to the circumstances of the particular case. The following factors may be relevant, individually or cumulatively, in assessing whether a case involves unique or exceptional circumstances.

4.2.1 Particular circumstances or personal characteristics that provide a sound basis for a significant threat to a person's personal security, human rights or human dignity on return to their country of origin, including:

- persons who may have been refugees at time of departure from their country of origin, but due to changes in their country, are not now refugees; and it would be inhumane to return them to their country of origin because of their subjective fear. For example, a person who has experienced torture or trauma and who is likely to experience further trauma if returned to their country; or
- persons who have been individually subject to a systematic program of harassment or denial of basic rights available to others in their country, but this treatment does not constitute Refugee Convention persecution as it is not sufficiently serious to amount to persecution or has not occurred for a Convention reason;

4.2.2 Substantial grounds for believing a person may be in danger of being subject to torture if required to return to their country of origin, in contravention of the International Convention Against Torture (CAT). Article 3.1 of the Convention provides:

'No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture.'

[Torture is defined by Article 1 of the Convention as follows:

'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.]

4.2.3 Circumstances that may bring Australia's obligations as a signatory to the *Convention on the Rights of the Child* (CROC) into consideration. Article 3 of the Convention provides:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. '[3]

4.2.4 Circumstances that may bring Australia's obligations as a signatory to the *International Covenant on Civil and Political Rights* (ICCP*R)* into consideration. For example:

- the person would, as a necessary and foreseeable consequence of their removal or deportation from Australia, face a real risk of violation of his or her human rights, such as being subject to torture or the death penalty (no matter whether lawfully imposed);
- issues relating to Article 23.1 of the Convention are raised. Article 23.1 provides:

'The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State.'[4]

4.2.5 Circumstances that the legislation could not have anticipated;

4.2.6 Clearly unintended consequences of legislation;

4.2.7 Intended, but in the particular circumstances, particularly unfair or unreasonable, consequences of legislation;

4.2.8 Strong compassionate circumstances such that failure to recognise them would result in irreparable harm and continuing hardship to an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident) or an Australian citizen;

4.2.9 Exceptional economic, scientific, cultural or other benefit to Australia;

4.2.10 The length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community;

4.2.11 The age of the person; or

4.2.12 The health and psychological state of the person.

5 Other Considerations

5.1 Cases identified as involving unique or exceptional circumstances will sometimes raise issues relevant to my consideration of whether or not it may be in the public interest to substitute a more favourable decision in the case. If relevant, countervailing issues that a case officer should draw to my attention include, but are not limited to:

3 Note: This must be balanced against any countervailing considerations.

4 Note: This must be balanced against any countervailing considerations.

5.1.1 Whether the presence or continued presence of the person in Australia would pose a threat to an individual in Australia, Australian society or security or may prejudice Australia's international relations (having regard to Australia's international obligations).

5.1.2 Whether there are character concerns in relation to the individual, particularly in relation to criminal conduct.

5.1.3 Whether the person need not return to the country in which a significant threat to their personal security, human rights or human dignity has occurred or is likely to occur, because they have rights of entry and stay in another country.

5.1.4 Whether the person is likely to face a significant threat to their personal security, human rights or human dignity only if they return to a particular area in their country of origin and they could reasonably locate themselves safely, elsewhere within that country.

5.1.5 The degree to which the person cooperated with the Department and complied with any reporting or other conditions of a visa.

Outcome of my Consideration

5.2 If I decide to consider a person's case I may ask, amongst other things, that certain health and character assessments be made or that an assurance of support or other surety be sought before I make a final decision about whether or not I wish to substitute a more favourable decision.

5.3 I may decide not to substitute a more favourable decision for that of a review authority.

5.4 If I decide to substitute a more favourable decision for that of a review authority, I will grant what I consider to be, in the circumstances, the most appropriate visa.

6 Application of these Guidelines

6.1 I direct that the following procedures be applied to ensure the effective and efficient administration of my powers under s.345, 351, 391, 417 and 454 (hereafter referred to as my public interest powers):

Post-decision procedures

6.2 When a case officer receives notification of an IRT, RRT or AAT[5] decision that is not the most favourable decision for the applicant they are to assess that person's circumstances against these Guidelines and:

5 Concerning a decision otherwise reviewable by the IRT or RRT

- bring the case to my attention in a submission so that I may consider exercising my power because the case falls within the ambit of these Guidelines; OR
- make a file note to the effect that the case does not fall within the ambit of my Guidelines.

6.3 When a MIRO review officer or Tribunal member is of the view that a particular case they have decided may fall within the ambit of these Guidelines they may refer the case to the Department and their views will be brought to my attention using the process outlined in 6.5 below.

- comments by members of review authorities do not constitute an initial 'request' for the purposes of 6.6 below.

Requests for the exercise of my public interest powers

6.4 Requests can be made in writing by the person seeking my intervention, their agents or supporters.

6.5 When a written request for me to exercise my power is received, a case officer is to assess that person's circumstances against these Guidelines and:

- for cases falling within the ambit of these Guidelines, bring the case to my attention in a submission so that I may consider exercising my power; OR
- for cases falling outside the ambit of these Guidelines, bring a short summary of the case in a schedule format to my attention recommending that I not consider exercising my power.

'Repeat' requests for the exercise of public interest powers

6.6 If a written request for me to exercise my public interest powers is received after the case has previously been brought to my attention as the result of a previous request (in a schedule or as a submission) a case officer is to assess the request and:

- for cases then falling within the ambit of these Guidelines, bring the case to my attention as a submission so that I may consider exercising my power; OR
- for cases remaining outside the ambit of these Guidelines (because the letter does not contain additional information or the additional information provided, in combination with the information known previously, does not bring the case within the ambit of these Guidelines) reply on my behalf that I do not wish to consider exercising my power.

No limitation of the Minister's powers

6.7 My ability to exercise my public interest powers is not curtailed in a case brought to my attention in a manner other than that described above.

6.8 Where appropriate, I will seek further information to enable me to make a decision whether to consider exercising, or to exercise, my public interest powers.

6.9 Every person whose case is brought to my attention will be advised of my decision, whether it is a decision to refuse to consider exercising my public interest powers or a decision following consideration of the exercise of those powers.

7 Removal Policy

7.1 Section 198 of the Act, broadly speaking, requires the removal of unlawful non-citizen detainees who are not either holding or applying for a visa. A request for me to exercise one of my public interest powers is not an application for a visa and, unless the request leads to grant of a bridging visa, such a request has no effect on the removal provisions.

PHILIP RUDDOCK MP

31 MARCH 1999