Dissenting Report—Dr Andrew Theophanous MP

Introduction

The recommendation of the majority to retain the $1,000 fee is 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.

Nearly every major organisation of note was opposed to the fee and wanted its abolition. Distinguished bodies such as the Australian Human Rights and Equal Opportunity Commission and the International Commission of Jurists were strongly opposed to the fee. Bodies representative of the ethnic communities, such as the Federation of Ethnic Communities' Councils of Australia, and bodies representative of refugees themselves, such as the Refugee Council of Australia, were also strongly opposed. In addition, the following organisations which made submissions were opposed:

- Tribal Refugee Welfare of Western Australia
- Kingsford Legal Centre
- Amnesty International Australia
- Refugee Advice and Casework Service (Australia)
- Campbelltown Legal Centre
- Migration Institute of Australia
- Refugee and Immigration Legal Centre
- Network for International Protection of Refugees
- The Australian Family Party
- Immigration Advice and Rights Centre
- Adelaide Justice Coalition

In fact, DIMA was about the only body which supported the retention of the fee. But as we explain here, their argument was often confused and contradictory. Their factual claims were certainly not persuasive.

The most disturbing thing about DIMA's submissions and evidence was their complete failure to accept that there are people who fail in the RRT process, but who may be genuine refugee and humanitarian claimants. Of course, there are vexatious and non-genuine applicants; but the department made no attempt to find a solution which would differentiate these from genuine claimants. This point is summed up well in the submission from the Refugee Council of Australia:

> Migration Regulation 4.31B was introduced as part of a series of measures to target perceived "abuse" of the protection visa process. Official statements about this abuse tend to be very black and white - either a person is a Convention refugee or they are abusing the system. RCOA would argue that the reality is more complex and there are many reasons and motivations behind applications for refugee status. These include:
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> - people with a well founded fear of returning to their country of origin on grounds consistent with the 1951 Convention Relating to the Status of Refugees;
> - people with well founded fears of returning to their country for non-Convention reasons, such as the fact that their country is in a state of civil war and they fear generalised violence;
> - people with compelling family or medical (eg a condition for which treatment does not exist in their country) reasons to remain in Australia which properly ought to be brought to the Minister's attention;
> - people who have no reason not to return other than a desire to extend their stay and who have sought advice from agents who have promised them a "work visa" (usually at considerable expense). Commonly in such cases the applicant had no notion that this hinged on an application for a protection visa or that their conduct was in fact abusive;
> - people wishing to extend their stay in Australia (for economic or lifestyle reasons) and who apply for a protection visa knowing full well that it is not applicable to them.
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> Of the above, it could be said that only one group (the first) has legitimate "refugee based" reasons to apply. It can be argued too that only one group (the last) is knowingly abusing the system. [1]

As the Refugee Council points out, people in the second and third group are genuine applicants - people who believe that they have genuine refugee and/or humanitarian reasons to apply under this process. Yet it is these genuine applicants who are most affected by the fee. As the evidence shows, ‘shonky’ applicants simply leave Australia and do not pay. On the other hand, genuine

1 ROCA, *Submissions*, pp. S6-7.

applicants (who should not be penalised) are the ones who bear the burden. As the Refugee Council says:

> Our concerns with regard to the decision fee are as follows:
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> - the fact that a person found to be a refugee does not have to pay the fee does not mean that he/she is not affected by it. It is our experience that most refugees survive the determination period in a state of penury - often amounting to destitution. They are not eligible for welfare payments and because of their background (torture/trauma, poor English, lack of community contacts) are unable to work. Add to this their fear that their story will not be believed (as it was not at the primary stage). The prospect of having to pay the fee, plus the knowledge that there is no way he/she can, combined with the fear of "doing the wrong thing" all add up to a debilitating psychological cocktail that imposes yet another stress on an already traumatised person during the determination process;
> - those rejected by the Refugee Review Tribunal but who have genuine fears of returning often fit the profile outlined above AND the actuality of having to pay the $1,000.
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> It is true that if a person is required to pay the fee and cannot, they can simply leave the country and a debt to the Commonwealth will be recorded against them. This may be of no consequence if:
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> - the person has no reason ever to return;
> - has no scruples about incurring this debt.
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> If, on the other hand, the person wishes to return (eg they have family here) or does not want to "do the wrong thing", they have to find a way to pay. People working with such applicants report that they will often go to extraordinary lengths to secure the funds eg borrowing money and/or the families feel obliged to pay (even though the families are often struggling themselves).[2]

There are also a number of important counter-arguments to the claims in the majority report, and to their recommendation that the fee be retained:

Abuse in the system

Despite the views of DIMA and the majority, we do not regard most refugee applicants as trying to abuse the system. The department and the majority apparently regard the success rate at the RRT - 10% - as an indication that many applicants are not genuine. Their conclusion, however, is mistaken. People can be *bona fide* applicants even if they are refused a protection visa, because the Refugees Convention is quite limited. As the Refugee Council of Australia explained:

2 ROCA, *Submissions*, p. S8.

> The definition of refugee status is incredibly narrow, and the people who fit the criteria are not necessarily all of those people who have very good reasons to fear returning to their country of origin. For instance, the Refugee Convention does not cover people from countries like Somalia and Algeria, who could be victims of generalised violence. It allows people to be returned to countries where there is no rule of law and where there is generalised violence.[3]

In addition, some people are applying for protection visas not because they are trying to abuse the system, but because they have little or no access to proper advice. Migration agents are expensive and free legal advice has been severely curtailed.[4] In those circumstances, it is no surprise that some are applying for protection visas even if they are not eligible. All that regulation 4.31B does is to expose these people to a $1,000 debt.

The actions of some immigration agents in this matter need to be scrutinized. Yet there is no recommendation from the majority in relation to this issue. The Refugee Council's recommendation that 'increased measures [be] taken to curtail the activities of unscrupulous migration agents who inappropriately lodge protection visa applications on behalf of their client'[5] should have been given serious consideration.

Effectiveness of the fee

The weight of evidence was against DIMA. Virtually every other organisation questioned whether the fee had been successful. The Migration Institute of Australia, for example, reported feedback from members there had 'not been even a single case known…in which the prospect of the $1,000 penalty was even a relevant consideration when clients were deciding whether or not to apply for a review.'[6] The RRT noted that the flow-on rate had risen significantly; and stated that, if the fee were effective, there should also have been a rise in the withdrawal rate for review applicants. This rise had not occurred.[7] The Refugee Council of Australia, moreover, pointed out that refugee application numbers had been falling internationally and suggested that this might explain the drop in primary and review applications.[8] It explained the point in this way:

3 ROCA, *Transcript*, pp. 64-65.
4 Campbelltown Legal Centre, *Submissions*, p. S36.
5 ROCA, *Submissions*, p. S9.
6 Migration Institute of Australia, *Submissions*, p. S40.
7 RRT, *Submissions*, pp. S10-11.
8 ROCA, *Submissions*, p. S9.

> In 1996 all bar two European states (the exceptions being Ireland and Poland) saw a reduction in application rates. In some cases the fall was marked - 62.5% in Italy, 45% in Portugal, 43% in Sweden and 30% in the Netherlands - and there were no major policy changes that would explain the fall. It is thus not unreasonable to expect that a similar reduction in the number of people applying for refugee status would be witnessed in Australia - unless of course there has been a major regional upheaval - which there has not.[9]

Given such views, we believed that it was incumbent upon DIMA to provide compelling evidence that the fee had worked. This it failed to do. For example, the only evidence suggesting that the fee had affected primary applicants was the reduction in numbers. However, DIMA never satisfactorily explained how an RRT post-decision fee could lead to a drop in primary applications; nor did it even attempt to address the point made by the Refugee Council about international trends.

DIMA's evidence on review applicants was even weaker. It made no attempt to explain the steady rate of withdrawals before and after 1 July 1997; and its contention that the flow-on rate for certain countries had fallen was inconsistent with the evidence of the RRT and the Refugee Council. These organisations showed that the flow-on rate had increased markedly since the fee had been introduced.[10] This in turn suggested that the fee had not made a significant impact on unmeritorious review applicants.

It is worth noting that DIMA made no less than three attempts to provide the Committee with figures about the reduced flow-on rate for so-called 'low refugee producing' countries.[11] Even on its third attempt, its statistics were hardly convincing. The flow-on rate for these countries remained steady in 1997-98 and there appeared to be a trifling 2.5% decrease during this financial year. It is apparent that the size of the decrease and the short timeframe in which it occurred makes it difficult to assess whether the fee has been effective. Yet this was DIMA's strongest evidence.

There are other flaws in the department's evidence. As DIMA conceded in its first submission, it was difficult to separate the impact of the fee on applicants from the impact of other elements in the package.[12] Nonetheless, it maintained that it was reasonable to infer that the fee, as an integral part of that package, had contributed to a reduction in abuse.[13]

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9 ROCA, *Submissions*, p. S9.

10 RRT, *Submissions*, p. S10; ROCA, *Submissions*, p. S107.

11 See DIMA, *Submissions*, p. S81, S179; Exhibit 2, Part A.

12 DIMA, *Submissions*, p. S79.

13 DIMA, *Submissions*, p. S84.

This argument, however, simply begged the question. The fact that the rest of the package may have achieved its aims did not logically mean that the fee had been an effective deterrent. It was possible that streamlined processing and the 45 day limit for work rights might have been responsible for any reduction in abuse. For DIMA to assert the contrary was fallacious.

Furthermore, DIMA's approach seemed to be contradictory. On the one hand, it claimed that many refugee applicants had the potential to pay the fee;[14] on the other, it claimed that the fee was a financial deterrent to abusers of the system. If most applicants really can afford the $1,000, how can it be an effective deterrent? This is a question the department never seems to have asked, let alone answered.

In our view, there is no clear evidence that the fee has contributed to a reduction of abuse in the system.

Impact on genuine refugee applicants

That the fee could deter genuine applicants from applying was clear to a number of organisations. Amnesty International considered that the imposition of the fee effectively impeded "the right of all applicants to seek and enjoy in other countries asylum from persecution…by deterring asylum seekers from appealing negative decisions."[15]

The Kingsford Legal Centre explained the fee's potential to deter genuine applicants in these terms:

> Asylum seekers with strong grounds for appeal may be deterred out of fear that despite their genuine claim for asylum, the Tribunal may rule against them, therefore exposing the asylum seeker to a significant debt. The fact that many asylum seekers already live in poverty intensifies this fear of debt.[16]

The Campbelltown Legal Centre, moreover, gave detailed reasons why the fee could deter genuine applicants.[17] It noted that asylum seekers faced myriad pressures in deciding whether to appeal to the RRT. They were confronted with a complex body of law concerning refugee status; they did not have enough income to obtain private legal assistance; their English skills were poor; and access to free legal services and advice was extremely limited. These difficulties already made it easy for meritorious claims to be abandoned. The fee simply piled more pressure upon applicants to abandon their applications:

> The additional barrier of a $1,000.00 post decision fee can only add weight to a decision to abandon their application. Given the

14 DIMA, *Submissions,* pp. S92-94.

15 Amnesty International Australia, *Submissions,* p. S25.

16 Kingsford Legal Centre, *Submission,* p. S15.

17 Campbelltown Legal Centre, *Submissions,* p. S36

> environment from which these applicants have come to Australia, many are fearful of government and of the prospect of what will happen if they are unsuccessful and they then cannot afford to pay the post-decision fee.[18]

Clearly, as these organisations demonstrated, there are powerful reasons for believing that the fee has the potential to deter applicants, despite DIMA's claims to the contrary.

Imposing unfair burdens on genuine applicants

Linked to the potential of the fee to deter applicants is its capacity to cause hardship. There was plain, concrete evidence that regulation 4.31B had distressed and traumatised some asylum seekers. The Immigration Advice and Rights Centre and the Australian Section of the International Commission of Jurists (ASICJ) each provided the Committee with examples of families hurt by the fee.[19] It is appropriate to quote two such examples. The first is from ASICJ:

> **Ms Biok** - I have had a family of Sri Lankan refugee applicants and I would class them as genuine refugees…The parents were here, the father was very severely traumatised after extensive torture at the hands of the Sri Lankan police. Their case was rejected very quickly by the department and went on to the RRT. As their legal representative, I had to inform them of the $1,000 fee. At this stage the father was working in a factory, the family was finding it very difficult to meet their financial needs and it did cause them incredible concern. As we prepared the RRT application and prior to the hearing I had to convince them again and again that if they were successful they would not have to pay the $1,000. In fact, in their mind it had almost become that the $1,000 was an application fee that you had to pay because they were so confused and distressed that they just were not listening carefully.[20]

The second is from the Immigration Advice and Rights Centre:

> Mr X had applied to the RRT after the introduction of Regulation 4.31B and was therefore subject to the payment of the $1000 fee. Mr X was originally from one of the Pacific Islands. He arrived in Australia in January 1995 and applied for refugee status without really understanding the nature of the application. He married an Australian citizen in 1997 and two Australian citizen children were born. Refused by the Department of Immigration at primary

18 Campbelltown Legal Centre, *Submissions*, p. S36.

19 IARC, *Submissions*, p. S62; ASICJ, *Transcript*, p. 85.

20 ASICJ, *Transcript*, p. 85.

> application stage, he made his own application to the Refugee Review Tribunal. IARC undertook to act for Mr X, following his unsuccessful RRT application and his submission to the Minister for Immigration pursuant to section 417 of the Migration Act.
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> IARC advised Mr X that the only way for him to live with his wife and children in Australia was for him to leave Australia and make an application for a spouse visa from Fiji, sponsored by his Australian citizen wife. During his time in Australia Mr X was in employment and totally financially supporting his wife and children. As advised, Mr X left Australia and lodged his application for a spouse visa in Fiji.
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> During the period of enforced separation, the Australian family of three were without the salary of their husband and father, and for the first time, needed the financial support of the Australian social security system. Both young Australian citizen children suffered from a serious asthma condition and each required hospitalisation on a regular basis. The Australian mother was so distraught and stressed that she herself needed to access community nursing and support services to assist her to cope during this difficult time. The financial burden on the Australian community for the support of a vulnerable young Australian family, deprived of husband, father and bread-winner was heavy and grew heavier.
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> The spouse visa application was accorded high priority by the Australian Embassy but even so took close to a nine months to finalise. In pursuit of the $1000 the young Fijian husband spent some time raising money through loans from friends and family which further delayed his return.
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> The visa would not be granted until Mr X (paid) entered into an instalment plan to repay the debt.[21]

These examples illustrate the oppressive impact of the fee on refugee applicants. In our view, it is unfair of the majority to brush such examples aside and pretend they do not exist.

International obligations

The bulk of legal advice pointed out that regulation 4.31B breached Australia's international legal obligations. The Human Rights and Equal Opportunity Commission (HREOC), for example, stated that the fee breached our obligation of non-refoulement. Among other things, this obligation required Australia to

21 IARC, *Submissions*, pp. S62-S63.

provide an accessible, effective procedure for determining whether a person was a refugee. The fee impeded access to such a procedure:

> Access to this effective procedure cannot be made to depend upon the capacity of the applicant to pay. Nor can it be discouraged [by] being made subject to a penalty in the event that the applicant has misapprehended his or her situation in light of the Refugee Convention definition or has been unable to muster the evidence required to establish his or her case.
>
> Yet this is the effect of *Migration Regulation* 4.31B.[22]

Amnesty International[23] and the Refugee and Immigration Legal Centre (RILC) reached virtually the same conclusions, the later labelling the fee "another unacceptable imposition upon Australia's obligation to provide an accessible refugee determination process."[24]

ASICJ showed that the fee breached the right to equality before the law. This right was enshrined in Article 7 of the Universal Declaration of Human Rights and Article 26 of the ICCPR.[25] Article 26 provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status.

For ASICJ, regulation 4.31B imposed "structural discrimination" against asylum seekers, thereby violating their right to legal equality.[26]

The Campbelltown Legal Centre and the Kingsford Legal Centre also advised that the fee was discriminatory.[27]

In the face of this overwhelming evidence, DIMA offered contrary advice from just one body: the Attorney-General's Department. Unfortunately, advice from that source has sometimes proven inaccurate, to Australia's cost. As the Deputy Chair noted in an exchange with the Deputy Secretary of the department:

> **Senator McKiernan** - The advice that has been gained or tendered…has in recent times been seen to be wrong.

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22 HREOC, *Submissions*, pp. S19-20.

23 Amnesty International Australia, *Submissions*, p. S25.

24 RILC, *Submissions*, p. S47.

25 ASICJ, *Submissions*, p. S56.

26 ASICJ, *Submissions*, p. S56.

27 Kingsford Legal Centre, *Submissions*, p. S16; Campbelltown Legal Centre, *Submissions*, p. S37.

> Consequently, we, the people of Australia, and the Parliament of Australia, have got egg on our faces.[28]

It will only compound the embarrassment to this nation if we keep in place a fee that discriminates against refugees and breaches international law.

Alternatives to the fee

The majority skips too quickly to the conclusion that none of the alternatives to the fee are viable. Although some of the proposals canvassed in the evidence would be undesirable or impractical, two should have been given much greater consideration by the majority.

The first was the proposal to restrict the $1,000 fee to vexatious or abusive applicants.[29] Australia's Human Rights and Equal Opportunity Commission said in its submission:

> *Migration Regulation* 4.31B is much too blunt an instrument…and will deny to many genuine claimants their entitlement to an effective procedure and to non-refoulement.
>
> If the Government is concerned that some applicants to the RRT are 'unmeritorious' or 'abusing the system' the appropriate response is not to penalise all unsuccessful applicants, as the present Regulation does, but to give the Tribunal discretion to impose a fee where it finds that an application is vexatious or an abuse of process.[30]

The Refugee and Immigration Legal Centre gave compelling reasons why such a change would not provide unmeritorious applicants with more time in Australia. It explained that an RRT decision to impose the fee would not affect a person's migration status, and noted that such decisions could be excluded from judicial review under the Migration Act.[31]

Unfortunately, neither DIMA nor the majority took this option seriously. Instead, they devoted much time to denying that the fee was a penalty. Regulation 4.31B, however, is a penalty in all but the narrowest legal sense. It applies only to those who fail to be granted protection visas, and no one else. In those circumstances, it is fair to regard the $1,000 as a penalty, not as a general fee.

The second proposal concerned the creation of an onshore humanitarian stream. The Refugee Council of Australia and ASICJ both made it clear that Australia was

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28 Senator McKiernan, *Transcript*, pp. 107-108.

29 HREOC, *Submissions*, p. S21; RILC, *Submissions*, p. S51

30 HREOC, *Submissions*, p. S21.

31 RILC, *Transcript*, pp.54-55.

one of the few countries without an onshore humanitarian visa.[32] They added that its absence forced humanitarian applicants to apply as refugees in the hope that they could access the minister's intervention power. The result was to overburden the refugee determination system and to expose applicants to the $1,000.

DIMA alleged that the introduction of an onshore humanitarian visa would create insuperable difficulties. Yet the fact the most European countries and Canada have such as system indicates that the problems can be overcome. It would be incredible to think that other countries could manage successfully but Australia could not. This, however, seems to be the upshot of DIMA's argument.

In our opinion, limiting the fee to vexatious applicants and creating a humanitarian visa are much preferable alternatives to regulation 4.31B. In combination, they have the advantages of reducing the number of applicants for refugee status, acknowledging that people have reasons for staying beyond Convention grounds, and avoiding harm to refugees. They deserve the government's serious consideration, not a brusque dismissal.

Conclusion

In the absence of the government and the department being prepared to take these alternatives seriously we believe that the only humane and rational course is to follow our recommendation as follows:

Recommendation 1

We recommend that the regulation 4.31B cease to operate after 1 July 1999.

DR ANDREW THEOPHANOUS MP

MR BERNIE RIPOLL MP

MRS JULIA IRWIN MP

SENATOR ANDREW BARTLETT

May 1999

32 ROCA, *Transcript*, p. 74; ASICJ, *Transcript*, p. 90.