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JOINT COMMITTEE ON MIGRATION

Reference: Review of migration regulation 4.31B

FRIDAY, 26 FEBRUARY 1999

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JOINT COMMITTEE ON MIGRATION

Friday, 26 February 1999

Members: Mrs Gallus *(Chair)*, Mr Baird, Mrs Irwin, Mrs May, Mr Ripoll and Dr Theophanous and Senators Bartlett, Eggleston, McKiernan and Tierney

Senators and members in attendance: Senator McKiernan and Mrs Gallus, Mrs Irwin, Mrs May, Mr Ripoll and Dr Theophanous

Terms of reference for the inquiry:

Review of Migration Regulation 4.31B

WITNESSES

BEDLINGTON, Ms Jennifer, First Assistant Secretary, Refugee and Humanitarian Division, Department of Immigration and Multicultural Affairs 1

GARDNER, Mrs Grace Mary, Adelaide Justice Coalition 43

GRAYDON, Ms Carolyn Julie, Solicitor, Refugee and Immigration Legal Centre . . 51

ILLINGWORTH, Mr Robert, Branch Head, Onshore Protection and Review, Refugee and Humanitarian Division, Department of Immigration and Multicultural Affairs 1

LEKAKIS, Mr George, Deputy Chairperson, Federation of Ethnic Communities Councils of Australia Inc., and Chairperson, Ethnic Communities Council of Victoria Inc. 33

NYGH, Dr Peter Edward, Principal Member, Refugee Review Tribunal 25

SULLIVAN, Mr Mark, Deputy Secretary, Department of Immigration and Multicultural Affairs 1

TOOHEY, Ms Jill Frances, Registrar, Refugee Review Tribunal 25

Committee met at 1.03 p.m.

BEDLINGTON, Ms Jennifer, First Assistant Secretary, Refugee and Humanitarian Division, Department of Immigration and Multicultural Affairs

ILLINGWORTH, Mr Robert, Branch Head, Onshore Protection and Review, Refugee and Humanitarian Division, Department of Immigration and Multicultural Affairs

SULLIVAN, Mr Mark, Deputy Secretary, Department of Immigration and Multicultural Affairs

CHAIR—I now open the public hearing for the committee's inquiry into Migration Regulation 4.31B. This matter was first referred to the committee on 6 January 1999. Senator McKiernan, I think you had better take over before I disappear altogether.

Senator McKIERNAN—Very brave, Madam Chair. Regulation 4.31B imposes a $1,000 post-decision fee on unsuccessful applicants to the Refugee Review Tribunal. This regulation was introduced on 1 July 1997, along with a package of other measures designed to curb abuse in the refugee application process. When the regulation was introduced, the government and the opposition agreed that it would be subject to a sunset clause and that the government would ask the Joint Standing Committee on Migration to review the provision. The current inquiry is in response to that undertaking.

During this inquiry the committee will examine issues such as the impact of the fee on genuine asylum seekers, its effectiveness, and possible alternatives to the fee. At this hearing, members will hear evidence from the Department of Immigration and Multicultural Affairs, the Refugee Review Tribunal, and community organisations involved in refugee issues. If you would like further details about the inquiry, please feel free to ask any of the committee staff here at the hearing.

I welcome witnesses from the Department of Immigration and Multicultural Affairs. Although the committee does not require witnesses to give evidence under oath, you should understand that these proceedings are legal proceedings of the parliament and warrant the same respect as proceedings of the parliament itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Are there any corrections or amendments you would like to make to your submission and is the submission in any way different from the draft submission that was earlier supplied to the committee?

Mr Sullivan—There are no amendments we wish to make. There are some minor changes between the draft that you received and the final. Those changes do not go to any of the substance of the submission, they are to some of the tables and someone can point those out to the staff here. I do not think that if anyone has read the first submission that there is anything in the second submission that would worry them.

Senator McKIERNAN—Thank you for your attendance here. Before I invite members of the committee to ask questions, I invite you to make an opening statement.

Mr Sullivan—As always, it is a pleasure for the department to appear before this committee on whatever matter, and at this time on the $1,000 post-decision fee charged to failed applicants to the Refugee Review Tribunal. The government remains strongly committed to meeting its international obligations as defined by the Convention Relating to Refugees. The introduction of the $1,000 post-decision RRT fee was one of a parcel of measures proposed for reducing the abuse or misuse of the protection visa system by people lodging applications for visas or review knowing their claims to be unfounded simply to gain the benefit of an extended stay in Australia during the processing period. The fee does not apply to those persons determined by the RRT to be a refugee. The fee is payable only after the RRT has made a decision and found that an applicant is not a refugee; it is not an application fee. The fee is waived or refunded where the individual is subject to the minister's intervention.

The other measures that went with this measure were: the restriction of permission to work for those protection visa applicants who at the time of application have been in Australia for less than 45 days; the implementation of a more strategic approach to managing the processing of protection visa applications, giving a greater priority to processing straightforward applications; and, using more streamlined processing methods. The data we have collected and incorporated in our submission show that the changes are having the desired effect, but there is still substantial abuse or misuse of the review system. In general, since the introduction of the changes the number of primary and review applications from low refugee producing nations has decreased, whilst the number of applications from high refugee producing nations has remained steady. Similarly, the flow-on rates for the RRT from low refugee producing nations have in general decreased, whilst the flow-on rates from high refugee producing nations have remained steady. This shows a tendency towards fewer abusive review applications without there being any apparent deterrents of bona fide applicants.

The $1,000 fee falls well short of cost recovery. It is open to the government to review and alter policy and regulations as part of its usual business. This reference on this sunset clause serves a useful purpose and we believe that no useful purpose would be served by attaching a further sunset clause to regulation 4.31B or by establishing a requirement that the fee be reviewed again in such a formal manner. We are happy to answer any questions, Madam Chair.

CHAIR—I have actually handed over to Senator McKiernan at the moment. I can come in with any questions at the end.

Senator McKIERNAN—The definition of 'abuse', could you put a definition on that? Would you say it is abuse by somebody who has no thought of success in a refugee application but who merely wants to remain in Australia and makes an application for refugee status in order to do so? Would you categorise that as abuse?

Mr Sullivan—I think in that case, yes, we would. I think it was before a legal and constitutional affairs committee that we suggested what we felt was abuse of the system. If I can use the words I used then, 'A person who applies for a protection visa, knowing that they are seeking not protection but the coverage of what a protection visa in process offers them is committing an abuse.' It does not include people who make applications for

protection in good faith. So we are not saying that a failed asylum seeker before the RRT is necessarily abusing the system, but the person who goes down the protection application route, knowing they are not a refugee but seeing the advantage of the process, is abusing the system.

Senator McKIERNAN—You have offered quite a number of statistics in the submission. Have you come down to a definite or finite number: the numbers of people the department think have abused the system in the past 12 or 18 months since this provision has been in existence? You are not saying everybody who failed in the review process has been abusing it, but out of that number can you come down to a percentage figure?

Mr Sullivan—We have never tried to do that. What we still say is that in the very, very rapid expansion of applications for protection that have occurred over the last seven or eight years in Australia we see great numbers of applications from persons from countries for which, in our experience—an international experience—successful refugee applications are rarely made. That is point 1. Anecdotally, and I cannot give a number, we strike cases of people who are involved in an abuse of the system but whom we believe are involved in that abuse probably unwittingly at the suggestion or under the guidance of persons offering advice to them as to how they may remain in Australia. That advice may be from a person who is a registered migration agent or it may be from a person who is not a registered migration agent. Certainly, we strike numbers of people who, when we talk to them, or even when they appear before justices of the Federal Court—as there was a particular case not long ago before Justice Wilcox—the individual involved does not know they have applied for refugee status. In this instance, they did not know that they had gone to a Refugee Review Tribunal to determine whether or not they were a refugee and did not know they were in a Federal Court hoping to convince the Federal Court that they were a refugee. They thought that they were here looking for some form of temporary work visa. So there is a lot of anecdotal evidence.

I think the most compelling evidence that there is abuse in the system—but we will never label anyone as abusing the system—is the fact of this preponderance of applications coming from nationals of countries where the overwhelming experience is that refugee claims are not well founded. With the introduction of the package of measures, including the $1,000 fee, what we are seeing, and what the statistics are telling us, is a fall off in the primary application rate.

If you ask what impact that has had, as opposed to another part of the package, overall we have seen a fall off in primary applications from nationals of countries where we were not seeing refugees produced from. We are seeing a holding up in numbers of applications for refugee status from countries where we do see a high incidence of refugee claims being founded, and we see that carrying through into the Refugee Review Tribunal statistics. I am not sure whether it has taken abusers out of the system, but it certainly has taken a lot of applicants out of the system from countries you would not expect to find refugees from.

Senator McKIERNAN—In terms of the numbers who are now not applying from those countries which you would not naturally get successful refugee applications, what has that done to this process within the tribunal itself? Has it served to speed up the decision making within the tribunal, or would that be a better question put on notice for the tribunal itself?

Has the department got a view on that, because it invariably will be one that we will ask the tribunal when they appear?

Mr Sullivan—I think we do have a view on it and the tribunal will say that they are dealing with the backlog and they are working their way through it. Their annual report last year shows a marked success in working through that backlog. What we are saying is that with the impact these measures are having on applicants at the primary stage a number of things are happening: firstly, fewer people are applying, and that has an impact on us and has a flow-on impact to the RRT; and, secondly, the procedures that have been in place to recognise applications that are manifestly unfounded and to deal rapidly with applications that are undetailed means that the prospect of spending a lot of time in Australia while you go through a protection visa application process is diminished. That is again having a roll-on effect to both us and the RRT.

Senator McKIERNAN—And, of course, to successful applications. I want to address some questions on what you put forward on migration agents, but I am going to leave that for the moment and come back to it because I think that is an important factor you have just alluded to.

Ms MAY—In your submission you made reference to raising the fee. I would like to know what level you were thinking of raising it to, or you would suggest raising it to, and what sorts of difficulties that could impose on genuine asylum seekers who may not have any further means, if you like, if you raise that fee. What sorts of difficulties is this going to cause?

Mr Sullivan—The whole design of this fee regime is to not impose a barrier on anyone applying for refugee status or anyone applying for the review of their refugee status. So, for a person who believes themselves to be a refugee, there is no financial pecuniary barrier put in their way to applying. This fee is imposed only if that review application is successful and then they do not seek judicial review and see the matter remitted back to the Review Tribunal—if they do that, we waive the fee—or they do not see the matter considered by the minister, as all failed RRT cases are considered, for his possible personal intervention. If he does that, they do not pay.

The point we make is that to process a refugee claim in Australia is an expensive business; $1,000 goes little towards cost recovery. By the time you go through primary processing and Refugee Review Tribunal processing, the cost of an application is significantly higher than the $1,000. We make the point that the $1,000 fee, in respect of someone who may be in Australia and applying for a protection visa with a view to securing work rights, equates to about 1½ weeks average weekly earnings, while that person going through that process has allowed them access to the Australian labour market, even with our more streamlined processing now, for up to a year, and in the past maybe up to two or three years. So in saying that we are only dealing with people who are found not to be refugees—we are looking at an average cost of processing of around $1,800 and we are looking at the relativity of $1,000 to what we believe some of those who misuse the system are really about, and that is access to the labour market—$1,000 doesn't seem to be very high. This in no way should be seen, and is not, as a penalty and it should not be seen as a pecuniary form of tax or anything on the individual. Certainly, that ceiling of $1,800, being the average

processing cost of such an application, is a valid guide to what levels of fee we would see as being appropriate.

Ms MAY—What sort of revenue has been raised to date by the government?

Mr Sullivan—Revenue in terms of revenue that is put on the books—that is, how many $1,000 fees have been levied—is very high; revenue as in terms of cash in the Commonwealth's hands is somewhat less than impressive a number. I think we have imposed 3,259 fees. On my working out, that is $3.259 million in revenue that has been technically raised. We have had $328,000 in fees paid to us.

Dr THEOPHANOUS—What happened to all the rest of them?

Mr Sullivan—People have not paid. A debt has been raised against them by the Commonwealth and that remains an outstanding debt.

Dr THEOPHANOUS—What is that—90 per cent?

Mr Sullivan—Yes.

Ms MAY—But they would be on the MAL list now?

Mr Sullivan—With a person who has a debt against the Commonwealth, and particularly one which has been imposed by us, we go through a normal debt collection regime; that is, they get a notice of the debt, and then they get a reminder of the debt. If they have not paid after the reminder, we pursue the debt and place that person on the Movement Alert List. The greatest disincentive about having such a debt to the Commonwealth is that in the public interest criteria that apply to all temporary and permanent resident visa classes, the fact of a debt to the Commonwealth becomes relevant. You need to clear the debt if you are going to attempt to stay or enter Australia under another valid visa.

Senator McKIERNAN—Seeing that you have had legal advice that a debt is not a penalty, is it possible to get a copy of that legal advice?

Mr Sullivan—I will take it on notice.

Mrs IRWIN—It has been suggested that, instead of targeting genuine asylum seekers, the department should focus on the unscrupulous migration agents, and there are quite a few of them around, especially in my electorate. How much of the abuse in the refugee determination process can be attributed to unscrupulous migration agents and what action is the department taking against such people?

Mr Sullivan—Again, it is very, very hard to pin down specific numbers here. We know a number of things. We see an increasing proportion of the refugee caseload being assisted—I think it has moved from something around 30 per cent towards 50 per cent of people telling us that in the processing of their refugee applications they are being assisted. A lot of that assistance comes from thoroughly reputable persons who are in the migration industry operating as registered migration agents and pursuing further assistance for asylum seekers.

So we see more people being assisted. We also see these cases whereby persons do not know they are applying for refugee status or we see evidence that they have paid a lot of money with the intention of staying in Australia and they are not sure what their adviser has done for them—some are somewhat surprised sometimes when they discover that they have been claiming refugee status.

Dr THEOPHANOUS—What do you do in that sort of case?

Mr Sullivan—When those cases come to our notice, if the person is not a registered migration agent we investigate it. The easiest charge against a person who is not a registered migration agent offering such advice is for unregistered practice. That is the easiest thing to prove. You only have to establish, 'Did you offer advice? Were you registered?' That is where we investigate and where we concentrate our efforts. It is easier to prove that than the fee being charged is exorbitant. In some respects as long as the agent has told the person what they are going to do and what they are going to charge them, technically if the person accepts that contract, that is their business. If the person is a registered migration agent, that matter is referred to the Migration Agents Registration Authority. The Migration Agents Registration Authority will investigate the complaint and as a result of that investigation an agent may be suspended or an agent's licence may be cancelled.

The other thing in the code of conduct under the Migration Agents Registration Authority, MARA, is that an agent should not be involved in a vexatious application and we refer cases to MARA in respect of agents who we believe have lodged vexatious applications. To a degree, the migration industry and agents have still got a lot of work to do to establish themselves as a profession which has the sort of respect that the profession is expected to have. I think certainly they understand that and are addressing the issue. We primarily want people to go to registered migration agents; that is a good first step. A problem of a scale even greater than bad advice from a registered agent is those persons who solicit business in the migration field who are not registered, who are not knowledgeable, and who see migration decisions, migration applications, and the right to stay in this country, as something where a person will give up their life savings if they believe they can be successful, and we know of very large sums of money.

Unregistered agents is where we concentrate our efforts and we do promote the use of registered agents and say, 'You should use registered agents.' We then work hard with the MARA and with the Migration Institute of Australia in terms of the work they are doing to turn their industry into a profession.

Dr THEOPHANOUS—You say you work hard with them. How many agents have been, for example, struck off for misbehaving?

Mr Sullivan—There have been 727 agents deregistered under section 302 of the Migration Act.

Dr THEOPHANOUS—Seven hundred and twenty-seven?

Mr Sullivan—Yes, 727. Most of those are persons who have voluntarily become deregistered, and this to a degree represents part of the clean-up that the review of the

migration agents scheme resulted in. What we are seeing now is that, with a requirement for continuing professional development and a requirement for a knowledge base to be established at registration and re-established at re-registration, a lot of agents are discontinuing their registration. We look at those numbers of 727 and it is because they have asked to be deregistered, they have not paid their fees, or they have died.

Dr THEOPHANOUS—But have you actually struck any off for actual mismanagement?

Mr Sullivan—The MARA has suspended one agent for conduct matters.

Dr THEOPHANOUS—So only one for conduct matters but the rest dropped out because of the tougher provisions; is that correct?

Mr Sullivan—A lot of people are dropping out of the industry and we see that as positive. You have to understand that the MARA has been in existence for a short time, has had its conduct panel in existence for even a shorter time, and has a number of cases which are under their active consideration now. In respect of suspensions, there is one case.

Dr THEOPHANOUS—How many agents remain?

Mr Sullivan—There were 2,297 registered agents as at 12 January.

Dr THEOPHANOUS—That is still a considerable number.

Mr Sullivan—There are a lot of migration agents, as I say, but our emphasis is on getting people into the registered scheme. If you said to me, 'How many unregistered agents are there?' I would say there are a lot. There are a lot of people who are unlawfully providing migration advice in this country today.

Dr THEOPHANOUS—Perhaps we will come back to those. Can I just ask one more question about agents. You would admit that there are more than 2,000 professional people who are trying to make a living in this area, and given what you said earlier about the availability of a lot of money in terms of people's desperation to stay in Australia, does that not create a circumstance in which people might be tempted to cut corners? Do we have to have so many agents?

Mr Sullivan—It is all relative: compared to the number of lawyers and accountants and other professions, we probably do not have many agents at 2,000. Of course, a lot of the agents in that 2,000 are in fact other professionals—they are solicitors, they are accountants. There are people who if they are going to involve themselves in migration matters understand they need to be registered. From someone who has watched this industry for as long as you, yourself and other members of this committee have, I think we are seeing now—and it is reminiscent of some other professions—some large practices developing which are doing a lot of work, and I think their professional standards are very high. I think we are seeing fewer of the one-person shows, the one who puts a shingle out saying, 'I'm a migration agent and I just work by myself.' I think we are seeing them drop out. We have certainly seen the professionals who understand that at times they delve into migration matters registering, but probably not involving themselves heavily in the field.

So that number does not jump at me. Again, and I go back to it, the ones who worry me more are the people who have got no intention of applying for migration agent status because they probably know they will not get it, but who, due to their position within a community or just their connections, have unregistered and unlawful practices running.

Mrs IRWIN—Can I ask another question. I hope I have got these figures right. Ms May asked how much revenue the fee has raised for the department so far. I think you said that it should have raised $3.259 million but in fact it has only raised $328,000. Your submission also suggests that it would be appropriate to raise that fee. What figure do you feel that it should be raised to?

Mr Sullivan—As I said to Ms May, an average application for refugee status costs about $1,800 and we are looking at that number as probably a natural ceiling on any possible fee. We are not making any suggestion that the primary application should cost anything. We are suggesting that a primary application should remain free. When I say 'free', there is a $30 charge at the primary level for the protection visa applications. We believe there should be no impediment to entering the review stage; this fee comes afterwards. As I said, cost recovery would suggest some form of a ceiling of $1,800.

If we ask what the purpose of misuse of the refugee system is, our answer is generally that it is time in Australia and access to the labour market. We then look at things like average weekly earnings and if you are in a process which you may be in to stay in Australia for as long as you can and work, and if you are earning average weekly earnings, $1,000 is about 1½ weeks work. So we are saying $1,000 is not that high. Somewhere between $1,000 and cost recovery of $1,800 is where we believe the appropriate level of the fee should be.

When you see our financial accounts, we will report the fact that we have raised $3.2 million in revenue, as a business would—it is the invoices you send out. We will then make proper declarations that we have actually collected $328,000 and that we have an outstanding debt to the Commonwealth of $3 million, and we will probably have to have a view as to that debt. Debt to us from people who have left Australia is not an easy debt to collect, and that is generally known. We write off a lot of debt after a while, although we must remind people that writing off a debt technically does not remove the debt for them—it does not say, 'Once we write it off our books, you are clear.' If you come back near us, we will ask you for the money. It is the same with detention debts. We have people removed from Australia with large detention debts and recovery is not high when we send them a bill for the Port Hedland Hilton, or wherever they have been.

Mr RIPOLL—Mr Sullivan, those figures you have given in terms of cost recovery, if that $1,000 is a nominal a fee and you only recover a small percentage of your total cost, if cost recovery is one of the imperatives will not raising the fee make it even less attractive for people to pay? Therefore, your cost recovery will be even less, or the same? What I am trying to say is that, if cost recovery is an issue, then surely increasing the fee is not going to increase any costs that you recover.

Mr Sullivan—No, I think you have to see them separately and we have to take in the overall sense I gave of the system. If you want to collect debts easily you do not perform the

service until someone pays you the money. That is the classic way of making sure you have 100 per cent debt collection. We cannot do that. We do not want to impede people going through the Review Tribunal who believe they are refugees. What we are left with then is a debt at the end. The issue of saying that we should only collect what they are willing to pay could drive you down to all sorts of levels of fees. We believe that you should set such a fee at least reflecting what it has cost you, and also reflecting what potential they have to have that money to pay the fee.

The next thing is debt collection. We understand and accept that a person who has been refused in the RRT may have gone to the Federal Court and lost the case in the Federal Court. They then may have left Australia, or may have decided they have had enough of the formal processes and they will just quietly disappear and see what happens. It is never going to be easy. We chase the debt, as we are required to under the Financial Management Act. We know when we are going to be successful with a debt, and that is if you want to come in or you want to pursue another visa class. I think the fact that there are policy reasons why you cannot employ good debt collection processes should not then mean that you do not impose a fee which, firstly, reflects cost, and, secondly, reflects capacity. We talked about people being assisted, and we are seeing people pay large sums of money to be assisted. If you take this process through primary processing, through the Refugee Review Tribunal, pay listing fees and go to the court, with a sound consultant you are expending quite a deal of money anyway.

Mr RIPOLL—Just to follow up on that, if you still come back to cost recovery as an imperative, if it is starting to become around that issue, then there is probably a range of options that the department can look at. If cost imperative is the issue, why not charge the fee up-front and say, ‘If you are successful, we will give it back to you’?

Mr Sullivan—Because we believe that would put an unnecessary impediment in the way of a person making the application for review. Fundamentally, and it is why we started our opening comment with the fact that Australia will meet its obligations under the Refugee Convention, if you look at those obligations and you look at the best practice that is enunciated by people like the United Nations High Commissioner for Refugees, Australian systems stacks up well. If you put an impediment into that second level review saying, ‘Give us $1,000 and you can proceed. We will give it back to you if you are successful,’ I think that would be viewed by most commentators as a real impediment to going into that second stage.

Mr RIPOLL—But is it not the same thing? It is the same thing in that there is still an impediment; people have a debt. They are going into it knowing that they still have a debt, or the possibility of a debt, so the impediment is still there.

Mr Sullivan—The only measure we have of that is if we look at countries which produce reasonable numbers of refugees and we look at the application rate from those countries post the imposition of the fee. We see that it is not falling, we see that it is steady, and we see the number of people from those countries who are going to the RRT for review of their decision is not falling, it is remaining steady.

Mr RIPOLL—So then would that not be the same thing again?

Mr Sullivan—What we are seeing is that in the countries that do not generally produce refugees primary applications falling, and we are seeing—

Mr RIPOLL—So there is an impact?

Mr Sullivan—There is an impact at the right level; that is, do not get into this process. If $1,000 deters those people and does not deter bona fide refugee applicants, it is a great policy result. The numbers are suggesting that that is what is occurring.

Dr THEOPHANOUS—You cannot draw that conclusion.

Senator McKIERNAN—Are you finished on this one?

Mr RIPOLL—I just had a couple more questions.

Senator McKIERNAN—On this theme the Chair has a question. It probably will be a bit tidier than us jumping around.

CHAIR—I would like to just go, if we can, a bit further into these figures. You have given us your low refugee country, which is Fiji, and you have indicated that your primary has fallen from 302 to 61 in the table. Can you explain to me why it should make an impact on the primary? If we are actually saying, 'These people are trying to prolong the process so they can stay here and work,' will they not then go through the primary process, because that allows them to stay and work and then pull out before they have to incur this debt of $1,000?

Mr Sullivan—This is where the other measures come in. A refugee application comes in two parts: Part A, which is really just your personal particulars and your family details, and Part B, which is where you actually tell us why you believe you have a well-founded fear of persecution if returned to your country, on the basis of your race, religion, politics, or membership of a particular social class. We were seeing applications lodged with Part A only completed and Part B a photocopied generic statement for the country and signed. In some of the old practices at primary decision making, that went into a first in first process scheme and you joined the backlog and went through it and got considerable time out of the primary process. Then you went to RRT and you got considerable time out of the RRT.

The package of measures included the fact that for nationals of countries where refugees are generally not found, you may have your primary application dealt with in days, if not short numbers of weeks. If the application was as sparse as the one I described to you, a decision maker is within their rights to determine that matter on the papers and say, 'You are not a refugee.'

So, two things were happening: one, the disincentives for not going through the whole process, time disincentives were going away, and the $1,000 fee for the RRT was suddenly there. At the same time, there were processing disincentives which said, particularly if you were in the hands of a consultant, 'Why do I give you a lot of money to lodge an application for me where I might get a letter from the department within two weeks stating the application was refused and I have got 28 days to apply to the tribunal and if I fail in the

tribunal I will have a $1,000 fee?' That is why I say you cannot disaggregate. Without trying to duck Dr Theophanous's question, it is hard to disaggregate the measures and say, 'This one does that; this one does that,' but as a package I think what those numbers are showing is that the disincentives are there.

CHAIR—I take the point you are making. Would you say Indonesia was a refugee country or a non-refugee country?

Mr Sullivan—Indonesia has, until more recent times, been a non-refugee producing country. There is not yet evidence that Indonesia has turned into a refugee-producing country. The exception to that, of course, in our Indonesian statistics are a large group of East Timorese who are not being processed while court cases resolve very important refugee issues, particularly prior—

CHAIR—I notice the granting has been pretty well one case—maybe two or more or less—yet, for all that, Indonesia's flow-on rate has gone up between 1995-96 to 1998-99. It has gone from 71 per cent to 87 per cent; how would you explain that?

Ms Bedlington—It is difficult to explain without assessing the individual applications. But if you cast your mind back over the events in Indonesia over the last 12 months or so and the impact of the economic downturn, there may very well be two sorts of reasons why people from Indonesia would want to prolong their stay.

CHAIR—On the face of it, it actually goes against what you are claiming?

Mr Sullivan—But I think the balance is shifting. What we are saying with Indonesians is that if you look at Indonesia at 1996-97 and 1997-98 where the social turmoil with Indonesia was not there, we were seeing large caseloads from Indonesia. I would have put that caseload well and truly into that group I talked about before of coming from a country where refugees were generally not founded and I think I would say that we regarded quite a proportion of the Indonesian caseload as fitting into what we would say was an abuse of the scheme.

I think in 1998-99 what we are seeing amongst those applications and amongst the flow-on rate is an increase in the number of persons who believe they may be refugees, that is that they are subject to the social turmoil that is occurring in Indonesia. As to whether or not they are refugees, I do not think we are seeing a great increase in the number of Indonesians found to be refugees yet, but I do think we are seeing in good faith people who are expressing fears of return. Whether that turns into saying, 'We are seeing refugees,' I do not believe we are seeing that, but I think we are seeing a shift there from where I would have said that most of the Indonesian caseload was misusing the system, to a situation now where I would say that a degree of the Indonesian caseload sits properly in the protection visa system, without commenting on what might be a potential outcome.

CHAIR—Would you list Iran as a refugee country?

Mr Sullivan—Yes.

CHAIR—And yet Iran's flow-on has gone down from 81 per cent to 74 per cent.

Mr Sullivan—They are again very small numbers and I think it has bounced around that 80: 75, up to 87 again, down to 74. Certainly, the proportion of Iranian applicants who are approved at primary stage or Refugee Review Tribunal stage is quite high. They are a refugee producing country.

CHAIR—But then again, your primaries from Iran have gone down from 209 in 1995-96 to 79 in 1998-99. If your theory is right and we have got this whole process of the faster primary and everything else to stop people from taking advantage of work and your claim is that that is discouraging only people from non-refugee countries, how do you explain why Iran has gone down from 209 to 79?

Mr Sullivan—The 79 is a half year number, so it has gone down a little bit.

CHAIR—From 209 to 79 is a hell of a big jump.

Mr Sullivan—No, it is 209 in a full year, 79 in a half year. That is about 160 in a full year.

CHAIR—So can we say that about the other figures that you refer to about Fiji. If you are going to discount your figures for Iran then we could equally discount the figures from Fiji.

Mr Sullivan—The important thing for Iran—and this is where this is a very complex issue—is that Australia is not a country of first asylum for people from Iran. Iranians who attempt to arrive unauthorised have been subject to another package of measures which is really aimed at the unauthorised arrivals. That is an interdiction policy, it is an interception policy which is a policy whereby we have people now at airports around this region who are stopping people. We see the feeder group from Iran is going down and our numbers will bounce, there is no doubt about that.

CHAIR—Is Somalia a refugee country?

Mr Sullivan—Yes, Somalia produces refugees.

CHAIR—Somalia's primary has gone down from 100 to 39.

Mr Sullivan—Again, almost all of our Somali refugee population is an unauthorised arrival population; it is not a population which arrives on a tourist visa. If I compare it with, say, the Indonesian population, the Indonesian population arrives in Australia on a tourist or a business visa, spends some time in Australia and then lodges an application for refugee status. The Somali population is an unauthorised arrival population which is going down not because of $1,000 fees or anything like that, but because we are actively intercepting Somalis trying to get to Australia and we are seeing the number drop considerably.

CHAIR—First of all you have argued, 'When we look at the figures we see that non-refugee countries have gone down and refugee countries have stayed the same,' but when we look at those figures that is not held up in the figures at all.

Mr Sullivan—I think if you look at the aggregate numbers it does hold up. We can have a discussion on individual countries for as long as every individual is there, and, as I say, there is no way I can honestly answer you as to what part of what is going on is to do with the $1,000 fee. There is a lot going on. The previous government initiated it and this government has pursued it hard in an attempt to assure that the Australian refugee determination process is one with integrity, is one that links our primary obligations to people in need of protection and is now more and more one that is not abused or misused by people. We are seeing primary applications drop and if you analyse where they are dropping from, it is from non-refugee producing countries.

Dr THEOPHANOUS—As defined by you.

Mr Sullivan—As defined by international experience.

CHAIR—That is not true. Mark, you have just told me that it is from non-refugee countries. We have been through Iran and we have been through Somalia, which are both refugee producing countries. On the other hand, Indonesia is not and Indonesia has gone up. We do not have that many more countries to play with. Is Sri Lanka a refugee producing country?

Mr Sullivan—Sri Lanka certainly produces some refugees.

CHAIR—And yet their primary one has gone down from 1,017 to 211. The individual countries are not holding up your thesis.

Mr Sullivan—In our major refugee—and I have to keep highlighting 'major'—producing countries, the ones you are using—Iraq, Iran, Sri Lanka, Somalia—these are populations whose application for refugee status in Australia is due to unauthorised arrival in Australia.

CHAIR—So which are the refugee producing countries?

Mr Sullivan—The other statistic which we do have to concentrate on—

CHAIR—No, could you just answer that question of which are the refugee producing countries.

Mr Sullivan—We will give you a chart which shows what the refugee determination rate is by nationality at primary level and at RRT level. I used the term so I will criticise myself, but the term 'a refugee producing country,' I was more careful when I first used it and I talked about countries from which our experience and international experience a higher number of refugees are found to be from. It does not mean when I say that a country is a refugee producing country that everyone who comes from that country is a refugee: many of them are tourists who come and go and some do not ever enter the refugee thing.

The other statistic to look at in this chart which is important is just the flow-on rate from those at primary, and this is important in terms of whether the $1,000 deters people going for the review—

CHAIR—Are you referring to table 3?

Mr Sullivan—I am referring to table 3. I will talk about Fiji as a country which does not produce refugees. In 1995-96 we had 312 at the primary level and 84 per cent went on to the RRT. In 1996, if you look at the percentage, 86 per cent went on. By 1997-98 we are down to 70 per cent, and by 1998-99 we are down to 65 per cent. So, without looking at the absolute numbers and saying what is bouncing around in terms of absolute numbers, we are seeing a reduction in Fijian refugee applicants taking their case from primary to the RRT. Tonga is another good one which we have described as not being a country that produces refugees generally. That application rate has gone down.

CHAIR—I have looked at the table. As a good example I will give you the Philippines, Tonga and Fiji; I have no question that you have said that they are not countries that tend to produce refugees, and indeed their flow-on rate has gone down. But against that, we have Indonesia which has gone up and other countries which you claimed the flow-on should have remained static, or the primary should remain static, which have in fact gone down.

Mr Sullivan—The flow-on in Iran is 81, 75, 87, 74, which seems pretty stable against those numbers.

CHAIR—Yes, but your primaries have gone down.

Mr Sullivan—That does not matter. It is a different factor—

CHAIR—But you are moving around the place. One minute it is the flow-on and the next minute it is the primary, then we attack the primary and you move back to the flow-on.

Mr Sullivan—As I have said, there is an aggregate of measures hitting all sorts of things. If I read the debates on this measure when it was passed by the parliament, the greatest criticism of it was about the potential the fee would have on people not proceeding to the RRT because of the fee. It was basically saying, 'You say you are hitting the abusers, but you are going to actually hit everybody.' The flow-on rate is the important statement there saying, 'Who is no longer going from primary to RRT?' My contention remains that the numbers show that in countries which have a propensity to produce refugees we are seeing a stable flow-on rate—

CHAIR—If we have a look back at those again—

Mr Sullivan—and countries which are not, we are seeing a diminishing one.

CHAIR—Your refugee countries, to use the shorthand: Iran, flow-on went down from 81 per cent to 74 per cent—

Mr Sullivan—No, it went from 81 per cent to 75 per cent—75 per cent is the number before the fee—then 87 per cent and 74 per cent. I can say that 1998-99, post-fee, is the same as 1996-97, pre-fee.

CHAIR—The flow-on rate for 1995-96 was 81 per cent?

Mr Sullivan—Yes. But let us not jump to 1998-99, let us go through 1996-97, 75 per cent; 1997-98, 87 per cent. So it went from 81 per cent, down to 75 per cent, up to 87 per cent, down to 74 per cent. The trend line is probably a nice stable line there. From my old mathematics days you would say it was about an 80 per cent line.

CHAIR—I will take your trend line, because in fact if I look at Fiji, the trend line has in fact gone down on the basis of your trend line. Let us have a look at Algeria; your trend line has gone—

Mr Sullivan—Up.

CHAIR—Up, down.

Mr Sullivan—It goes 85, 100, 98; the trend is about 96.

CHAIR—In fact, Indonesia has gone up and your explanation for that is the political situation in Indonesia.

Mr Sullivan—In fact, we would say the Indonesian number there is a further supporting number.

CHAIR—In Iran you have claimed the trend line is stable. You have got the 87 up there which puts it up, so probably the trend line is equal. Iraq goes up, up and stays up. Iraq is up; your trend line is up. The Philippines go up on your trend line, until this last year when you have a sudden dip—your line is up and then you dip. Somalia stays fairly high up. Sri Lanka, 86, 73—that seems to be a downward trend line. We will not look at Tonga and Thailand. I am still not totally convinced.

I take the point you make, and perhaps you would like to get back to us with another analysis of those figures. I know Andrew is dying to ask some questions, but before he does, can I just again go back to the figures on table 2. Other submissions we have received from other organisations have indicated that the flow-on rate in 1995-96 was 71 per cent and in 1997-98 was 81 per cent. We have two submissions that have used those figures.

Mr Sullivan—Who are they from?

CHAIR—The first one is from the Refugee Council of Australia and the second one is either from the Refugee Advice and Casework Service or the International Commission of Jurists.

Mr Sullivan—They draw their statistics from us or the RRT. The only thing they can be doing is looking at applications and failing to take account of a 30-day lag rate. If you add those in, you push up your primary application rate and push down your flow-on rate.

CHAIR—Perhaps you could analyse that for us.

Mr Sullivan—We will stick to our numbers; there is nothing wrong with our numbers.

CHAIR—Tell us again, just very clearly so we can get it on the record, why the others have done their numbers wrong?

Mr Sullivan—I will not answer that until I see them. I will check my numbers—

CHAIR—I am not suggesting that your numbers are wrong, I am just trying to work out why we have a discrepancy.

Mr Sullivan—I will not check their numbers, I will check my numbers and confirm that they are right. If you ask them when you see them where they get the numbers from, there are two sources of material on this—and we certainly have worked with the RRT to ensure that we are in sync—that is ourselves and our publications and the Refugee Review Tribunal and their publications. No-one else counts them. We are in sync with the RRT. If you look at applications lodged in a 12-month period you will get a carryover of about 30 days applications which have not been looked at. If you load them back into the numbers, you will increase the primary number in a particular year and therefore see a flow-on rate go down. I will read with interest the transcript when they tell you how their numbers work, but I am confident about our numbers.

CHAIR—Finally, perhaps you would be able to produce for us trend lines for each of the countries?

Mr Sullivan—A trend line?

CHAIR—Yes, for each of these countries.

Mr Sullivan—No problem.

CHAIR—If you could just pop them out and give the up and down as well as the trend line, I think that would help the committee. Senator McKiernan seems to have disappeared, so Andrew I believe you wanted to ask some questions.

Dr THEOPHANOUS—Yes. I am very interested that you chose these countries. What has happened to China, Vietnam, Turkey and Lebanon, four countries that I have nominated at the last hearing in relation to an analysis according to your account? Especially I am interested in China; do you classify China as a refugee producing country?

Mr Sullivan—No, I would not.

Dr THEOPHANOUS—You do not?

Mr Sullivan—You have to be careful. There are refugees from the People's Republic of China, but the proportion of them, against our caseload and against comparable caseloads internationally, are very low.

Dr THEOPHANOUS—But the proportion of people applying at the primary level from China, how many have you got? Is it a large level?

Mr Sullivan—We will do this for as many countries as we can and certainly cover all those countries you mentioned.

Dr THEOPHANOUS—For example, do you classify Turkey as a refugee producing country?

Mr Sullivan—Again, there are refugees founded in Turkey but the proportion of those is quite low.

Dr THEOPHANOUS—But is that because of your policy?

Mr Sullivan—It is because of the government's policy, it is because of our application of the convention: you are found not to be a refugee because at the primary level or the Refugee Review Tribunal level you were found not to meet the convention.

Dr THEOPHANOUS—Given the fact that we now have, for example, coming to international attention the Kurdish crisis, is it not true that you refuse to recognise Kurdish people as having a refugee claim, as a group?

Mr Sullivan—I would never make a generalisation like that: persons who identify themselves as Kurdish have been found to be refugees in Australia and persons who identify themselves as Kurdish have been found not to be refugees in Australia. There is no policy against any person who applies to be a refugee, that because you are a national that you cannot be a refugee. If we have a person from the United States of America, as we have had, who claims to be a refugee in this country, they will go through the same process as a person from Algeria or a person from wherever.

Dr THEOPHANOUS—But, Mr Sullivan, you have two categories: you have a category called 'refugee producing countries'—I do not know where that comes from and what criteria you use. You cannot be using for the criteria merely the figures, so you are obviously using other criteria.

Mr Sullivan—No, the criteria is solely the figures.

Dr THEOPHANOUS—In what sense?

Mr Sullivan—It is solely the figures in that our basis is to say that our experience over several years on numbers will say, 'This many thousand persons from this country have applied for refugee status. This percentage of them have been granted refugee status.'

Dr THEOPHANOUS—It is on the basis of how many were actually granted, as distinct from applied?

Mr Sullivan—It is the percentage granted against applied. If that percentage is very, very low, for the purposes of discussions like this we would describe that country as a country that generally does not produce refugees. I must say that refugee determination processes are solely on an individual basis. They consider the claims that an individual person makes that they face persecution if returned home on the basis of their race, religion, politics—

Dr THEOPHANOUS—That is your claim, which we will not dispute at this time because that is not the purpose of this inquiry, but can I just ask you this: in a case like China or in a case like Turkey where there may be a low level of people approved, it is possible, is it not, that that is a consequence of the failure of the tribunal and of the government to recognise certain features of those claims? For example, China's human rights situation or Turkey's internal situation, or indeed Vietnam's human rights situation?

Mr Sullivan—A decision maker in any case has to come to their decision as to whether that person meets the convention. Probably the most common claim from many people from the People's Republic of China was that China's one child policy makes them a refugee. Now, that issue was determined in the High Court and so the guidance to a decision maker on important issues such as that is coming properly in the end from the highest court in the land. That certainly was the most common claim.

A decision maker is required to determine in their judgment that claims made against the convention on convention reasons and against their knowledge of events and circumstances in the country they are assessing that person against. If it is believed that the decision maker has not followed a lawful process in doing that, it is open to take that matter to the courts—and many do. They should not challenge the merits of decisions, they challenge whether or not the decision maker in the tribunal applied themselves in a lawful manner to the decision process. The result of that, of course, is that overwhelmingly people who go to the courts who are found not to be refugees emerge from that process in the end still being found not to be refugees. So there has been a confirmation that the process works.

Dr THEOPHANOUS—One final question, because you are in fact clarifying the point about how you define it. I just wanted to make the point that in every one of these applications advice is taken from the Department of Foreign Affairs as to their assessment of the general situation in that particular country. That is true, is it not?

Mr Sullivan—That is one of many sources of information.

Dr THEOPHANOUS—We had a situation where it was stated when many of the East Timorese were rejected that the situation in East Timor, according to our assessment by Foreign Affairs, was such that it did not threaten these people. Is that not true?

Mr Sullivan—No, I do not think there has been an East Timorese decision taken on the grounds of what the circumstances are in East Timor, because the issue with East Timorese is not about East Timor.

CHAIR—Dr Theophanous, you have had your extra question. This is not on the sunset clause. Perhaps we could arrange another briefing with the department on this issue if you are interested.

Mr RIPOLL—If I can follow up on the Movement Alert List, MAL. In your submission it says that if a person does not pay the fee they incur a debt with the Commonwealth and they will be put on the MAL but if they do pay that debt later they will still be on that list. Is that correct?

Mr Sullivan—No, once the debt is cleared they are taken off the MAL.

Mr RIPOLL—Completely, and any time afterwards that does not affect their reapplication down the track?

Mr Sullivan—No.

Mr RIPOLL—Okay, that is fine. It is a complicated matter in terms of how this all works and there is obviously an issue with agents and people making applications, and you said earlier there was even the case of somebody not even knowing they had made an application. What does your department do in making agents aware of what the rules are, what the situation is, and trying to get that information out to prevent them from making an application which they think is genuine at the time but would have realised, given the proper information, that it was not?

Mr Sullivan—There are two things we do. The first thing is we encourage publicly persons who make applications who need assistance to use registered migration agents. In the development of the Migration Agents Registration Scheme it was determined that things such as an agents' code of conduct, which includes the handling of vexatious applications and things like that, would be statute based, so it is part of the regulation making process around the agent's scheme and incorporated in statutes the code of conduct that agents must abide by. We then become one of the most active complainants, if you like. If we see practice going on, it is open to the department to complain about an agent to MARA. When it had the process internal, and also now that it has got it with MARA, the Department of Immigration and Multicultural Affairs has been, I think, the largest single source of complaints to MARA. So we use the scheme, as designed by government, and we put it on to the agents to do something about it.

Primarily it is about education, that people should not use for any migration process, be it refugee processing, a visitor visa, or anything else, the services of an unregistered migration agent. If they see unregistered migration agents operating, they should contact the department and give them the details of them.

Mr RIPOLL—Just to get that a little bit clearer, because from what we have heard today and what you say you have such a high number of people who make these applications either non-genuinely or do not get accepted, there being such a high number and the deterrent put in place, what do we do about those cases where we see particular agents being responsible for those high numbers? What does the department do about trying to curb it at

that end, rather than putting the penalty back onto the individual who may not have been responsible?

Mr Sullivan—That is a good question. We analyse the Refugee Review caseload by the agents providing the assistance and we look for agents who are overrepresented in that caseload, particularly in that size—

Mr RIPOLL—But what do you do? What happens to them?

Mr Sullivan—That is when we go to MARA about them, and particularly in respect of the vexatious applications. It needs the cooperation of some of the applicants and you are dealing with an applicant who may not be in the mood to cooperate fully with the department. They are throwing their last dice, and we do not make any deals in saying, 'Help us with this agent and you can stay.' They have got to work with it. The other side is that it is very important, particularly when you get to court, and it is of interest to the law societies, that a solicitor has been properly instructed. Certainly, any complaint that goes to the MARA about a lawyer can be referred to the relevant law society in the state so that they may consider where there is any breach or problems there.

Mr RIPOLL—The reason I raised my question, and you do not necessarily have to answer this, is that my concern is that we have got unscrupulous agents—as is in your submission—and that the people making the applications pay the penalty for what they may not be aware is the best method to apply by. What I am saying is that they may not know that what they are doing is actually not fulfilling the criteria or they may not be aware that the agents are going down this path, that perhaps we are targeting the wrong people.

Mr Sullivan—I think we are targeting all those groups. This measure actually targets the agents as much as individuals. It really attempts to nip in the bud the marketing spiel of a clever, unscrupulous agent, that is, 'I'll get you a long time and it won't cost you anything.'

CHAIR—Senator McKiernan has some final questions.

Senator McKIERNAN—What is the proportion of applicants to the RRT that are represented by an agent from the non-fee paying sector?

Mr Sullivan—From a non-fee paying sector? I will take that on notice; we will try and break it up. I see the Registrar and the Principal Member going to their notes. If they cannot answer, we will take it on notice and between us we will get you what we can.

Senator McKIERNAN—The reason why I asked the question is in a sense part of the department's submission does hang on that, on the ability of the individual to afford the fees of the agent in going to the tribunal.

Mr Sullivan—It was a minor part of my argument. I certainly said that a lot of people are paying a lot of money for assistance. About 50 per cent have an adviser now.

Senator McKIERNAN—You do not mention at all in your submission—and I am referring now to the draft submission rather than the submission we have received today—

the fact that the agents representing the person before the tribunal may in fact not be getting a fee for their services at all. The submission is built on the assumption that everybody is paying a fee, is it not?

Mr Sullivan—No, that part of my submission is not a major part of it. Even breaking it up between fee charging and non-fee charging, I cannot break up whether a fee-charging agent did it for free. I know a non-fee-charging agent did not charge a fee, or they should not have. But important again is that we say to people, in the whole design of the refugee process in Australia and the nature of the RRT and the nature of the RRT members' duties to determine if a person is a refugee, you do not need an adviser. This is not an adversarial hearing where you have someone who puts up your case for you. The department does not appear at the RRT. We do not argue why we said no at the primary stage. It is the tribunal member who is charged, in an inquisitorial way, at coming to a decision. The tribunal member, unlike an adversarial tribunal, will lead an applicant through the issues.

All we are saying is that, if a person seeks to use an adviser, make it a registered adviser and make it clear that the sorts of things that you use in migration advice, you know what they are going to charge you, what they are going to do, what they are doing for you, make sure that they are clear to you so that you do not have, as Mr Ripoll said, people who are unaware of what is going on. If you are aware and the agent told you what they are doing, and if it is a misuse of the system, you are as culpable as the agent advising you. The worrying ones are the ones, and it is anecdotally there, that do not know what is going on.

Senator McKIERNAN—We accept that.

Mr Sullivan—We want people to use registered advisers but we make the point that the whole design of the refugee process is to help a person through their case. It is why this tribunal is different to most other tribunals in this country, particularly at the federal level, and that is that in most cases it is the tribunal member and the applicant that talks through the case. The tribunal member on most occasions will allow a friend in, on some occasions will allow agents or lawyers in—on a notable occasion happening at the moment I understand has allowed three QCs—but they do not need to be there.

When we go to the AAT and argue a criminal deport, we have a departmental officer there, with the assistance if necessary of counsel, to argue why this person should be deported. In an RRT case, we have no-one there arguing this person is not a refugee. We leave that to the tribunal member to determine. We do not make submissions. I think a lot of people still misunderstand how the RRT works. They use their knowledge of other tribunals or courts and think that is how the RRT works, and it works very, very differently. It was a bold experiment at the time, continued on, and when I see these calls for its review, its abolition—'it is not fair, it does not work'—I would hope that the look at that is a very dispassionate look to see whether a different way of giving people a fair go actually does work, because I think the statistics show it does. There is my sermon for the day.

Senator McKIERNAN—An argument perhaps for another day, but it does bring up the point that, for example, the International Commission of Jurists have argued that the primary determination process is relatively meaningless because the standards of procedural fairness no longer apply. They argue that this leads to more applicants using the tribunal as the first

place to gain a substantial examination of their claim. What have you got to say on this, because it is relevant in the sense of what you have just said?

Mr Sullivan—I have not in my tables been convincing enough for the Chair to show some trends and I am going to try and do that. You would be expecting that if the first level is meaningless we would see a general escalation of flow-through rates, because basically you would say, 'I will just pro forma to the department and the game is in the RRT.' We are not seeing that happening. So, firstly I would challenge on that basis and, secondly, I do not think the legal fraternity are comfortable with inquisitorial tribunals generally and the processes that go on, and I will say no more as to why they may not be comfortable with it. I think there are people who are out to knock it down and if it is to be knocked down for the right reasons, it is fine.

Senator McKIERNAN—I don't follow that.

Dr THEOPHANOUS—Are you saying that the motives of the ICJ in making this statement are not correct; is that what you are saying?

Mr Sullivan—No, I never said that.

Dr THEOPHANOUS—What are you actually saying?

Mr Sullivan—I am saying that I think the statistics dispute their first premise, that is that at primary level it is meaningless, because more and more people are actually accepting the decision at primary level and concluding the process, and I challenge their second premise that the RRT process does not work. I have seen the Law Council and the International Commission of Jurists promote an AAT type process as the alternative. All I am saying is that people are more familiar with adversarial processes and so the inquisitorial process of the RRT is something that maybe they have an inherent dislike for.

Dr THEOPHANOUS—Yes, but is it not also possible that the reason why people do not go on is that they are disheartened as to the content of what your department issues them with the reasons for rejection, that maybe they are disheartened by those reasons and feel there is no point in going on?

Mr Sullivan—I think that is why you design a system which has free and simple access to an independent tribunal—independent of the department. If you are disheartened, you should have another go. If you accept what the department has said, you do not have another go; you accept what the primary decision maker says. We do not have a problem with some people. A refugee determination is a very complex decision which some people do not understand. As far as they are concerned they believe, 'I'm persecuted,' and often you'll read a decision at primary level or at tribunal level saying, 'Yes, you may be persecuted but you're not a refugee. You don't meet the convention reasons.' You have to do a lot of things. Some people look at it and say, 'Now I understand I'm not a refugee. I won't go ahead with the tribunal.' But the tribunal is there and why we do not charge $1,000 up-front and why we allow free and easy access is the fact that it is available for all.

CHAIR—Dr Theophanous, we are already running about 15 minutes late and I know Senator McKiernan has one final question.

Senator McKIERNAN—You will probably have to take it on notice. It is about the ability of people to front the tribunal. You mentioned in your submission the number of people who were working and the percentage of the fee would be what they had earned in a period of time. Can you tell us the number of people who are actually working when they come before you?

Mr Sullivan—No, we cannot tell you that. We can tell you the number of people who have a right to work. Not having a right to work does not mean people do not work, as we have found in recent days, and having a right to work does not mean you will work. We do not monitor people in any way in terms of, 'Are you working? What are you doing?'

Senator McKIERNAN—Despite the fact that your argument is relying on that, you cannot tell us—

Mr Sullivan—Again I am saying it was one of the issues. The most common argument put as to why people use this process to spend a lot of time is employment and access to the labour market. That is where we said: if that is the motive and people are working, the relativity of average weekly earnings to the $1,000 is a consideration.

The most important argument we have about the fee is, firstly, its role in the package of measures to deter people who should not be in the process, and, secondly, in setting a fee you should have primary consideration of cost recovery—you should not exceed cost recovery and that should be your primary driver. Thirdly, we said you look to see if work is the motivation, the comparison of average weekly earnings to the fee. Then, fourthly, we said that in comparison to what people are sometimes paying advisers to assist in this process, the $1,000 may not be high. But the primary argument is its role in a package of measures to deter and cost recovery.

Senator McKIERNAN—On behalf of the Chair, can I ask you to provide the committee with a copy of the letter you send to failed applicants—

Mr Sullivan—About the fee?

Senator McKIERNAN—Which tells them about the failure and what they can do from there.

Mr Sullivan—Yes.

CHAIR—Just a very quite factual question I need to ask because it is evidence we have got later. Under my notes on the determination process I have, 'At the primary stage, applicants are given opportunities to comment on any adverse information personal to them which is taken into account when considering a claim.' Is that true at the primary stage?

Ms Bedlington—Yes.

CHAIR—I will let you know that it has been claimed in other submissions that that does not happen, so it is important that we have it from you that at the primary stage the applicant, if there is any adverse information, is informed and has a chance to answer that.

Ms Bedlington—That does happen. Sometimes there is a confusion about what constitutes information that is personal to the applicant. It has to be relating to the applicant individually to come within that definition, so generally available information—for example, in an amnesty report or whatever—is not covered by that.

CHAIR—I know the committee will have more questions later on. We look forward, I hope, to seeing you towards the end of the inquiry to follow up some of the issues that have been raised today—and obviously others will come up. Thank you very much for appearing before the committee today. As you would know, if you want to question anything that is in *Hansard* or any other information there are ways and means and you can get back to us.

Mr Sullivan—Thank you very much.

[2.37 p.m.]

NYGH, Dr Peter Edward, Principal Member, Refugee Review Tribunal

TOOHEY, Ms Jill Frances, Registrar, Refugee Review Tribunal

CHAIR—I now welcome witnesses from the Refugee Review Tribunal. You understand that these are legal proceedings of parliament and the giving of false or misleading evidence is regarded as a contempt of parliament. Are there any amendments you would like to make to your submission?

Dr Nygh—No, there are no amendments.

CHAIR—Before the committee asks you questions, is there a brief opening statement you would like to make?

Dr Nygh—The only opening statement I want to make is that we see our function here as supplying information to the committee which may be useful in coming to its conclusion. The tribunal, as a body, of course has no views as to whether the fee is a good or a bad thing, whether it should be decreased or increased.

CHAIR—We understand your impartiality. Senator McKiernan, you have some questions?

Senator McKIERNAN—Yes. Dr Nygh, you would have heard the question I earlier directed to the department about the proportion of agents appearing before the tribunal, whether they are fee paying or non-fee paying. Could you provide the committee with some more information in regard to that?

Dr Nygh—I cannot give you detailed information, but we can take that on notice and supply that through the Registrar at a later stage. At this stage all I can say, based on information given to me by the Registrar, is that approximately 45 to 50 per cent of applicants who appear before us have at some stage of the proceedings received advice, either from registered migration agents or from refugee organisations. However, in many cases—and again, I am not sure whether we maintain statistics, although we should be able to get that too—the adviser does not attend at the hearing. It is only a relatively small proportion. Ms Toohey, would you say about 20 per cent or a bit higher?

Ms Toohey—That would be about correct.

Dr Nygh—About 20 per cent of applicants are actually accompanied into the hearing room by an adviser.

Senator McKIERNAN—In that sense, could you very briefly describe what happens, bearing in mind that it is a non-adversarial hearing. If a person is accompanied by an adviser or a registered agent, could you describe to the committee the process that occurs then. What

I am trying to find out is what role the agent would have in an appearance before the tribunal.

Dr Nygh—Again, you must understand that it is an inquisitorial process and that therefore the member is in charge. The agent does not examine or cross-examine, as of course a lawyer would in court. The practice is normally for the member to proceed with the questioning of the applicant and any of the witnesses. At the conclusion of the hearing the member will ask the adviser whether there are any aspects that perhaps should be covered by further questioning. The adviser may then indicate either the general range of inquiry that should be further pursued or even request that specific questions be put through the member to the applicant and then the member will put those questions to the applicant.

At the conclusion, the member will ask the adviser whether he or she wishes to make any submissions, and of course invariably they do. Sometimes they ask for time in which to submit further submissions in writing—very often, of course, submissions are already presented at the beginning of the proceedings or usually have been sent in to the member beforehand. In my experience, about 50 per cent of cases where there is an adviser the adviser will ask for some time to think over the evidence and then to present written submissions and sometimes further evidence. So there is a great advantage, obviously, in having an adviser there.

Senator McKIERNAN—Yes. The adviser does not necessarily have to be a migration agent or a registered migration agent. They can be an individual, a friend?

Dr Nygh—You can have a friend but normally the friend does not really play a role of an advocate, more as a hand-holder.

Senator McKIERNAN—If you think an agent is not behaving in a proper manner, do you have an authority or a power to make a complaint to the MARA or to the body that was there previously?

Dr Nygh—Yes, we can. There is only one difficulty that we experience and that is, of course, the question of confidentiality. If one wants to make a complaint, one has to disclose the identity of the applicant and the applicant may not wish that identity to be known. Perhaps Ms Toohey can say a bit more about this.

Ms Toohey—We do have a process whereby members can forward through the Registrar, either direct to MARA or to the department's MARA liaison officer, matters that are of concern to them. At the same time, we are balancing the applicant who may have concerns or may be put in a vulnerable position where a complaint is made about an adviser he may have a particular relationship to. There are questions about how effective complaints in those circumstances are. What we do as well is have available complaint forms and applicants are advised about them and encouraged to make complaints themselves if that is what they wish to do.

Senator McKIERNAN—I have one final question. What is the proportion of the tribunal's decisions that are made on the papers, and they would obviously be the positive decisions granting status?

Dr Nygh—Fairly small.

Ms Toohey—They are very small.

Dr Nygh—I saw the figure of 226 mentioned out of all the decisions made since 1993, which I think on an earlier occasion was 27,000-odd. So it is very rare for a positive decision to be made on the papers.

Senator McKIERNAN—Thank you.

Ms MAY—In your submission, your flow-on rate of appeals, your percentages are different to the department's.

Dr Nygh—We noticed that too.

Ms MAY—We would like an explanation of where you get your figures from? The department tell us you get your figures from them.

Dr Nygh—We do get our figures from the department and in most cases, of course, the difference is only a few percentage points. The most notable difference relates to the first six months of this year where the department's figures say that the flow-on rate has actually reduced to below 80 per cent and our figures for the first six months indicate that it has actually been increasing to an average of 86 per cent, reaching a height of 88 per cent for the month of October. I do not quite know what the statistical methods of averaging employed by the department are. I am no expert on statistics; I failed mathematics.

Ms MAY—Did those figures come from the department?

Dr Nygh—Those figures came from the department, yes.

Ms MAY—So you cannot explain why yours are different then to the department's?

Dr Nygh—Except that we have done a different calculation on averaging as we see it for the first six months than the department has done. I cannot explain it. We have done a straight, simplistic averaging of taking the rate for each of the six months and then producing an average of that. What the department has done only the department can tell you.

Mrs IRWIN—One of the major criticisms of the post-decision fee is that it impedes access to the RRT for genuine asylum seekers. Would you like to comment on that?

Dr Nygh—The figures actually show the reverse. The flow-on rate on our figures have actually increased rather than decreased. There are two aspects to look at, the first of which, of course, is the flow-on rate. What has decreased is the primary rate, the primary application rate, and the reasons for that I cannot tell you. Another feature to look at is the withdrawal rate. A fee is not incurred if an applicant withdraws the application before the RRT hearing. That withdrawal rate has remained pretty static, around seven per cent. The obvious thing is that, if people were worried about the $1,000, they would string it out as

long as they could and then the day before the hearing, or perhaps even the morning of the hearing, simply withdraw. That does not seem to have happened.

Mrs IRWIN—It has also been argued in a number of submissions that the fee discriminates against asylum seekers because a similar fee does not apply to applicants before other administrative tribunals. Are you aware of any other Commonwealth tribunals that impose a similar fee and do you regard the fee as discriminatory?

Dr Nygh—The answer to the first question is I do not know of any tribunals, although of course courts do charge fees—the Federal Court charges some hefty fees for access to the courts. As regards your discriminatory point, I do not think I can comment on that.

Dr THEOPHANOUS—In the third paragraph of your submission, you say:

> . . . the actual number of cases coming to the Tribunal has fallen in absolute terms, this may be simply a function of the Department making fewer decisions which are open to review, not a reduction in the flow on rate of appeal.

Do you mean by that that there are fewer cases going to the department or do you mean that the department has discouraged or has ruled out some cases to go to review?

Dr Nygh—No, we mean by that that the department simply is getting fewer applications overall. In other words, the flow-out rate has either remained static or has increased, but the absolute numbers have fallen because there is less flowing into the primary stage. Why that is so, I could not tell you.

Dr THEOPHANOUS—We heard from the department—you probably heard some of the evidence—that there are two types of countries: refugee producing countries and others. Do you accept that categorisation?

Dr Nygh—I think the point was also made, and this is certainly a point I would prefer to make, that in principle every country around the world can produce refugees—we have received refugee applications from the United States, the United Kingdom, the Republic of Ireland, the Hellenic Republic, and others. But it is true to say—and it is no doubt what the department meant—that the success rate of claims from various countries differs sharply.

Dr THEOPHANOUS—In your opinion, what is this difference due to? Is it due to the fact that your assessments of the conditions on the ground in different countries are different?

Dr Nygh—Yes, the assessment; in some cases it is rather obvious. Some of the highest set aside rates in the tribunal come from countries such as Iraq. I think everybody around here would agree that that is a country likely to produce credible claims of infringement of human rights.

Dr THEOPHANOUS—Yes, but what I raised before with the department is that in determining these matters you depend a great deal on the information and reports of the Department of Foreign Affairs; is that correct?

Dr Nygh—Inter alia, not exclusively so. That is part of the input. We also rely upon reports produced by Amnesty International, reports produced by the United States State Department, which has to make an annual report on human rights and human rights infringements in each country as a precondition to certain aid being given to that country, reports from Human Rights Watch in New York, which is a private organisation which is not tied to any governmental body, and also from the world press.

Dr THEOPHANOUS—You are not concerned that some of the judgments made by the Department of Foreign Affairs in terms of their assessment about the situation in some countries may actually be inaccurate or may be based on other factors rather than a pure objective assessment of the situation on the ground?

Dr Nygh—Such reports from the Department of Foreign Affairs that I have seen have struck me as being very objective.

Dr THEOPHANOUS—So you would say, for example in the case of Turkey, that the failure of the department to favourably report on the Kurdish situation for refugee purposes is an objective assessment?

Dr Nygh—I cannot enter into a debate because I have not seen any DFAT reports on Turkey. I can only point out that the tribunal this year in applications from Turkey—which of course includes Kurdistan: since it is not a nationality, that does not show up, of course—there were 55 decisions so far this year, of which 29 were set aside and 22 were affirmed. So it cannot be said that the tribunal ignores or is given false information about the human rights situation in Turkey.

Dr THEOPHANOUS—What about China?

Dr Nygh—For China the set aside rate is very low. The set aside rate is 1.5 per cent.

Dr THEOPHANOUS—One point five per cent, and yet we have continuing reports from the United Nations and many other places about the human rights situation in China. Do you think that reflects that situation, 1.5 per cent?

Dr Nygh—Yes. China—and it is very interesting to read some of the reports from the United States—and particularly the southern provinces of China, are traditionally emigration countries. There is a tradition in some parts of China to go overseas to countries like the United States and countries like Australia to better one's social position, particularly in a situation when what is called the 'iron ricebowl' is breaking down and unemployment and company defaults are rising very steeply. So although there are undoubtedly people who come to Australia and to the United States from China for reasons of persecution, there is in the Chinese caseload a very strong element of emigration.

Dr THEOPHANOUS—So you are satisfied that, notwithstanding reports other than the Australian Foreign Affairs department, notwithstanding the reports for example from the United States Congress and others about the human rights situation in China, 1.5 per cent reflects the actual situation?

Dr Nygh—From my observation it reflects correctly the present situation in China. Human rights violations are properly reported in China but there is also from China a very strong push to use generalised claims which often are not particularised—as it were, jumping on the bandwagon. A function of the department and of the tribunal is to separate those two strands out.

Dr THEOPHANOUS—What are your figures for Lebanon?

Dr Nygh—So far in this current year there have been 93 decisions for Lebanon, of which only five were set aside and 77 were affirmed.

Dr THEOPHANOUS—So that means—

Dr Nygh—So that means that Lebanon does not produce a high rate of claims that are accepted.

Dr THEOPHANOUS—This is notwithstanding the current problems in the Lebanon?

Dr Nygh—There are undoubtedly again serious problems in the Lebanon, but some of the comments I have made in relation to the People's Republic of China also apply to Lebanon.

Mr RIPOLL—Dr Nygh, DIMA has claimed in its submission that a large number of their primary applications are invited to go to the RRT and that a large number of those do not then take that opportunity up. They are suggesting that that actually would mean that those people are not serious about their claims. What would you have to say about that?

Dr Nygh—As I have said, the figure of the flow-on—what you might roughly call the appeal rate from the department to the tribunal—ranges from 80 per cent and may now be running as high as 86 per cent, so obviously the overwhelming majority of people who have an adverse decision at primary level do go to the tribunal. However, what happens at the tribunal is that we have a very high proportion of people who do not answer or accept our invitation to attend for hearing. As I made clear earlier in my response to Senator McKiernan, it is only a very, very small proportion of people where a favourable decision is made on the papers. Therefore, in 99 point something per cent of cases an invitation goes out and a hearing must be offered to the applicants.

The figures that we have from 1 July 1993 until the end of last calendar year show that no hearing was held in 33.5 per cent of cases. As I said, the overwhelming number—virtually all of them—would have been cases where someone was offered a hearing and did not accept it. That is accentuated in the current financial year, from 1 July 1998 until 31 January 1999, where that percentage has increased to 47.92 per cent of people. In other words, applicants who have appealed and who have then been offered a hearing either do not accept that offer of a hearing or, if they have at first accepted it and a date is set for the hearing, do not bother to show up.

Mr RIPOLL—Do you have any explanation for or any reasoning behind those figures?

Dr Nygh—No. I think the department draws from this the conclusion that those people were not serious about their application. From my point of view, I think that is a fair inference.

Mr RIPOLL—There is a question as to whether the fee actually serves as a deterrent for unmeritorious applicants who have then failed to identify themselves to you. Do you agree with that? Do you think it actually is a huge deterrent? Does it actually vary the numbers or not?

Dr Nygh—I think it makes no difference at all. I have shown the figures and our flow-on rate seems to have increased rather than decreased. So I do not think it can be described as a deterrent.

Senator McKIERNAN—The priority the tribunal use for determining cases is that it is for persons who are in detention in the first instance and those that are suffering trauma or—

Dr Nygh—Yes, there are three categories of priority: detention, torture and trauma and financial need. In relation to financial need, this includes people who are on the ASA scheme. We have also issued an open invitation to all refugee organisations to nominate people whom they feel are in need.

Senator McKIERNAN—People on the ASA scheme, which was the one that I missed when I asked my question, they would be six months awaiting a primary decision, would they not? Am I correct on that?

Dr Nygh—I do not know.

Senator McKIERNAN—You do not know. We can find out from other areas. What I am trying to get to with this question is that the system that is currently in place would benefit a person seeking to abuse the system. Persons seeking to use the refugee application system will know that their application is going to take some time because it will be in a queue behind those other three categories of applicants.

Dr Nygh—Historically I think that undoubtedly was true, but as you will see—and the figures are given by the department at table 5, Average Number of Days—there has been a sharp decline. If you look at 1995-96 for instance, the average Indonesian application took 589 days going through both the primary and the secondary level, the review level. The average time taken has sharply decreased. Undoubtedly, that would counteract any expectation that just by lodging an application one could stay in this country.

Senator McKIERNAN—Nonetheless, if one accepted the department's argument that the individuals may be working and earning at the average weekly wages, it might be beneficial to them, even with those shortened determination days.

Dr Nygh—Maybe.

Senator McKIERNAN—It could be?

Dr Nygh—Yes, it could be but I do not know.

Senator McKIERNAN—Are there any further questions? Dr Nygh and Ms Toohey, thank you very much for your attendance this afternoon and the assistance you have given the committee.

[3.05 p.m.]

LEKAKIS, Mr George, Deputy Chairperson, Federation of Ethnic Communities Councils of Australia Inc., and Chairperson, Ethnic Communities Council of Victoria Inc.

Senator McKIERNAN—The committee does not require witnesses to give evidence under oath; however, you should understand that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the parliament itself. Giving false and misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have received your submission and have authorised its publication. Are there any corrections or amendments you want to make to that submission?

Mr Lekakis—No, but there is some additional information.

Senator McKIERNAN—I am now going to ask if you wanted to make an opening statement and speak to your submission or add additional comments if you choose to do so. At the conclusion of your remarks, I will invite members of the committee to address questions.

Mr Lekakis—The Ethnic Communities Council and FECCA's position is underpinned by some fundamental principles. We believe that the Commonwealth must ensure a fundamental human right that immigrants and refugees have full access to judicial review and administrative review regarding decisions concerning their residency. Immigration and refugee review decisions should also be fair, just, economical, informal and, most importantly, very speedy. We are also of the view that the policies and practices of the Immigration Review Tribunal and the Refugee Review Tribunal, especially in regard to access and equity policy, access to interpreters, informality and non-adversarial nature, should remain intact. We also hold the view that an appeal system must be readily accessible and not cost driven for the appellant.

Most of the ethnic communities councils around Australia put forward the argument that access to quality and professional legal advice is the key determinant of whether a person would decide to proceed with an appeal. Access to such advice has been undermined—firstly, by cuts to organisations that have provided that advice in the past, like MIA, RACS here in Victoria and other similar bodies right around the nation, and the encouragement of a self-regulation migration agent system in this country which were previously regulated by the department. The above two factors, in our view, have resulted in people being more vulnerable to abuse by unethical and unscrupulous migration agents. We do not believe that all agents operate in this manner. However, when people are in such a vulnerable state they tend to examine all avenues and thereby are likely at some point to encounter less ethical operatives.

The councils are of a firm view that the migration agents should be regulated via the department, possibly issuing limited licence, and that fee structures should be imposed, and that this sector should not be allowed to continue to self regulate. We have recommended

that the Migration Agents Registration Authority be abolished and the responsibility for registration and the regulation of migration agents again be returned to the department.

It is our view that the department's entry into regulating the sector was initially driven by the numerous cases of financial abuse that many onshore applicants were experiencing. We have much anecdotal evidence to suggest that a lot of the claims going up for review before the Refugee Review Tribunal are made in the hope that an extra buck might be collected by putting up bogus claims and prolonging the stay of the appellant. We have many, many such examples.

In respect to migration regulation 4.31B, it is within the context of my previous comments that we also oppose the migration regulation relating to the fee of $1,000 for a review by the Refugee Review Tribunal. The government has stated that the justification for the operation of that particular regulation is to discourage abuse of refugee applications. In his media release on 25 June 1997, the Minister for Immigration and Multicultural Affairs, Mr Ruddock, stated:

> There are no clear indications that significant numbers of people are lodging protection visa applications in the full knowledge that they have no claim for refugee status. Their intention is to delay their departure and obtain work rights.

Accordingly, in their annual report the Refugee Review Tribunal comment that 'Ninety per cent of the RRT's decisions affirm that the applicants were not entitled to protection'. This is a remarkably high rejection rate.

By publicly claiming to know in advance the motives of applicants, the government is making the dangerous presumption that a person is guilty before his or her case is reviewed. In effect, the government is vilifying a class of people—asylum seekers—who are in special need of protection. The fact is people have very different understandings of the meaning of what it is to be a refugee. Not only is the definition of a refugee contestable in international law, perceptions of whether people have a genuine fear of persecution in their country of origin are often complicated by many political, religious, economic and other considerations. The assumption that generalisations can be made about the motives of most of the applicants from these countries, and that many can be lumped together as all having the same base motives, should clearly be unacceptable.

It is a daunting task for many refugee applicants to understand how the Australian government operates, particularly if they do not speak English. In addition, the review of the operation of regulation 4.31B must critically assess its implication for Australia's human rights record with respect to asylum seekers. We believe that the problem is being addressed from the wrong end. Steps to inhibit people's access to the review process violates basic principles of human rights and access to justice. The correct approach is to identify where the abuse occurs within the system. Therefore, we have highlighted the fact that we believe a lot of the abuse occurs for the deregulation of migration agents. If asylum seekers are manifestly unfounded, then it is quite possible to devise a cost-effective and objective process of review that can be conducted in a relatively short period of time—for example, social security processes could usefully be studied to find more appropriate models, or maybe we could encourage the tribunal to examine and decide on matters on the papers.

We believe that, in reviewing decisions relating to their claims for refugee status the government must be more flexible in responding to the diversity of people's concerns, while being careful to fully respect and uphold universal human rights principles. We recommend that the regulation ceases to apply as soon as possible; that the review considers the issue of regulation of migration agents and its implication on the type of applications that are made to the RRT; that the government review the decisions by the Refugee Review Tribunal to determine the reasons why a significantly high proportion—90 per cent—have been unsuccessful in their claims for refugee status; and that other more appropriate alternative strategies be implemented to encourage the determination of these decisions.

Senator McKIERNAN—Thank you, Mr Lekakis. Part of your argument was that the system should be fair, just, open and speedy. Would you agree though that the large numbers of applications, which brought about a 90 per cent rejection rate, have caused that speedy part of your proposition not to be able to be fulfilled?

Mr Lekakis—Yes, we believe that quite clearly. We have a lot of anecdotal evidence of people being rejected in the normal course of migration decisions and then going before migration agents who are pushing their cases as refugees. I do not want to mention specific source countries where some of these particular cases emanate from, but we have evidence of people paying up to $40,000 in order to pursue a claim for refugee status, and quite clearly there is no refugee problem in that country. I will not mention the country. You are all politicians and I am sure many of you have come across cases where people make representations before you and clearly those people do not fit the regulations. You go away thinking that you have provided the best advice to your constituent and the next thing you know a migration agent has taken up the case and put it before the Refugee Review Tribunal.

If we have funded programs in the community, migration advisory services in migrant resource centres or various other community based bodies, they are not in a position to determine whether the case is profit motive driven. They are going to put the best cases up that they think warrant a reviewable decision. Those organisations will be much more careful in the types of cases they put up. They will put up cases which have merit rather than being driven by whether they are going to earn an extra buck or not.

Senator McKIERNAN—I am a bit flabbergasted at your $40,000 fee. Has a complaint been launched with regard to that particular figure?

Mr Lekakis—We have that evidence and we have evidence of many others.

Senator McKIERNAN—Has a complaint been lodged to the agents authority?

Mr Lekakis—No, it has not. How can a complaint be lodged against a body which reviews its own and plays it against its own members. There has got to be some independence. The complaint in that case was not lodged.

Senator McKIERNAN—Yes, that is the point. I do not want to be put in a position where I am defending MARA, because I have not been in that position previously, but one cannot expect an organisation like that, which is now a statutory body, to undertake its role

if a complaint is not lodged against the agent. MARA is accountable to the parliament through the Senate estimates processes, so if a complaint was lodged and it was not investigated and carried through, the parliament can then have a view at a later time. Do you see where I am coming from? If no complaints are lodged, we cannot blame the MARA or any other authority.

Mr Lekakis—No, but if the government's $1,000 fee is to inhibit bogus claims—

Senator McKIERNAN—Okay, we will stay with that one.

Mr Lekakis—Why do we not inhibit where a source of that problem occurs?

Senator McKIERNAN—The government would argue—and this is where I do not want to be in this defence role—that there is a system of statutory bodies set up to do that. It can do that, it can act on complaints, but complaints are not made.

Mr Lekakis—If somebody has paid $40,000 in the hope that they will get a favourable decision and they have been spun a story, they will continue with that particular situation if it prolongs their stay where clearly a decision can at least be made on the papers that where this particular applicant is coming from there are no reportable human rights abuses, that there is no case of persecution of that particular person in that country. There has to be some speedy process by which decisions can be made and I think that really needs to be examined.

Senator McKIERNAN—Is FECCA's view then that regulation 4.31B has been a deterrent?

Mr Lekakis—No.

Senator McKIERNAN—Not at all?

Mr Lekakis—No, not at all.

Senator McKIERNAN—You do not think it has worked?

Mr Lekakis—People will go to desperate measures. These people are denied work rights, they are denied any income support—they are being denied a whole range of things which used to exist in the previous government. These people are desperate enough; they will find the money to pay it. As we said, 90 per cent of the cases were affirmed, which means that 90 per cent of the cases are bogus. So whether you pay the $1,000 up-front or you do not pay it, you will still come to similar ratios of rejection.

Dr THEOPHANOUS—I am very surprised at your last comment. Are you saying that it is FECCA's position that the operations of the RRT in rejecting 90 per cent of cases are correct?

Mr Lekakis—No, not at all.

Dr THEOPHANOUS—In your assessment what proportion of the 90 per cent do you think are rejected unjustly or come to your attention as being rejected unjustly by the tribunal, because you mentioned right at the beginning something about our international reputation and the rest of it?

Mr Lekakis—No, the question was posed to me as to whether $1,000 will inhibit—

Senator McKIERNAN—Was a deterrent.

Mr Lekakis—Will act as a deterrent. We are suggesting that it is not. There is a high rejection rate. Those rejections are determined by individual decisions which examine all aspects pertaining to every case. We are not in any position to comment on the fairness or unfairness of their rejection rate because we are not privy to the actual determinants that lead to that decision.

Dr THEOPHANOUS—Mr Lekakis, I do not know if you were here before, but one of the key factors in making this determination of the rate are the reports as mentioned by the acting chief of the tribunal, reports of the Department of Foreign Affairs and other international bodies. Are you satisfied that that process is accurate and above board? We have had situations where the Department of Foreign Affairs has changed its position in relation to advice with respect to particular countries.

Mr Lekakis—We have some concerns and in the past we have suggested that other sources for decision making should be explored. It is not necessarily that one source of information—namely, the Department of Foreign Affairs reports—should be the sole and only way of researching and coming to a decision.

Mr RIPOLL—Mr Lekakis, in your submission you say that there are other ways that you could deal with this whole system. Do you have any suggestions as to what they are? It is a fairly broad question but it says here, 'FECCA argued that any abuse in the system should be dealt with in other ways.' What would those other ways be?

Mr Lekakis—We have suggested regulating the migration agent area, that funding for an advisory service be established in the community where people can receive adequate advice rather than putting up bogus claims, and that decisions be made in a much more speedy fashion. Also, there might be an opportunity to examine whether decisions can be made on the papers.

Mr RIPOLL—Do you believe enough is being done in trying to find and prosecute unscrupulous agents?

Mr Lekakis—No.

Mr RIPOLL—Can you give a bit more of an explanation?

Mr Lekakis—Well, how can there be?

Mr RIPOLL—One of the issues I raised earlier with DIMA was asking what they were doing to get to the heart of the problem. Where are the problems originating from: is it the applicants or is it perhaps unscrupulous agents? What do you think they are doing, or are they doing enough, to target where those problems may or may not be originating?

Mr Lekakis—No, they cannot be because the authority which regulates migration agencies is quasi independent from the department directly. Schedules for fees and a whole host of other things cannot be determined by the department. It is usually a self-regulating process.

Mr RIPOLL—The department is suggesting not only that the fee be retained, but that it also go up to $1,800 to effect some sort of cost recovery. There are probably two angles to it but do you think that the fee will be a greater deterrent to people in their application and do you think that there will be any cost recovery?

Mr Lekakis—No, I think there will be a lot more stress on the actual applicants trying to raise the funds to put their applications in, and it does not say much for our international reputation that we put fees up for administrative review in this country. To my knowledge, there are not too many other tribunals for administrative review purposes that have up-front fees—the Social Security Appeals Tribunal does not, the Veterans Affairs Board does not. Which administrative review body in this country has up-front fees? We deny work rights, we deny income support, we deny housing, we deny a whole host of social provisions and we impose harsher measures for decision. On top of that, we have a fee for our appeal mechanism. Let us make the appeal process speedy and everybody can have their day towards natural justice.

Ms MAY—You are identifying the financial hardship for people in an up-front fee, but on the other hand you have told us of people who have been able to find $40,000 to go to a migration agent. That just does not seem to balance there. Obviously, if people are desperate enough they can find this money—you have said that yourself—and yet you are disagreeing with the fee as imposing another hardship on people, along with the other hardships we have obviously imposed, or you are saying we have imposed.

Mr Lekakis—There are cases which are set aside and there are people with genuine fears of persecution if they are returned back to their country of origin. By putting up the fee, it just increases the toll on those people. At the same time, you are asking for a process by which we inhibit people to make applications. We should not be inhibiting the people who are making the applications. We should be determining matters in a much speedier fashion.

Ms MAY—Okay.

Mrs IRWIN—In your submission, you state, 'Where asylum claims are manifestly unfounded, then it is quite possible to devise a cost-effective and objective process of review which can be conducted in a relatively short period of time.' Can you give us any detail on that?

Mr Lekakis—I have made suggestions on the papers, but it would be up to the tribunal to come up with solutions for the way in which decisions can be made quickly. The turnaround rates in some tribunals are remarkably quick; in others they are very lengthy. There might be ways in which the copious information that is required in order to come to a decision before the RRT is collected and decisions are made. You have to allow the tribunal to come up with the ways in which it could make its decisions speedier. Having more members on the tribunal might not necessarily be the answer; it might be that certain types of applications get reviewed on the papers.

Dr THEOPHANOUS—You would be aware that it is not actually an up-front fee; it is a fee that is paid after the event?

Mr Lekakis—Yes.

Dr THEOPHANOUS—Given that it is a fee that is paid after the event, and we heard from the department that 90 per cent do not pay after the event, what is your comment about that?

Mr Lekakis—If they do not pay, they are on their way out anyway. They are being deported so you are dealing with some pretty desperate people.

Mrs IRWIN—But it is also going to be very, very hard for those people if they do leave the country because if then they apply to come back under the refugee and humanitarian program as genuine refugees we will not even look at the application. Is that correct?

Dr THEOPHANOUS—Or even as migrants?

Mrs IRWIN—Because they have a debt to the Commonwealth of Australia.

Mr Lekakis—Oh, yes, but that goes with a lot of other migration regulations. The non-payment of any debt prevents you from re-entering the country for a certain period.

Dr THEOPHANOUS—But you said earlier that you were concerned about the impact up front. We are pointing out that it is really not the same as an up-front fee. Does that lead you to adjust your comment as to the desirability of the fee?

Mr Lekakis—If it is a fee that is paid after the decision is made it is an imposition on those people. There should not be fees associated with review processes.

Dr THEOPHANOUS—In relation to refugees?

Mr Lekakis—Yes.

Dr THEOPHANOUS—What, in principle?

Mr Lekakis—In principle, there should not be fees.

Dr THEOPHANOUS—Can you elaborate as to why you feel that way?

Mr Lekakis—If people have a genuine fear of persecution, and we are a receiving country of refugees, on the one hand we receive them and settle them in the country, but we give people the view that they have to pay in order to get access to a fair process of administrative review. I just do not think that fees should be imposed at that level.

Senator McKIERNAN—In regard to refugees, the fee does not apply.

Mr Lekakis—After the event, once a refugee has been determined, it does not. But there are no charges for any other tribunal.

Senator McKIERNAN—Yes, but in regard to refugees, the refugee or the asylum seeker or the person seeking protection going through the system in country, a fee does not apply.

Mr Lekakis—It is after the event.

Senator McKIERNAN—It applies to a failed one after the event, but in regard to a person who is determined to be in need of protection a fee does not apply in the system. Is that not correct?

Mr Lekakis—Yes, it is as the result of the decision that the fee is imposed.

Senator McKIERNAN—Your comment about more decisions being made on the paper somewhat surprises me. Are you arguing that the current system whereby only positive decisions can be made on the papers should be expanded and that decisions ought to be made in regard to unmeritorious applicants on the papers?

Mr Lekakis—If you are looking at speedy decision making then there has to be some assessment of what gets decided on the papers. There should be a whole host of criteria as to what can be decided on the papers but that is a decision I cannot elaborate on; it has to be something that comes from the tribunal. It has to be a considered view as to what gets decided on the papers. But that is one way. You can either increase the people on the tribunal making decisions or there has to be some other mechanism of making speedier decisions. That is one suggestion. It is something that I cannot elaborate on.

Senator McKIERNAN—I recall that when the tribunal was being set up there were concerns that an individual would have—a colloquial saying—'their day in court' in pressing their case forward; that they could not be given a negative decision on the papers. We felt that quite strongly. I think it was actually this committee who put views in on that proposition. You are not moving away from that proposition now, are you, or are you not?

Mr Lekakis—There has to be some way in which decisions are reviewed in a speedy fashion. Whether we look at the positive decisions being reviewed on the papers or the negative ones, the issue of people having their day in court is fundamental. But at the same time, you have to look at decisions which emanate from particular areas—I mean, there are some countries in the world that do not have refugee problems.

Senator McKIERNAN—That is not strictly true, though. I mean the country many not have refugee problems, but an individual in this country can make a claim against another

country and they do not have to come from a refugee generating country in order to be able to make a claim. Indeed, you might find that some of the actual decisions have granted protection to individuals from countries we would not normally expect decisions be made against. That is because decisions are made for the individual.

Mr Lekakis—Well, maybe the positive ones can be made on the papers.

Senator McKIERNAN—They are.

Dr THEOPHANOUS—That happens now.

Senator McKIERNAN—They are allowed to be. No negative ones can be made on the papers. The individual has to be offered a hearing. In regard to migration agents, I was very surprised when the previous witness from the tribunal said that only 20 per cent of the cases before the tribunal actually had an agent in attendance.

Mr Lekakis—Agents are not encouraged to appear.

Senator McKIERNAN—In that case, are agents such a problem in this area?

Mr Lekakis—They prepare all the preparatory work though. They prepare the statements, they fill out the forms and they send them off. Further fees would be imposed to appear before a tribunal. Applicants probably invest all their money in the area in which they have an immediate need, because they cannot fill out the forms and might not have the money to be provided with advocacy at the tribunal.

Dr THEOPHANOUS—Just on agents, the department said that something like 2,200 agents have been accredited. I asked the question whether with so many agents it created a competitive atmosphere in which there may be a temptation to cut corners. The department denied that. What is your view? Do you think that there are too many agents and therefore there is competition between agents to get cases and to make a living out of it by cutting corners?

Mr Lekakis—That depends on what you are defining as cutting corners. It is creating more work.

Dr THEOPHANOUS—I am not defining it. You were the one who talked about it.

Mr Lekakis—It is not cutting corners so much as creating more work, creating more work to generate more income. People are coming in and they might appear not to have a claim for refugee status yet they are encouraged to put one in for the purposes of then generating an income. The more agents, the less potential for income. There is a propensity to retain your clients and to retain them on the basis that you put forward any claim which could prolong their stay in the country.

Dr THEOPHANOUS—So is it the feeling at FECCA that there are too many agents?

Mr Lekakis—There are.

Dr THEOPHANOUS—And that therefore this does encourage this practice?

Mr Lekakis—Well, it encourages the practice. There has not been any examination of the impact of migration agents to the whole process of review. The money that was generated through registration in the past went into community based advisory services; that is all gone. So we do believe that there is an overpropensity of agents who are flooding the marketplace.

Dr THEOPHANOUS—We are obviously aware of confidentiality rules, but you mentioned before that you have cases coming to attention. I think the committee would be interested to get some examples where you do not actually have the name either of the agent or of the person concerned, but agent X did this and client Y did that. Perhaps a few concrete examples provided in writing might be useful in the assessment of this matter. I wonder whether you could provide those without—

Mr Lekakis—I think we can endeavour to collect cases.

Senator McKIERNAN—If there are no further questions for Mr Lekakis, thank you very much for your attendance here this afternoon and the assistance you and your organisation have given to the committee in following its inquiry. We will have a short adjournment.

Proceedings suspended from 3.37 p.m. to 3.51 p.m.

GARDNER, Mrs Grace Mary, Adelaide Justice Coalition

Senator McKIERNAN—Welcome. The committee does not require witnesses to give evidence under oath, but you should understand that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the parliament. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee has received your submission. We have authorised its publication and it is now a part of the records of the committee's inquiry. Are there any corrections or amendments you wish to make to that submission?

Mrs Gardner—Well, not at this moment. There is a slight point that is not entirely correct but I will leave it at this stage.

Senator McKIERNAN—I will invite you now to make an opening statement to the committee and at the conclusion of your remarks I will invite members of the committee to address questions to you.

Mrs Gardner—I am honoured to represent the Adelaide Justice Coalition and to speak to the submission dated 12 February 1999 which was made to the Joint Standing Committee on Migration in relation to migration regulation 4.31B. The Adelaide Justice Coalition and its organisations are concerned with refugees from overseas, for people who come to this country and apply for refugee status, and for migrants coming to Australia under various visa programs. In addition, they have concerns for prisoners, for Aborigines, for the homeless, and for the vital issues of social justice. To the Adelaide Justice Coalition these are most important matters to which they give a great deal of consideration and, if possible, act wherever they can. The umbrella organisation, the Adelaide Justice Coalition, with its constituent organisations, aims to better the lives of these people and if possible provide better paths for others who will come in the wake of these people. In other words, they want to better the lives of the people they meet and to allow other people to avoid the difficulties these people have had. Ladies and gentlemen, this is the basis and the background against this submission.

The Adelaide Justice Coalition has first-hand knowledge of the misery and the privations of people who do apply for a protection visa and refugee status. As you are all very much aware, as from 1 July 1997 a provision in the regulations came in that anyone who applied for a protection visa who had not been in the country, or who had been in the country for more than 45 days, would not be permitted to be employed. This means, of course, there is no income for these people on which they are able to live, no money whatsoever. I am prepared to say that in the experience of the Adelaide Justice Coalition—and indeed from my own experience practising in this field—that the vast majority of people who apply for a protection visa and refugee status have a very genuine fear of persecution should they be forced to go back to their own country. It may not be judged by the Refugee Review Tribunal that it is a well-founded fear within the meaning of the 1951 convention and 1967 protocols but it is a genuine fear these people have.

I ask you, ladies and gentlemen: is it fair to impose a fee of $1,000 if these people fail to succeed at the Refugee Review Tribunal? These are people who have had to live in

accommodation provided by charity or possibly friends and who eat from handout food parcels if they are lucky. These are the people who have had to wait for a decision at the first instance and then have had to face the Refugee Review Tribunal and, in some instances, a very strict and uncompromising member. These people have failed in their wish to have refugee status. Are these people to be penalised, ladies and gentlemen, for the few who flout the system by applying for a protection visa and refugee status so that they may acquire more time in Australia? I do not feel it is fair to the genuine people who really do have a fear of returning.

I think it would be of significant interest if we could see what net income is gained by the Commonwealth government from the collection of these fees of $1,000; how much it costs to chase this money from people who simply cannot pay. If those people who are forced to leave the country when their refugee review decision has been refused are able to come back into the country, will they remain on a computer list and be sued or arrested on their return for the recovery of this money?

I think it is important to bear in mind what causes this very genuine fear in the vast majority of people who apply for a protection visa and refugee status. These people have suffered grievous times in their country; otherwise in most cases many, many of them would not be applying for a protection visa. Some have been imprisoned; some have been tortured. They come out here, apply for a protection visa and refugee status, and, on top of not being able to earn any income for food and shelter for themselves and their families, they are very, very much disadvantaged by being called upon, if they are refused a decision at the Refugee Review Tribunal, to pay $1,000. I think it is visiting the sins of the few on the genuine. I think the enforced payment by them of $1,000 is unjust and it is harsh.

I cannot agree with the Hon. Philip Ruddock who said on the *Sunday* program on 27 July 1997, 'We are asking those people who do not succeed, those people who do not have a bona fide claim, to pay $1,000 costs.' He went on to say, 'I believe there are very few people who have bona fide claims who will be subjected to these costs.' Ladies and gentlemen, I do not believe that that is right. Of the more than 86 per cent of people who are refused at the Refugee Review Tribunal, I do not believe that it is only a small minority who have very genuine claims. I believe that the vast majority who apply for review at the Refugee Review Tribunal have a very genuine fear—it may not measure up to what the Refugee Review Tribunal requires, but it is a very genuine fear that should they be forced to go back to their country of origin they will be persecuted. I think this fee of $1,000 is not correct. It is unjust and it is harsh and I ask that it be removed. I ask that the sunset clause be invoked and that this regulation 4.31B be removed so that the sun may never arise again on this most harsh and iniquitous regulation 4.31B.

Senator McKIERNAN—Thank you very much, Mrs Gardner. The day they brought this regulation into being, the minister argued that it would be a deterrent for unmeritorious claims being made for refugee status. He also argued that there were some who were abusing the system. Would you agree that it has been a deterrent in the 18 months or so that it has been operating?

Mrs Gardner—I do not know the figures, but I do know that from my experience in this area the people who have come to me have been very genuine in their fear of returning to

their country. The evidence that they have brought to me certainly supports that fear. I do not believe that the majority of the people are simply doing it to flout the system. I do not believe that; they have a very genuine fear. Yes, I accept that it would appear that it does not measure up to what is required by the RRT. However, to make these people with the very genuine fear, the background they have and the fact they cannot work, pay the $1,000 fee is, frankly—and I say it with respect—iniquitous.

Senator McKIERNAN—I listened to your argument and I have some sympathies for your argument, but we are making determinations in regard to what was contained in the 1951 convention and the—

Mrs Gardner—I understand.

Senator McKIERNAN—That is the baseline and the parameters that we are working from.

Mrs Gardner—That is the basis and I have argued it many times.

Senator McKIERNAN—In a sense you are putting forward an argument that we should change those parameters, change those baselines, change those benchmarks.

Mrs Gardner—I am entirely respecting the convention—definitely the well-founded fear of persecution has to measure up to those standards which the RRT impose. But what I am saying is I think there are many, many people who have very genuine fears of persecution should they be forced to return to their homeland and I do not think they should be penalised for what is a minority of people. That is what I am saying.

Senator McKIERNAN—In saying that you are saying that there is a measure of abuse in the system now?

Mrs Gardner—Yes, I understand that there is. But I believe strongly, as does the Adelaide Justice Coalition, that it is a minority and I do not believe the sins of a few should be visited on the genuine.

Senator McKIERNAN—Another set of witnesses has put forward to the committee that essentially there are five areas why people make application for refugee status in Australia. They would be, of course, convention reasons; people you would so describe as having well-founded fears but they do not actually fit a convention reason; people with compelling family or medical reasons to remain in Australia—for example, a condition for which treatment does not exist in their country—which properly ought to be brought to the minister's attention. Do you think that should be a valid reason for claiming refugee status in Australia?

Mrs Gardner—It is a valid reason for coming out here but I would not have put it on that basis. I would have put it on the basis that they come out to get medical attention, which I think is only humane. I am not sure if the two fit absolutely together.

Senator McKIERNAN—Medical would not necessarily be a refugee reason?

Mrs Gardner—No.

Senator McKIERNAN—The other one—and I think you have mentioned it as well—is the role of migration agents in this system. Would you care to elaborate further on what you had to say? We have had some very strong arguments from the previous witness about some agents unscrupulously practising and giving wrong advice or bad advice to their clients.

Mrs Gardner—What I would say about this is that I think very stringent steps have been taken to eradicate malpractices. Before we get our registration for the next year, we are now required, as you know, to have 10 points to our credit. In other words, we have to attend what one might call professional development meetings at which you get two points, so, effectively, you have to go to five meetings. In fact, I spoke at one meeting only the other night. They are really professional development. So, unless the people attend those meetings, they simply do not get registered. There is absolutely no exception to that; it is stringent.

Now, you could say they could attend those meetings and still be unscrupulous, but I think there are very strict rules of conduct. We have to display our little sort of notice saying if you are unhappy you can report us and so on and so forth. My feeling is that, yes, I believe it has happened but I think that there will not be too many who will be able to get through that sort of net.

Senator McKIERNAN—Thank you.

Ms MAY—Ms Gardner, you do not believe there is a lot of abuse in the system from applicants?

Mrs Gardner—I speak from the vantage point of South Australia—which is not Melbourne and Sydney, I realise that—but my experience and the experience of the organisation that I represent is that these people are genuine. The evidence is certainly pretty grim stuff. So, yes, it is possible that in Sydney and Melbourne where there are huge numbers of people coming through—otherwise we may not have had this $1,000 fee—there are numbers of such people; but I do not believe that it is the majority of people. As I understand it, more than 86 per cent of people are knocked back at the Refugee Review Tribunal.

Ms MAY—That was the next point I was going to raise with you, because the figure is more like 90 per cent.

Mrs Gardner—Yes, well I think I have been rather generous on that. I find—and I say it with respect—that many of the members are very strict and very uncompromising and it is not an easy tribunal to appear at.

Ms MAY—You do not think we have to be very strict in determining who does fit that criterion?

Mrs Gardner—Yes, I appreciate and respect the strictness and I think that it is very carefully and deliberately carried out in a pretty tough atmosphere.

Dr THEOPHANOUS—You would be aware, of course, that the government itself has accepted the fact that some people do not fit into the refugee category but have to be given protection over a period of time? That is why we introduced the special category for Yugoslavia and other places.

Mrs Gardner—Oh, yes, indeed I am.

Dr THEOPHANOUS—Clearly, those people who come from those regions are in a better position than those who have come from other areas which are not recognised for these purposes. But, given that we have those categories—although we are reducing them a little bit at the moment—where does the evidence come from for your claim that the majority of people are genuine in their fear of persecution? For example, we heard from the tribunal head before that 1.5 per cent of applications from China are accepted. The argument was that most people coming from China are not really in fear of any persecution but are actually trying to improve their lot in life here. What have you to say about that?

Mrs Gardner—I had a really dreadful case of a Chinese woman who had come out with her family and they had separate claims: she was claiming on the basis of the one-child policy and as a member of a social group and he was claiming on the basis of religious persecution. The evidence was absolutely shocking. I have no reason not to believe the claims, and I know that it is confirmed by other cases of what actually goes on in China and the abuse of human rights in relation to the one-child policy. It is absolutely dreadful what women go through every month in their factories to prove that they are not pregnant. We won that case—I think with every justification—and I would not have thought that was an isolated case.

Dr THEOPHANOUS—Is a way through this for the government to include other countries in its non-refugee category? I think that is the sort of question Senator McKiernan was getting at before when he mentioned the other categories. Is a way through this to include some other countries in this special category, for example, China or Turkey or some other country?

Mrs Gardner—Well, this may be a way of doing it. I certainly think there are a lot of deserving cases. I will say, though, that I had a man who applied for refugee status and we went to the Refugee Review Tribunal—in fact, I came over for that rather than sitting in front of a big television screen. He was applying on the basis that he would be sent back, no doubt, and put in the front line to go to Kosovo. Unfortunately, his evidence simply was not believed. Some months later we know what is happening in Kosovo, and I hope that there will be peace. But I think we do have the problem that some of the information on which the members seem to take total credence could be open to—

Dr THEOPHANOUS—I have already raised this issue of that Foreign Affairs advice.

Mrs Gardner—That worries me because that man had a very good case.

Senator McKIERNAN—In that instance it is not necessarily Foreign Affairs's advice which is necessarily incorrect. Being put on the front line in Kosovo is not necessarily meeting the convention guidelines, is it?

Mrs Gardner—No.

Senator McKIERNAN—I mean, that is what the tribunal has to judge.

Mrs Gardner—I understand and I take the point you make. It was on the basis of his political activities that he obviously tried to get his refugee status. It was a perfectly properly based application. What I am saying is that people like him who were detested over there—and I know that this is not entirely relevant to the RRT—when they are sent back are either shot when they get there or on the way. They do not really mind where the shooting takes place; they are simply lost in action. I do not like that.

Mrs IRWIN—I think we all know that the statistics are showing that there is a small majority of people abusing the system. Can you suggest alternatives to the fee that might reduce abuse of the system while not harming genuine asylum seekers?

Mrs Gardner—It is not easy. My feeling would be that it is like a class of schoolchildren: if one child is naughty, the whole class is kept in after school. I have never seen the justice in that. It is a little bit like this here. I do not believe that there should be this $1,000 fee and I just wonder what the net gain or net income is from imposing the fees, because many of them simply have no money anyway. How could they have?

Dr THEOPHANOUS—Ninety per cent do not pay.

Mrs Gardner—Yes. So, with enormous respect, why have it? It causes an enormous lot of heartache. It is another source of misery and degradation to these people. Many of them have had to live on charity because they have no incomes; by the very nature of the people, they are not going to have money. It is claimed that it is only $1,000—but it might as well be $500,000 to these people because they are living on charity and the smell of an oily rag. Many, many of these people are, I can assure you.

Mrs IRWIN—As we have just told you, 90 per cent of people are not paying the fee. The department claims that abolishing the fee might send the wrong message to those who intend abusing the protection visa system. Could you give the committee your views on that?

Mrs Gardner—I think it might send a message that there is some humanity and there is some compassion and I think that would be a very good move because the act is tough, tough, tough. Unless you fall right squarely within a category you are out and there is very little discretion. So I think it would be good to send that message.

Mr RIPOLL—Mrs Gardner, the Commonwealth has a program with the Red Cross to assist people in times of hardship in relation to this issue. Can you just explain to us how well that program is being used, whether it is successful, or what actually happens with that program?

Mrs Gardner—It never hit South Australia; it simply does not operate in South Australia.

Dr THEOPHANOUS—Not at all?

Mrs Gardner—No. I can say that categorically because after several times of asking it is no good asking any more. The Red Cross simply do not operate in South Australia to provide relief for these people. In fact, what happens is that they have to go to the church organisations and the church organisations are finding it difficult because of the pokies, because people are not giving as readily as they used to. It is a ripple effect really and they are finding it very difficult. But it is generally St Vincent de Paul, the Catholic Church and the Anglican Church who are providing the accommodation for these people, who are providing food parcels. May I say that this is supposed to be the lucky country and people who have come into the country are on food parcels.

Mr RIPOLL—I have just one more question. Could you give us your opinion in terms of the $1,000 fee itself, as $1,000. DIMA has made it clear in their submission that it equates to one and a half weeks worth of work and therefore is not a huge cost; it is a small cost. Can you give us your view in terms of people getting work and how big of a cost it actually is?

Mrs Gardner—They cannot work; they are not allowed to work if they have been in the country more than 45 days when they apply for a protection visa. They have no work. They have no income. They have no food. It is only charity that allows these people to survive. So, with enormous respect, that is baseless. It is very, very lacking in reality.

Mr RIPOLL—Could that be one of the reasons why there is such a low cost recovery rate?

Mrs Gardner—Of course, yes. The people who come out here have come from countries where they may have been tortured, many of them imprisoned. There is no food; their houses have been burnt down. They come out with nothing. Because of the language difficulty, some of them actually do not know how to apply for refugee status so they do not apply within the first 45 days—which is not a very long period of time—and then they cannot work. They have not accumulated any money anyway, so the idea of equating that with one and a half weeks work is just Alice in Wonderland stuff, frankly. It is not really the right sort of base.

Ms MAY—Mrs Gardner, just another question. We have heard today from other witnesses that many applicants do find the funds to have migration agents represent them. Do the Adelaide Justice Coalition charge people for their services? You said you are a migration agent yourself. Do you work with the Justice Coalition?

Mrs Gardner—No, I do not. I am not representing my organisation today. I am representing the Adelaide Justice Coalition but I am a solicitor with Legal Services Commission. They have had their funding drastically cut for work in the migration area—drastically cut. We are only able to advise and do the most esoteric work at the Federal Court in relation to matters going to the Refugee Review Tribunal, matters on which there is no real coincidence of thought between the judges of the Federal Court. In other words, it is a legal issue that has not been resolved by the judges and the matter that we could deal with only is one like that. In South Australia we just do not get those sorts of matters, so effectively I can only advise.

I will say that very informally I do quite a lot of work for them if I possibly can, because Legal Services Commission is the last port of call for people to have free legal work; otherwise they go to a migration agent. If they have no money, they struggle to do the work themselves, when many of them do not speak the language, cannot write and certainly do not understand our legal system.

Ms MAY—So you would see these people are bound by financial difficulties in getting that information?

Mrs Gardner—Absolutely, yes.

Ms MAY—Okay, thank you.

Senator McKIERNAN—Mrs Gardner, thank you very much for your attendance here this afternoon and for the assistance you have given the committee in pursuit of its inquiry into this very important issue. Thank you.

Mrs Gardner—Thank you very much.

[4.23 p.m.]

GRAYDON, Ms Carolyn Julie, Solicitor, Refugee and Immigration Legal Centre

Senator McKIERNAN—Welcome. The committee does not require that you give evidence under oath. However, you should understand that these hearings are legal proceedings of the parliament and warrant the same respect that proceedings in the parliament itself demand. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have received your submission and we have authorised its publication. It is now in the public domain of the inquiry. Are there any corrections, additions or amendments you want to make to that submission?

Ms Graydon—No, there is nothing further to add.

Senator McKIERNAN—I will invite you now to make an opening statement. At the conclusion of your remarks I will invite members of the committee to address questions to you.

Ms Graydon—Certainly. The comments that my service wanted to make have already been covered in our submission. Very briefly, we have always opposed regulation 4.31B; we thought it was nonsensical from the outset. It does not properly define the group that are supposed to be targeted and it makes no distinction between an unsuccessful applicant and an abusive applicant, which are the groups that the minister claims that he was targeting in introducing this regulation in the first place. It is very difficult to measure the effect of regulation 4.31B because it was introduced at the same time as a whole package of other changes affecting the rights of asylum seekers and the whole process. However, it is my understanding that there has been very little drop in terms of numbers of applications made to the tribunal. If you use that as the most crude—and probably misleading—measure, because there is no other measure really, then it has been unsuccessful even on its own terms.

It is our view that regulation 4.31B denigrates asylum seekers. It is impossible for an asylum seeker to necessarily know from the outset whether their application is going to be successful or not because that is inherently the role of the tribunal. Therefore, an asylum seeker is required to second guess the response of the tribunal and, if they are unsuccessful, then saddled with what we see as a $1,000 penalty fee. The minister has always stated clearly that it is a retrospective application fee for unsuccessful applicants, but we see it as a penalty. It is our view that regulation 4.31B comes close to breaching Australia's national obligations to create a refugee determination process that is acceptable. Application fees, whatever form they may take, affect the right of access that asylum seekers have to a process.

We were very pleased that there was at least a sunset clause attached to this regulation so that there would be an opportunity for the parliament to come back and have another look at it and to perhaps check the wisdom of this regulation. It is our view that if there are concerns of abuse in the refugee determination process—and we do not deny that there is a significant problem of abuse—there are better ways of addressing that. I am more than

happy at any point to elaborate to the committee upon what I see as being more constructive alternatives.

Senator McKIERNAN—Thank you very much, Ms Graydon. Perhaps I could start with a couple of questions first up. You say very strongly in your submission that the $1,000 fee has not met its objective as a deterrent. As a deterrent, do you think it may have inhibited the bona fide refugee applicants with a real chance of success from putting in an application?

Ms Graydon—It is difficult to assess that, of course, because they are perhaps the people that we are not going to see ever; that are so deterred from making that application that they never are in a position where they come into contact with our service. From my own personal knowledge, I am not aware of any cases where I thought a person had very strong prospects of success but has been deterred from applying due to the $1,000 penalty fee. Such people are driven by such strong subjective fear that I do consider it to be unlikely that someone who faces persecution, or has a well-founded fear of persecution, in their home country would be deterred. But I cannot say comprehensively that there are not genuine people being deterred, because I do not know.

Senator McKIERNAN—The numbers that the department have given us—and we have had quite a considerable debate with them today—do not indicate that this has served as a deterrent to people with unmeritorious claims. Would that be your opinion—that it has not served as the deterrent that it was meant to be?

Ms Graydon—I do not think it has worked at all. My initial difficulty with the whole regulation is that it is not clear who in fact it is trying to deter. It was my desire that we would have a proper discussion about what is an unmeritorious application, because the failure to distinguish between 'unsuccessful' and 'unmeritorious' causes me a great deal of disquiet. We act only for bona fide applicants and we have stringent merit tests at our service. We are a non-profit organisation; we have no interests to be served in seeing unmeritorious applications lodged, and yet a significant proportion of our clients are still unsuccessful. They are the borderline cases; they are the ones that could have gone either way. At the same time that these people are trying to come to terms with their bitter disappointment at having been rejected as refugees, there has been a $1,000 penalty fee. Most are unable to pay the fee—you cannot get blood out of a stone—and this causes significant anxiety to people, particularly those who are not familiar with Australian legal procedures and do not know what is going to happen to them if they do not pay. So that is our main concern—that it is applied indiscriminately, and we have never had these basic terms defined from the outset.

Senator McKIERNAN—Is it not determined by the tribunal when the person fails to meet the criteria for a protection visa in Australia? Is that not the definition of the tribunal?

Ms Graydon—The definition of a refugee is that which is applied by the tribunal, but we are looking at trying to deter unmeritorious applications. There is a significant portion of people who are ultimately unsuccessful, but whose cases had merit or are not within the class of those that should have never been lodged. They are people who are motivated by strong subjective fears, not by any attempt to abuse the process or just to seek a continuing stay in Australia for some other reason.

Senator McKIERNAN—Point taken, thank you. A final question from me. A different submission we received to the inquiry suggested five main reasons why people lodge applications to the commission: that is, the abusers at the bottom end of the scale; people with a well-founded fear that meets the guidelines; and then in the middle they offer this, 'people with compelling family or medical reasons to remain in Australia which properly ought to be brought to the minister's attention'. Would your organisation support an application to the Refugee Review Tribunal on those terms?

Ms Graydon—Our involvement in those cases would be limited to advising of the existence of the right for review to the tribunal. We would not agree to act in those circumstances, the difficulty being that you cannot access the ministerial discretions under section 417 unless you have been to the tribunal. That is, in my view, a weakness in the actual structure of the refugee determination process. There are basically humanitarian cases of people seeking review at the tribunal solely to gain access to that channel of then having a right to write to the minister and ask for his intervention under section 417. To answer your question, we do not act in those circumstances. We tell people to go away and, if they decide to proceed to the RRT and are refused, to come back to us then and we will talk about assisting them with a submission to the minister.

Mr RIPOLL—There has been some discussion today about unscrupulous agents. What measures would you see applying to unscrupulous agents and how would the measures apply to try and curb that problem?

Ms Graydon—It is a bit of a Pandora's box, the issue of regulating migration agents. I think that it is the root cause of many of the difficulties in the system and I have become very tired of seeing the asylum seekers being the ones penalised for what is often poor advice and exploitative practices. If agents are advising that the refugee determination process can be used as a way of buying time, with no other legitimate purpose attached, then that is the issue that needs to be addressed. That is the core issue.

In terms of how that should be addressed, for a start, take the profits out of the system; that assists to a large degree. Deal with agents that do not have a financial interest in seeing unmeritorious applications lodged, like our service. We have no financial interest; we share with the minister the same interest in seeing the credibility of the refugee determination process maintained and we certainly have no financial interest in seeing unmeritorious applications lodged. A lot of migration agents cannot say the same.

I am not saying that therefore all fee charging migration agents are operating unscrupulously, but I think that migration agent registration issues are at the core of the problems with the refugee determination process. I think that stripping resources from community organisations has not assisted in this matter at all.

Ms MAY—Ms Graydon, just as a follow-up to that then, and you touched on this in your opening remarks, can you suggest alternatives to the fee that might reduce abuse of the system while not harming genuine asylum seekers?

Ms Graydon—I suppose my first suggestion would be reform of the whole migration agent registration scheme. I think that that is the thing that has to happen before we are

going to see significant improvements in terms of the abuse problem throughout the process. But it is my view that the plethora of other measures that were introduced to reduce abuse have, in fact, made it harder for the department and harder for the tribunal to expeditiously process applications. If the purpose of people making applications is to buy time in Australia and there is no other reason, then any measure must be aimed at shortening processing time.

In the system at the moment there are so many competing priorities in terms of processing, because certain groups of people do not have work rights and are incomeless. People in financial hardship get priority in terms of processing. Survivors of trauma get priority in terms of processing. People in immigration detention get priority in processing because they are in detention—and so they should because there are serious human rights issues and that is why they get priority processing. But, if some of those things were not in place, the whole system could move faster and more smoothly and there would be less incentive for abuse.

I suppose what I am saying is that the unmeritorious applications that are supposed to be the target of this regulation are actually slowed down because of all the other pressures placed on the determination process by these incredibly needy groups that have been created through a whole range of other measures in the asylum process, such as removal or work rights and putting people in detention. In that sense it is my view that some of the government's problems are of their own making by creating these competing processing priorities within the system. Pressure can be released by treating the genuine people with a bit of dignity within the process. That would be another suggestion.

Finally, I would say that if parliament is committed to retaining the $1,000 penalty fee then it needs to be far more targeted and, in my view, should only be imposed following a finding by the tribunal that an application was abusive. It would need a specific finding so that it just does not automatically kick in on anybody who is unsuccessful. If the tribunal member had to turn their mind to not only the issue of whether this person meets the convention definition of a refugee, but whether this application is so manifestly unfounded that it should never have been lodged and constitutes an abuse of application, then let there be a finding of that and let only those people be subjected to a penalty fee. I say this with some degree of reservation and I am saying it only as a last ditch if the parliament is committed to retaining the $1,000 fee.

Senator McKIERNAN—What would the potential for litigation be if the government went down the track that you have just suggested?

Ms Graydon—Well, the reviewability of that kind of decision would only be limited to the payment of the fee. It would not have any effect upon a person's actual status because it is not going to the heart of whether or not Australia owes that person protection obligations.

Senator McKIERNAN—If the tribunal were to make a determination that the application was vexatious, was unmeritorious, could not that then open the doors to the Federal Court?

Ms Graydon—Only in terms of payment of the fee, not in terms of the person's status as an asylum seeker. The judicially reviewable decision would be the tribunal's finding that it was a manifestly unfounded case, or whatever the wording of that were to be. It still

would not form the basis for a person to secure a bridging visa and to remain in Australia. If that is the concern, that is just introducing a further mechanism for abusive applicants.

Senator McKIERNAN—Well, it would, would it not? It would allow the individual to remain in Australia because a bridging visa is virtually automatically granted if litigation is started in the Federal Court or the High Court.

Ms Graydon—But it would not necessarily have to be a part 8 reviewable decision under the Migration Act. It is only those decisions under part 8 that are judicially reviewable and there are plenty of other decisions under the act that are not judicially reviewable. So I do not anticipate there would necessarily be a difficulty with that.

Mrs IRWIN—Your submission canvasses the possibility of granting the RRT the power to impose a fee where it finds that an application was not a genuine one. So you are saying: do away with this $1,000 fee, go through the process and, if the RRT finds that you have only been trying to buy time with this protection visa to get an extra three or four months work, then it is up to them whether they charge that fee?

Ms Graydon—I am suggesting that if there is going to be this kind of penalty attached, that would be a more targeted or a more discriminating way. My view, and RILC's view, is that there should be no $1,000 penalty for anybody and that there are much better ways of reducing abuse—for example, reducing processing time, rather than saddling anyone with a $1,000 penalty fee. If the parliament were to say, 'We are committed to retaining the $1,000 penalty fee,' then this is just a suggestion as to how it could be better and more fairly targeted.

Mrs IRWIN—You just mentioned reducing the processing time. How would you like to see it reduced?

Ms Graydon—As I mentioned, I think that processing of the pool within which the unmeritorious applications lie is probably being slowed down due to the other prioritised cases, which, for good reason, need to be processed as matters of priority. If perhaps asylum seekers had permission to work again, so there is not this huge pool of people that are completely destitute and finding it very difficult to survive, the department and the tribunal would not be under such pressure to expedite processing in those cases, at the expense of the unmeritorious pool that get to sit there a bit longer and, hence, achieve some of their objective of remaining longer in Australia. Can you see that there are mechanisms in place that slow things down? I think that there should be more resources committed to processing it quickly. Ultimately, the costs blow out enormously and it would be much cheaper to put the resources in in terms of processing and seeing things expeditiously going through and the number of applications dropping because the incentive for abuse is removed.

Dr THEOPHANOUS—Ms Graydon, let me first commend you on your very logical presentation and your very logical arguments in your submission in relation to this matter. I want to come back to a couple of points. The first point was raised by Senator McKiernan and it concerns the question of the sorts of people who wish to access the minister and who are using the RRT process as a way of accessing the minister simply because they do not have any other method. Of course, the reason this came about was when we dropped the

humanitarian category some time ago, contrary to a lot of advice. There used to be a time when the minister could have looked at these cases through a different stream, which was the humanitarian stream. That is another story. However, maybe one of the ways in which to deal with this issue is to make access to the humanitarian stream available again via the minister. Do you think that would assist in this matter?

Ms Graydon—I do not know what proportion of cases that are primarily humanitarian cases are going through the RRT. We do see some. I think that the whole structure of the ministerial power has been the only mechanism for people whose rights might be under threat under different conventions other than the refugee convention. It is an inadequate mechanism and I would like to see a more formalised process, I suppose—a humanitarian visa or something of that kind reintroduced.

To address your question specifically, I think that would assist and that is something that has been debated or raised before the committee previously; that people be able to access ministerial discretion at an earlier stage of the process. I think that would definitely be a positive step. In the migration section, after you have been to what is at the moment MIRO—although MIRO and the RRT are, of course, in the process of being merged to form the MRT—you have been able to access ministerial discretion, as opposed to after the RRT. But, because the refugee determination process only has that one tier of review, it is only after review at the tribunal. I would agree with your suggestion that that would be a progressive step.

Dr THEOPHANOUS—You would also be aware, of course, as you made the point, that some cases are very meritorious but just miss out on the UN definition of refugee. The government has itself admitted this point by the fact that it has admitted a number of countries, such as former Yugoslavia and so on, where there is a special category of people who are not, strictly speaking, within the UN definition but who are allowed to stay at least for periods of time because it is recognised that the circumstances in those countries are such that they warrant this kind of determination. Do you think that the expansion of this kind of approach might assist us also in the processing of the categories and in the reduction of the number of spurious cases?

Ms Graydon—My main concerns are that there are genuine refugees who do meet that definition under the convention who are currently slipping through due to other systemic weaknesses in the process. I could be here for several hours, I suppose, explaining my concerns about that.

Dr THEOPHANOUS—Could you mention a couple so that we know what we are talking about here?

Ms Graydon—Well, difficulties in terms of the acceptance of people's evidence. Whilst the legal test is low, a low threshold test, you only need to show on paper that there is a real chance or it can be a less than 10 per cent chance that you are going to face persecution in your home country. It is my experience that the way that that is applied is in effect almost like a 'beyond reasonable doubt' test. So the legal tests, I think, are being far more stringently applied than as required by written law. I think also that it is increasingly the case

that the tribunal are becoming more focused. One issue that has come up a lot recently is whether something is for a convention ground or not.

Take Somali cases, for example. A year ago a person who could demonstrate to the tribunal that they were Somali and whose identity as a Somali was accepted was basically recognised as a refugee. A year later the situation in Somalia has not improved any. Yet now we are seeing large numbers of Somali asylum seekers refused by the tribunal on the basis that they might face serious harm or persecution but it is not for a convention reason, because they are the victims of random violence in civil war as opposed to being targeted due to their ethnicity or due to their membership of a clan. This is despite the fact that the whole civil war in Somalia is interclan conflict and interclan violence in the same way as it is between ethnic groups in the former Yugoslavia. It is a convention based war that has resulted in the atrocious human rights abuses there.

We are becoming more and more technical, I suppose, in determining what is a convention ground. That concerns me because that is resulting in quite a significant pool of Somali people who the tribunal admits might face serious harm if they are returned to Somalia being found not to be refugees. The only mechanism for seeking protection from being sent back to a situation which the tribunal admits might be persecutory is writing to the minister and asking him to intervene. It is not an adequate process for someone that perhaps faces torture but not for a convention reason.

Try and explain to an asylum seeker that the tribunal accepts that they might be killed, but for the wrong reasons. In the case of Somalia I think it is clear that the killing is often due to a person's membership of a clan—that they are even in Mogadishu, in that area, have paler skin or have some way of being identified from other clan groups. So that concerns me.

Dr THEOPHANOUS—In this sort of case, is this because of simply a change in the attitude of the tribunal for some reason or is this because of information coming from Foreign Affairs or other sources which led the tribunal to change its view, in your opinion?

Ms Graydon—I do not think on any reading of the country information that it could be said that the situation in Somalia has improved. It is my view that there has been one decision made in this way where a tribunal member thought, 'Oh, I've got some concerns about the strength of the nexus with the convention,' and has made a decision that has ultimately been upheld and it has just kind of become—

Dr THEOPHANOUS—A precedent?

Ms Graydon—Well, a trend; it has become a trend. We have seen it with Algerian cases as well, another country where people face very serious human rights abuses on return there. Also tribunal members come back with decisions saying, 'You might be massacred. You might be one of those unfortunate people living in village X that one day doesn't wake up, but we can't be satisfied it's for a convention ground.' I just do not think that there is a generosity at all in the tribunal. I am not suggesting that we are talking about non-convention refugees. I think that these people still do fall within the definition of a refugee, convention refugee.

Dr THEOPHANOUS—You talked about those that do fall in the definition. What about those cases that do not fall within the convention but have a genuine psychological fear of persecution? You would count those as a part of those meritorious cases which should not have the $1,000 imposed on them; is that correct?

Ms Graydon—That would be correct but that would be the humanitarian style cases and, as you have already suggested, it would be my suggestion that they would be able to access the minister's power at an earlier stage to alleviate their suffering as well. If they are, you know, genuinely labouring under some completely oppressive, subjective fear or psychological or psychiatric condition then no-one wants to see them put through an additional layer of legal processes that is inherently stressful and unpleasant.

Mr RIPOLL—Just one question: the department has recommended that the $1,000 fee be not only retained but also increased to $1,800. In your view, what effect will that have in two terms; one in terms of cost burden to the applicant, but also in terms of cost recovery to the government?

Ms Graydon—I do not know the statistics but I imagine the cost recovery would be fairly limited. Whilst some of the minister's initial comments when he was introducing the regulation were that this was to cover some of the administrative costs, its primary motivation has very clearly always been to deter the unmeritorious applications. A thousand dollars or $1,800; I do not know whether it makes an enormous difference.

It is of concern to me that any kind of debt that you have to the Commonwealth of Australia basically prejudices any other visa application. So an unsuccessful asylum seeker who leaves Australia and then seeks to return to Australia under one of Australia's global special humanitarian programs, for example, does not meet the character criteria if they have a debt to the Australian Commonwealth or unless they have made adequate arrangements for payment of that. So any kind of debt, whether it be $1,000 or $1,800, also has that nasty sting in the tail for an unsuccessful asylum seeker who leaves but may be eligible to return under some other kind of visa category.

Senator McKIERNAN—I wish we had more time but we unfortunately do not. I have a final question concerning this Somali type circumstance which is adjudicated by the tribunal. I want to ask questions particularly on that one because there is litigation going on in regard to it. Is there not a similar exercise that occurred some years back when China's one-child policy was determined by the tribunal to be a convention reason? That was then appealed to the court processes until the High Court ruled whether or not it fitted into the convention reasons?

Ms Graydon—The case of Somalis, in terms of whether or not their fees are grounded in a convention ground, is much more straightforward than that of the one-child policy, which was whether or not they formed members of a particular social group, which is a much more complex, amorphous kind of concept in refugee law than the question of ethnicity or race or clan membership. So I am not sure whether they are good analogies in that sense. I think perhaps the East Timorese are—

Senator McKIERNAN—That has not been adjudicated yet and that is why I did not put that forward as an example.

Ms Graydon—Oh, I see.

Senator McKIERNAN—The court has not ruled on it as such and, depending on what the Federal Court says, it may still go to the High Court—or other events which are happening apace might remove it.

Ms Graydon—Hopefully we will see that.

Senator McKIERNAN—So that is why I did not use the East Timorese case. I accept what you are saying in regard to the analogy between the one-child policy and the Somali situation. Are you not arguing, though, that the refugee status is now dependent on nationality; that if a person, in this case, is Somali, they will be a refugee under the terms of the convention?

Ms Graydon—Sorry, I am not quite clear exactly what your question was.

Senator McKIERNAN—Are you arguing now—to be more blunt—that somebody in Australia who is a Somali national should automatically be granted refugee status?

Ms Graydon—No, I am not suggesting that there should be any kind of blanket recognition of Somali cases. I was just merely pointing out that for no objective reason—the situation in Somalia has not changed in that year—the tribunal's whole approach to analysing Somali cases has undergone a radical change and has resulted in the creation of a new class of people with genuine concerns about their safety but with no proper legal mechanism for ensuring that Australia is meeting other international obligations perhaps not under the refugee convention. It is my view that there is ample room for them to be recognised as convention refugees, depending upon the case.

Senator McKIERNAN—I do not have the up-to-date figures but it is my understanding that the tribunal are still setting aside applications from Somalis. They are not blanketly wiping out all Somalis in the same way as perhaps could be argued with Filipino applications.

Ms Graydon—No, there would be a larger percentage of successful Somali applications, but there is also an increase in the number of ministerial appeals of Somali cases. We have had cases that have been found to be refugees by the tribunal, the minister's appealing on the basis that the tribunal has made a mistake in saying that there was a convention ground. One involved a 19-year-old Somali girl who is going to be held in detention for the whole period; who is not eligible for legal aid, for representation, and she will be defending an appeal against the minister.

Senator McKIERNAN—The minister would not be appealing against her?

Ms Graydon—Against the tribunal.

Senator McKIERNAN—The minister will be appealing against the tribunal?

Ms Graydon—She is listed as the other party, just in the same way that if we appeal a decision from the RRT it is the minister that is listed as the other party, even though it is the tribunal's decision that is under review.

Dr THEOPHANOUS—How often does this happen where the minister appeals decisions of the RRT?

Ms Graydon—I do not know the complete number of appeals that the minister is initiating but my experience is that the number of appeals is increasing.

Senator McKIERNAN—I do not have a recall of the tribunal's annual report which we just reviewed during the Senate estimates committee but I understand that there is a fall in the number of cases being taken on, but I do not know who they are coming from. Whatever information you have in regard to that, if you could provide the committee with it we would be most grateful. We, in turn, will check it too from our sources within the department. Unfortunately, time is against us. I wish we did have longer.

Are there any final questions from the committee? For the previous witness as well, we thank you for your attendance here today. If there are any matters that you feel the need to direct to the committee we would be most grateful to receive them. You will, in turn, receive transcripts of your evidence here this afternoon which will give you an opportunity to make editorial corrections. Thank you very much, Ms Graydon, for your attendance. I thank all concerned for their attendance, assistance and guidance during the hearing today.

Resolved (on motion by **Mr Ripoll**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 5.00 p.m.