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Conclusions and recommendations

3.1 Based on the operation of the fee and the evidence outlined in the previous chapter of this report, the Committee has reached the following conclusions:

- there is a significant amount of abuse from protection visa applicants;
- there is evidence to suggest that regulation 4.31B may have been effective in reducing that abuse, although this is difficult to gauge given the short time that the fee has been in place;
- there is no evidence to date that regulation 4.31B has deterred genuine refugees from applying for review;
- there is no evidence that regulation 4.31B breaches Australia's international obligations to refugees;
- the suggested alternatives are not appropriate; and, therefore,
- the fee should be retained, but it should be subjected to a further sunset clause to allow for a thorough assessment to be made of its effectiveness.

3.2 The Committee explains its findings and conclusions on these issues below.

Level of abuse in the refugee determination process

3.3 The Committee finds that there has been no satisfactory explanation for why approximately half of applicants who are invited to appear before the RRT fail to do so. For the most part this issue was avoided by those submissions critical of the introduction of the fee. This was a serious omission. The Committee finds DIMA's reasoning that a large number of people are not seriously pursuing their claims to be persuasive.

3.4 The Committee also finds that the abuse cannot be attributed solely or largely to migration agents. Approximately 39% of applicants do not have any kind of adviser when they apply to the RRT. This fact makes it difficult to claim that such people are being misled or manipulated. As DIMA pointed out, moreover, applicants have an interest in prolonging their stay in Australia, and only some 10% are found to be refugees by the RRT. These facts further suggest that a large number of protection visa applicants are not genuine.

3.5 Accordingly, the Committee concludes that there is a significant level of abuse on the part of applicants.

Effectiveness of Regulation 4.31B

3.6 The Committee acknowledges that it is hard to isolate the impact of the fee from other elements of the package introduced on 1 July 1997. It observes that DIMA's claim that the fee has contributed to a reduction in the number of primary applications is especially difficult to verify.

3.7 Nonetheless, the Committee notes DIMA's evidence that there appears to have been a decline in the flow-on rate for applicants from low refugee producing countries,[1] and an increase in the flow-on rate for applicants from high refugee producing countries. Although this disparity in the flow-on rates occurred in a brief timeframe, it would suggest that the fee has been effective in deterring non-genuine applicants, but has not deterred genuine asylum seekers.

3.8 The Committee points out that other evidence to the inquiry did not contradict this. Many submissions claimed that there was a rise in the average flow-on rate for all countries and this rise indicated that the fee had been ineffective. These claims, however, did not address the crucial issue of whether the fee had produced a divergence in the flow-on rates for high and low refugee producing countries.

3.9 In addition, much of the disparity between DIMA and other bodies seems to have resulted from employing different methods of analysis. DIMA calculated its flow-on rates using a ‘cohort’ method, whereas other bodies made a straight comparison of primary decisions and review applications in a given year. The Committee accepts that the ‘cohort’ method gives the more accurate picture of the impact of the whole package of measures.

1 These are countries whose nationals were unlikely to be awarded protection visas (ie the grant rate at primary level was less than 50% in the last three and a half years). This is in contrast to high refugee producing countries, where more than half of applicants were granted a protection visa over the same timeframe.

3.10 On balance, the Committee finds that there is probably sufficient evidence to indicate that the fee has contributed to a reduction in abuse of the system. However, given that the fee has been in place for less than two years, the Committee would prefer to assess the evidence after a longer period of time. It therefore recommends providing a further three years for DIMA and other organisations to gather more evidence about the fee's effectiveness. The Committee frames this recommendation at the end of this chapter.

Impact of the fee on genuine refugee applicants

3.11 The Committee acknowledges that many organisations are concerned that the fee has prevented asylum seekers from accessing review or has traumatised them. It notes, however, that the flow-on rate from high refugee producing countries has continued to increase, which suggests that the fee has not acted as a disincentive for genuine applicants. In its view, it is also difficult to reconcile the assertions that the fee has failed to have any impact on review applicants with the assertions by the same organisations that it has inhibited genuine asylum seekers.

3.12 More importantly, the Committee received no concrete evidence to indicate that the fee has been an inhibiting consideration for those who are genuinely in fear of their lives. This was despite the fact that the fee has been operating for almost two years.

3.13 The Committee therefore concludes that the evidence at this time indicates that the fee has not deterred genuine refugee applicants.

Effect on Australia's international obligations

3.14 The Committee accepts the advice from the Attorney-General's Department that the fee does not breach any of Australia's international obligations, including the right to equality before courts and tribunals.

Alternatives to the fee

Granting the RRT the power to impose the fee only on vexatious applicants or to waive the fee in compelling circumstances

3.15 In the Committee's view, this proposal appears to reflect the assumption that the fee must be a penalty if it is to be a deterrent. That assumption, however, is unfounded. The fee can deter unmeritorious applicants simply because they are aware of its existence. It need not be a penalty to achieve that result. The Committee is strengthened in this view by advice of the Australian Government Solicitor that the fee is not a penalty in law.

3.16 The Committee also believes that the proposal does not take sufficient account of the user-pays principle. It considers that the principle should apply in the context of failed protection visa applicants. Such people should be treated no differently from others who use the immigration system and are required to contribute to the cost of the service that has been provided. It is important to note that, by the time that the RRT has refused to grant a protection visa, applicants will have been through two levels of decision-making.

3.17 Furthermore, the proposal would require amendments to the Migration Act, mainly to curtail the possibility of litigation in the Federal Court. Even were such amendments to be made, litigants would still have access to the High Court. The potential for increased litigation is something that the Committee feels should be avoided.

3.18 For these reasons, the Committee does not endorse this proposal.

Strengthening the migration agents regulatory scheme

3.19 The Committee acknowledges that many groups in the community are concerned about unethical behaviour by migration agents and have strongly argued for changes to the regulatory scheme. The proposals for change ranged from ending self-regulation and abolishing MARA to imposing the fee on migration agents.

3.20 On the basis of the evidence from DIMA and the ASICJ, however, the Committee regards most abuse of the system as coming from applicants or unregistered people who advise them. It notes that these are the areas in which DIMA concentrates its efforts, whereas migration agents are dealt with by MARA.

3.21 If applicants and unregistered people are responsible for the bulk of abuse, there is little warrant for radically changing the migration agents

scheme by abolishing fees or ending self-regulation, as some have suggested.

3.22 It would also be inappropriate to recommend such changes when self-regulation will be reviewed in the coming year. The legislation establishing MARA on 21 March 1998 was subject to a two year sunset clause; as a consequence, MARA is due to cease operating on 21 March 2000.[2] The two years were designed to allow the government to review the regulatory arrangements before they expired.

3.23 In relation to imposing the fee on agents, the Committee believes this proposal would create many difficulties. Migration agents are likely to add the $1,000 to their base fee, and it is not clear what will happen to the 39% of applicants who do not have an adviser. It is also unclear what will happen to an applicant whose fee was not paid by the agent. In the Committee's opinion, this specific proposal raises too many difficulties to be acceptable.

3.24 Given the nature of the evidence and the fact that self-regulation will be reviewed shortly, the Committee believes that it would be premature to adopt wide-ranging proposals to strengthen the migration agents regulatory scheme, whether by imposing the fee on agents or otherwise. This conclusion, however, does not preclude the Committee from recommending changes at a later date should the evidence warrant it.

Introducing an onshore humanitarian stream

3.25 The Committee understands the desire of community groups to permit people to stay in Australia on humanitarian or compassionate grounds.

3.26 It points out, however, that the introduction of a humanitarian visa class could generate several problems. The creation of a humanitarian visa class has the potential to transfer the abuse problem from the refugee stream to the new class, and would provide unmeritorious applicants with more time in which to stay in Australia. It could also be subject to expansion through judicial review. The fact that the proposal was tried and proved unsatisfactory is another factor against its adoption.

3.27 Although the Committee acknowledges these problems, it does not wish to foreclose supporting a humanitarian visa at a later time. It believes that the issue deserves consideration as part of any detailed review of the entire refugee determination process. For present purposes, however, the Committee is not persuaded that the proposal should be followed.

2 *Migration Act 1958*, s.333.

Making certain applicants ineligible for refugee processing

3.28 The Committee believes that it is important to recognise that, in principle, any country may produce refugees. This idea lies at the core of the present system, and it should not be undermined without good reason.

3.29 The Committee finds that making applicants from countries such as the USA and the UK ineligible for processing would have few practical benefits. There were only 17 applicants from those countries during 1997-98, and there have been three during 1998-99. Thus, excluding applicants from those countries would not significantly diminish the problem of abuse.

3.30 Furthermore, the Committee considers that the proposal to exclude applicants from certain countries may raise questions about Australia's compliance with its international obligations, and would invariably prove controversial.

3.31 On these grounds, the Committee does not believe that the proposal should be adopted.

Reducing processing times

3.32 The Committee agrees with the aim of reducing processing times for primary and review decisions. It notes with approval the reductions already achieved by DIMA and the RRT since 1 July 1997. However, it is not convinced that the proposal to change government policies on detention, asylum seekers assistance and work rights[3] would lead to further reductions. It was alleged that such change would obviate the need to prioritise applicants in detention and financial hardship, and would result in other applicants being processed more quickly. DIMA's figures, however, indicate that 62% of protection visa applicants already apply within 45 days and over 98% of applicants are not detained.[4] It is thus unclear how ending detention and abolishing restrictions on work rights and asylum seekers assistance would materially improve the processing times.

3.33 The Committee encourages DIMA and the RRT to continue their efforts to process applications in a reasonably short time. It finds, however, that the proposal to change government policy as suggested in 3.31 would not lead to any significant improvements.

3 RILC, *Submissions*, p. S51; *Transcript*, p. 54.

4 DIMA, *Submissions*, pp. S98, S114.

Providing procedural fairness at the primary determination stage

3.34 The inquiry into regulation 4.31B did not focus on the primary determination stage, but on the fee and its impact on review applicants. In those circumstances, the Committee does not wish to pronounce upon allegations that DIMA failed to fulfil its obligations to accord procedural fairness under the Migration Act. It merely points out that if primary decisions are regarded as a meaningless formality, then applicants will inevitably appeal to the RRT. Judged from the flow-on rates, this does not appear to have occurred.

Recommendation 1

3.35 **The Committee recommends that :**

- **regulation 4.31B be retained; but**
- **to allow for a more thorough assessment of its effectiveness, it be subjected to a three year sunset clause commencing on 1 July 1999.**

MRS CHRIS GALLUS MP
CHAIR

MAY 1999