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Issues raised during the inquiry

Introduction

2.1 While many witnesses expressed support for the reduction of abuse in the refugee determination process, the Committee heard conflicting evidence about a number of issues. In this chapter, the Committee considers the views expressed on the following matters:

- the level of abuse in the refugee determination process;
- the effectiveness of regulation 4.31B;
- the impact of the fee on genuine asylum seekers;
- the effect of the fee on our international obligations; and
- alternatives to the fee.

Level of abuse in the refugee determination process

2.2 Determining the level of abuse in the refugee determination system has an important bearing on the maintenance of regulation 4.31B. If there is no longer a significant level of abuse in the system, the Committee would require compelling evidence that the abolition of the fee would increase non-genuine applications or that maintaining the fee served an important purpose.

2.3 The Committee received evidence that there was still significant abuse in the system, although it had been reduced by the raft of measures introduced on 1 July 1997. DIMA, for example, noted that under s.425 of the Migration Act, the RRT had to invite applicants to a hearing if it could

not make a favourable decision on the papers. The large proportion of such applicants who either declined an invitation to be heard or accepted the invitation and did not attend indicates a high level of abuse. In 1997-98, 45% of applicants who were invited to a hearing failed to appear, and during 1998-99, the percentage was 48%. Based on these figures, DIMA concluded that many of these applicants were not seriously pursuing their claims. It explained its reasoning in these terms:

> It is possible to conceive of legitimate instances where an individual may be unwilling or unable to attend a Tribunal hearing. However, given the large number of cases involved, it is reasonable to conclude that a large proportion of these applicants are not seriously pursuing their claim for refugee status as they are failing to assist the Tribunal to undertake the most thorough examination of their case possible.[1]

2.4 The RRT added support to some of DIMA's conclusions. In evidence before the Committee, the Tribunal stated out that 99% of applicants were offered a hearing, but, in the current financial year, 47.92% of those people either had not accepted an invitation or had simply failed to appear. When the Principal Member of the Tribunal was asked whether he could explain such figures, he replied:

> 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.[2]

2.5 Other organisations denied that there was a significant level of abuse on the part of applicants. The Adelaide Justice Coalition, for example, rejected the claim that asylum seekers were not genuine. It said: "the hardships that [asylum seekers] experience here are…sufficient [deterrent] in themselves and seem to prove categorically that their appeals for refugee status are genuine."[3]

2.6 The Australian Section of the International Commission of Jurists (ASICJ) expressed the opinion that abuse was no longer a significant feature of the system. While acknowledging that the $1,000 fee could have contributed to this outcome, it believed that the restrictions on work rights were more important.[4]

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1 DIMA, *Submissions*, p. S89.

2 RRT, *Transcript*, p. 31.

3 Adelaide Justice Coalition, *Submissions*, p. S66.

4 ASICJ, *Transcript*, p. 82.

2.7 A representative of the commission also suggested that applicants failed to attend hearings at the RRT because they did not understand the Tribunal's functions:

> I think [those who do not attend] are people who do not really understand what the tribunal is about, who have just lodged their application because they want somebody to listen to their case, and when it gets to a hearing date, they do not understand. They have not been properly legally advised and so they do not appear.[5]

2.8 The Refugee and Immigration Legal Centre (RILC) recognised that there were unmeritorious applications, but believed that unscrupulous agents were the "root cause of many difficulties in the system".[6] It maintained that asylum seekers should not be penalised for the poor advice and exploitative practices of some agents, and it advocated changes to the agents' registration scheme.[7]

2.9 While the Refugee Council of Australia (RCOA) agreed that there were people who wanted to extend their stay in Australia knowing that they were not refugees, it gave no indication of the numbers in this category. Nevertheless, it claimed that the bulk of applicants were not deliberately misusing the refugee process. It noted that applicants for protection visas included:

- people who had well-founded fears of returning to their country on grounds consistent with the Refugees Convention;
- people who had well-founded fears of returning to their country for non-Convention reasons, such as civil war;
- people who had compelling family or medical reasons that should be brought to the Minister’s attention;
- people who desired to extend their stay in Australia and who were advised by migration agents to obtain a “work visa”; and
- people who wanted to extend their stay in Australia and applied for a protection visa knowing that it was not applicable to them.[8]

2.10 RCOA accepted that there were people who abused the system, but argued that "abuse" resulted partly from the advice that applicants had received:

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5 ASICJ, *Transcript*, p. 92.

6 RILC, *Transcript*, p. 53.

7 RILC, *Transcript*, p. 53-54.

8 RCOA, *Submissions*, p. S6.

> The fact that there are some people who are abusing the system is, to some extent, a function of the advice that they are receiving - whether it is very bad advice from…unscrupulous agents…or the fact that at the moment there is virtually no free or assisted advice that they can receive.[9]

2.11 In response to these claims, DIMA rejected the notion that all unmeritorious RRT applicants were "victims" of migration agents and were unaware of what they were doing. It emphasized that:

- 48% of applicants did not appear before the RRT;
- only a small percentage of applicants (10% in 1997-98) were found to be refugees; and
- 39% of applicants had no "adviser" (whether a community group, migration agent or any other person).

2.12 DIMA stated that the applicants with no adviser were difficult to characterise as being misled or manipulated by migration agents.[10]

2.13 It also noted that 69% of applicants who had been subjected to the fee had not left Australia as at 31 December 1998.[11] According to the department, this fact undermined assertions that most RRT applicants had genuine intentions and were concerned to act in accordance with Australian law:

> It would appear that the vast majority of unsuccessful RRT applicants do not intend to act lawfully or to depart Australia on receipt of a review confirmation of the determination that they are not a refugee.[12]

2.14 DIMA concluded that, in this context, it was simplistic to attribute all intent and motivation for abuse to migration agents:

> RRT applicants gain something from the fact that they have an RRT application. They prolong their stay in Australia…The majority of onshore visa applicants in Australia have made plans to arrive here. They have paid for their travel, either via an ordinary travel agent or to a 'people smuggler'. It is incongruous to argue…that this level of sophistication and determination evaporates on arrival in Australia leaving all asylum seekers helpless and incapable of detecting or avoiding manipulation.[13]

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9 RCOA, *Transcript*, p. 64.
10 DIMA, *Submissions*, p. S115.
11 DIMA, *Submissions*, p. S115.
12 DIMA, *Submissions*, p. S115-116.
13 DIMA, *Submissions*, p. S116.

Effectiveness of Regulation 4.31B

2.15 DIMA argued that there was evidence that regulation 4.31B had deterred non-genuine applicants but had not deterred genuine refugees. It said that, since the introduction of the fee, primary and review applications from traditionally low refugee producing nations had decreased, while those from high refugee producing countries had remained steady.[14] It also stated that the flow-on rates (the rates of appeal) to the RRT from low refugee producing countries had decreased, but the flow-on rates from high refugee producing countries had remained steady or had increased.[15]

2.16 To illustrate these points, DIMA's first submission contained tables indicating that the numbers of primary applicants from five countries with a low grant rate had dropped. In the case of the Philippines, for example, the figures showed that primary applications had fallen from 693 in 1997-98 to 150 in 1998-99. This fall was accompanied by a fall in the flow-on rate, from 91% in 1997-98 to 62% in the current financial year. In contrast, the number of primary applicants from five nations with a high refugee grant, such as Algeria and Iraq, was roughly consistent with those in previous years, and so was the flow-on rate. According to the department, these examples suggested that the package of measures brought into effect on 1 July 1997 had been effective in curbing abuse.[16]

2.17 However, DIMA conceded that it was difficult to isolate the impact of the fee from the impact of other components of the package, such as the 45 day rule for work rights.[17] It submitted, however, that the fee was an important element of the package, and it was therefore reasonable to infer that the fee had contributed to a reduction in abuse.[18]

2.18 A number of submissions challenged these conclusions. The Refugee Advice and Casework Service (RACS), for instance, stated that it was difficult to understand why a post-decision RRT fee should contribute to a decrease in the number of *primary* applications. It also argued that, if the fee were effective, one might expect to find a decrease in the percentage of applicants seeking review. RACS used the evidence in DIMA's 1997-98 *Annual Report* to suggest that this had not occurred, as the flow-on rate of

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14 In DIMA's first submission, it classed "high refugee producing countries" as those where the grant rate for primary applications was consistently higher than 50%. Low refugee producing countries were those where the grant rate for applicants was lower than 2%. See DIMA, *Submissions*, p. S80.

15 DIMA, *Submissions*, p. S79.

16 DIMA, *Submissions*, pp. S80-81.

17 DIMA, *Submissions*, p. S79.

18 DIMA, *Submissions*, p. S84.

75% was broadly consistent with the experience of previous years.[19] It should be noted that this was an average figure and differed from the figures used by DIMA, which distinguished between high and low refugee producing countries.

2.19 Although DIMA had suggested that there was a decrease in the flow-on rate from low refugee producing countries, the RRT pointed out that there had been no decrease in the *average* flow-on rate since the fee's introduction. In 1996-97, the rate was 79.51% and in 1997-98 it was 80.82%. In the RRT's opinion, the rising trend had continued in the early months of 1998-99, with 88.08% seeking review in October.[20]

2.20 The RRT further suggested that, if people were concerned with paying the fee, they might be expected to withdraw prior to the Tribunal handing down its decisions. Yet while the absolute number of withdrawals had increased slightly since the fee came into effect, the withdrawal rate itself had remained steady. That rate was 8.35% in 1996-97, 6.6% in 1997-98, and it had been 7.7% in 1998-99. People thus were not withdrawing in significantly greater numbers than before.[21]

2.21 In its submission, RCOA suggested that there were other reasons why the reduction in applications could be occurring. It commented that refugee numbers were falling internationally, and this might well have affected the situation in Australia. It expressed the point in this way:

> In 1996 all bar two European states (the exceptions being Ireland and Poland) saw a reduction in application rates. In some cases the fall was marked - 62.5% in Italy, 45% in Portugal, 43% in Sweden and 30% in the Netherlands - and there were no major policy changes that would explain the fall. It is thus not unreasonable to expect that a similar reduction in the number of people applying for refugee status would be witnessed in Australia - unless of course there has been a major regional upheaval - which there has not.[22]

2.22 The figures that RCOA used also indicated that the flow-on rates had increased since the introduction of the fee. It stated that, as the flow-on rates had risen from 71% in 1995-96 to 81% in 1998-99, it was possible to argue that the fee had actually resulted in greater numbers of applications to the Tribunal.[23] However, these figures were different from DIMA's.

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19 RACS, *Submissions,* p. S31.

20 RRT, *Submissions,* p. S10.

21 RRT, *Submissions,* p. S11.

22 RCOA, *Submissions,* p. S9.

23 RCOA, *Submissions,* p. S9.

2.23 The ASICJ also used different figures. It noted that New South Wales and Victoria had seen a 7% increase in review applications between 1 July 1996 and 31 May 1998. However, it conceded that the number of applications had fallen during the first six months of this financial year.[24]

2.24 The Migration Institute of Australia believed that the fee was largely ineffective. It based this view on feedback from members who had worked with refugee applicants. Although the Institute gave no specific evidence or examples, it observed:

> [Members] report that there has not been even a single case known to them in which the prospect of the $1,000 penalty was even a relevant consideration when clients were deciding whether or not to apply for a review.[25]

2.25 The Institute added that most asylum seekers understood that the appeal to the RRT was their last chance to remain in Australia, and, in such circumstances, a monetary penalty such as the fee could never be a successful deterrent.[26]

2.26 The RILC disputed whether a mere drop in the number of review applicants was an adequate measure of the fee's effectiveness. It argued that to focus on a decline in review applicants was crude and probably misleading. Such an approach did not answer the question of who was deterred: whether it was an abusive group of applicants, or refugees who were entitled to Australia's protection.[27]

2.27 RILC further argued that, even if a fall in numbers were an adequate measure, there was no evidence to indicate that the fee had achieved its aims. In its view, the 3% fall in the number of review applicants between 1 July 1996 and 30 June 1998 was "hardly significant".[28]

2.28 In response to arguments provided by the organisations above, DIMA essentially made the following points:

- the fee was an integral part of the package of measures introduced on 1 July 1997 to curb abuse;
- removing the fee risked the positive impact of that package;
- its figures, which differed from those of other bodies, were sound; and

24 ASICJ, *Submissions*, p. S55.

25 Migration Institute of Australia, *Submissions*, p. S40.

26 Migration Institute of Australia, *Submissions*, p. S40.

27 RILC, *Submissions*, p. S46.

28 RILC, *Submissions*, p. S48.

- its figures showed a clear difference in the flow-on rates between low and high refugee producing countries, and this indicated that the fee was working.

2.29 DIMA first stressed that the fee was an integral part of the package introduced on 1 July 1997. The fee could affect primary and review applications because, along with other measures, it made it less attractive for non-genuine applicants to remain in Australia. As DIMA explained:

> At the worst days of protection visa processing in this country, if you lodged a primary application you may have had a wait of some 15 months or longer to have that primary application determined. You then had a 28-day period to consider whether you would go to review. That is another month. You then may have waited 24 months to have your review application considered. The cost of that processing was of the order of $5,000 to $7,000. The cost to you was zero. The result was three years plus. The package of measures as now described to you would be that, if you do not put in claim that has any merit, the likelihood of receiving a decision within one to three months is extremely high. The likelihood of receiving a decision from the RRT within a very short time frame is very high, and you will be charged $1,000.[29]

2.30 Secondly, DIMA warned that taking away the fee might risk the positive impact of the package of measures. It argued that removing the fee could make abuse of the system more attractive for applicants and might lead to increases in the primary rate of application and in the flow-on rates of applicants from certain countries.[30]

2.31 Thirdly, the department explained why its figures differed from those of the RRT and other bodies. It stated that it used a "cohort" method of calculating flow-on rates. This involved identifying applicants at the time of primary application and following them to see if they made review applications. Such an approach permitted DIMA to track the effect on applicants who had been subjected to the full package of measures introduced on 1 July 1997, including the 45 day rule for permission to work and the $1,000 fee. In contrast, the RRT and other bodies had made a straight comparison between the numbers of primary decisions and review applications made in the same year. A drawback of this approach was that one could not identify those applicants who had been affected by

29 DIMA, *Transcript*, p. 103.

30 DIMA, *Transcript*, p. 100.

all the measures in the package.[31] Yet it was largely because of this flawed approach that other organisations regarded the fee as ineffective.[32]

2.32 Lastly, in response to requests from the Committee, DIMA provided new graphs and tables showing the flow-on rates for high refugee producing and low refugee producing countries.[33] These illustrated that the flow-on rate from high refugee producing countries had been increasing since 1 July 1997. On the other hand, the flow-on rate from low refugee producing countries had remained level in 1997-98 and was now decreasing. DIMA noted that the percentage difference between high and low refugee producing countries had trended upwards and there was now a difference of 12.41% between the two groups. These results strengthened its claims that the fee had not deterred genuine refugee applicants, but had helped to reduce abuse.

Impact of the fee on genuine refugee applicants

2.33 DIMA argued that the fee had not harmed genuine refugee applicants. In support of this claim, it stated that the number of applicants from high refugee producing countries had remained static at the primary and review stage. It also emphasized that the flow-on rates from **high** refugee producing countries had either increased or remained steady. In the case of Algeria, for instance, the flow-on rate had risen from 91% in 1997-98 to 98% in the current financial year.[34] Such evidence supported the contention that the fee had not deterred genuine applicants from seeking review.

2.34 DIMA also maintained that genuinely fearful applicants were unlikely to be dissuaded by the prospect of paying the $1,000 fee:

> When weighing the balance between returning to a country where they fear persecution, against the remote possibility that a post decision fee would be imposed or debt to the Commonwealth

31 DIMA, *Submissions*, pp. S109-110.

32 The two methods led to considerable differences in the flow on rates. Using a cohort approach, DIMA showed that the flow-on rate for all countries had dropped from 84.84% in 1997-98 to 82.11% in 1998-99. However, when DIMA used the other method for comparison, the rate rose from 80.88% in 1997-98 to 87.16% in 1998-99. See Exhibit 2, Parts B and C.

33 In this submission, DIMA defined high refugee producing countries as those whose nationals had a primary grant rate of 51% or more over the last three and a half years; low refugee producing countries were those whose nationals had a grant rate of less than 51% over the same period. See DIMA, *Submissions*, p. S177.

34 DIMA, *Submissions*, p. S81.

> incurred [a bona fide applicant] can be expected to choose the latter course of action.
>
> It is difficult to conceive of any scenario in which such a person would not pursue an RRT review opportunity and, instead, choose to face the risk of persecution because of the prospect that they would be liable to a fee if their review was unsuccessful.[35]

2.35 Evidence from organisations that were critical of the fee's effectiveness supported DIMA's claims. When the RRT was asked whether the fee had impeded access to the Tribunal for genuine asylum seekers, its representative replied:

> The figures actually show the reverse. The flow-on rate on our figures has actually increased rather than decreased.[36]

2.36 RILC also doubted whether the fee had impeded genuine refugees. It stated that, in its experience, the fee had not deterred bona fide applicants:

> 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 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.[37]

2.37 RACS expressed a similar view:

> The fact is that, when applicants are told that there is a fee payable to the Refugee Review Tribunal if the application is unsuccessful, it is not uppermost in their mind. What is uppermost in their mind is that they fear going back to a country that they really do not want to go back to.[38]

2.38 Similarly, the Migration Institute of Australia reported feedback that the fee was "not even a relevant consideration when clients were deciding whether or not to apply for a review."[39] It observed that most asylum seekers had little or no money and regarded the RRT as their last chance to remain in Australia. In those circumstances, the fee could not be a successful deterrent. The Institute added:

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35 DIMA, *Submissions*, p. S85.

36 RRT, *Transcript*, p. 27.

37 RILC, *Transcript*, p. 52.

38 RACS, *Transcript*, p. 76.

39 Migration Institute of Australia, *Submissions*, p. S40.

> Some applicants…may have prospects of returning to Australia on spouse or other grounds and the prospect of having to pay $1,000 may be a relevant consideration for such people. However, we doubt there would be many in this position.[40]

2.39 In contrast, two submissions viewed the fee as hindering genuine applicants from seeking review. The Kingsford Legal Centre believed that the fee could exacerbate the fears of genuine asylum seekers, leading them to abandon their applications:

> Asylum seekers with strong grounds for appeal may be deterred out of fear that despite their genuine claim for asylum, the Tribunal may rule against them, therefore exposing the asylum seeker to a significant debt. The fact that many asylum seekers already live in poverty intensifies this fear of debt.[41]

2.40 The Campbelltown Legal Centre also contended that the fee formed an impediment to justice. It claimed that asylum seekers faced many pressures in deciding whether to appeal to the RRT. Such people were confronted with a complex body of law concerning refugee status; they did not have sufficient income to obtain private legal assistance; their English skills were poor; and access to free legal services and advice was limited. The Centre stated that, given these difficulties, it would not be surprising if many meritorious applications were abandoned. In its view, the fee placed even more pressure on applicants:

> The additional barrier of a $1,000.00 post decision fee can only add weight to a decision to abandon their application. Given the environment from which these applicants have come to Australia, many are fearful of government and of the prospect of what will happen if they are unsuccessful and they then cannot afford to pay the post-decision fee.[42]

2.41 Other submissions concentrated not on whether regulation 4.31B had deterred bona fide applicants, but on a different issue: whether it had caused real hardship. Several organisations argued that the fee made the lives of genuine asylum seekers even more difficult. The Immigration Advice and Rights Centre (IARC), for instance, focused on the consequences for disadvantaged families, describing the fee's impact as "harsh and oppressive", although giving no actual examples.[43] It explained that applicants affected by regulation 4.31B were invariably affected by s.48 of the Migration Act, which prevented such people from lodging

40 Migration Institute of Australia, *Submissions*, p. S40.

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

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

43 IARC, *Submissions*, p. S60.

further visa applications (including applications for spouse visas) while they were in Australia.

2.42 To illustrate the hardships that these provisions could cause, IARC provided a constructed example of a Fijian man who applies for a protection visa, and while waiting for it to be processed, marries an Australian citizen and has two children. The applicant is refused by DIMA and the RRT, subjected to the fee, and is forced to leave Australia to make a spouse visa application. He raises the $1,000 through loans from friends and family, and only returns to Australia after waiting for the spouse visa for many months. In the interim, his family in Australia has been forced to obtain financial support from social security, and has required medical attention.[44]

2.43 RCOA noted that the fact that persons who were found to be refugees did not have to pay the fee did not mean they were unaffected by it. Claiming that most refugees survived the determination process in penurious state, the Council said that the possibility of paying the fee could increase such people's trauma:

> The prospect of having to pay the fee, plus the knowledge that there is no way he/she can, combined with the fear of "doing the wrong thing" all add up to a debilitating psychological cocktail that imposes yet another stress on an already traumatised person during the determination process.[45]

2.44 It also claimed that people who wished to discharge the $1,000 debt would often go to extraordinary lengths to secure the funds, with the applicants or their struggling families sometimes borrowing money.[46] However, no evidence was provided of this.

2.45 The ASICJ expressed similar sentiments to the RCOA.[47] In evidence before the Committee, it also gave two examples where the fee had caused hardship to applicants and their families. In the first case, a young Filipino lady had married an Australian and had a child, but after her protection visa was refused, she left the country and lodged a spouse visa application from the Philippines. It took three months before this visa was approved, and before she could return she had to pay $1,000. This imposed substantial hardship upon her young family. In the second, members of a poor Sri Lankan family repeatedly had to be convinced to continue with

44 IARC, *Submissions*, p. S62.

45 RCOA, *Submissions*, p. S8.

46 RCOA, *Submissions*, p. S8.

47 ASICJ, *Submissions*, p. S55.

an RRT appeal because in their distressed minds the $1,000 fee was an application fee. [48]

2.46 DIMA responded by reiterating that their evidence showed that the fee had not had a deleterious effect on genuine claimants. It submitted that the increasing flow-on rate from high refugee producing countries clearly showed that the fee had not been a disincentive for genuine applicants.[49]

2.47 The department also asserted that, because people had avoided paying the fee, it was not seen by many genuine applicants as a deterrent. It informed the Committee that 3,259 fees had been imposed, technically raising $3.259 million in revenue; however, failed applicants had paid only $328,000 of that amount.[50] According to DIMA, these figures undermined claims that the fee had impeded those seeking review:

> The statistics we showed comparing collection rates to raising rates show that [the fee] is not seen by many to be a real impediment at all - that is, [people] will take a $1,000 debt and they will probably take it to their grave.[51]

2.48 DIMA, moreover, rejected the notion that the fee had caused hardship. It argued that the level of the fee should be raised to a figure between $1,000 and $1,800, largely because applicants could afford the current amount. It gave two reasons in support of these claims.

2.49 First, even if applicants arrived without financial resources and worked in menial jobs earning half the minimum wage, $1,000 represented only 21% of their potential earnings during the time that they could expect to wait for an RRT decision in 1997-98. As many applicants had the potential to work for a longer period and to earn higher wages, the fee would represent an even lower percentage of their potential earnings.[52]

2.50 Second, migration agents represented a large number of refugee applicants. This suggested that such applicants were capable of paying the fee, since the average cost of migration agent assistance usually started at over $1,000.[53]

2.51 In DIMA's view, setting the level of the fee somewhere between $1,000 and $1,800 would reduce the cost to Australian taxpayers and reflect the earning capacity of refugee applicants.[54] DIMA conceded, however, that it

48 ASICJ, *Transcript*, p. 85.
49 DIMA, *Submissions*, p. S178.
50 DIMA, *Transcript*, p. 5.
51 DIMA, *Transcript*, p. 104.
52 DIMA, *Submissions*, p. S92.
53 DIMA, *Submissions*, pp. S92-93.
54 DIMA, *Submissions*, pp. S93-94; DIMA, *Transcript*, p.109.

could not specify how many refugee applicants were employed, as opposed to those who had permission to work.[55]

Effect on Australia's international obligations

2.52 The Committee received several submissions contending that the fee placed Australia in breach of its international obligations. The Human Rights and Equal Opportunity Commission (HREOC), for example, submitted that the fee breached our obligation of non-refoulement. This obligation was reflected in a number of international treaties such as the Refugees Convention, the Convention Against Torture, and the International Covenant on Civil and Political Rights (ICCPR). It forbade States from sending people to countries where their rights under the various conventions would be placed at risk.

2.53 HREOC explained that the obligation of non-refoulement imposed a further obligation: Australia had to provide an effective procedure for determining whether a person fell within one of the conventions. In the case of the Refugees Convention, that meant that there had to be an effective procedure to determine the validity of an asylum seeker's claim. HREOC submitted that, as people could be deterred by the prospect of paying a $1,000, the fee impeded access to such a procedure:

> Access to this effective procedure cannot be made to depend upon the capacity of the applicant to pay. Nor can it be discouraged [by] being made subject to a penalty in the event that the applicant has misapprehended his or her situation in light of the Refugee Convention definition or has been unable to muster the evidence required to establish his or her case.
>
> Yet this is the effect of *Migration Regulation* 4.31B.[56]

2.54 Amnesty International voiced similar concerns. It argued that the imposition of a post-decision fee created a "perceived and/or financial burden on all applicants, regardless of their *bona fides*."[57] Implicit in this argument was a belief that the fee deterred genuine applicants. In Amnesty's opinion, it followed that the fee impeded the right of all applicants to seek and enjoy asylum from persecution, as stated in Article 14 of the Universal Declaration of Human Rights.[58]

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55 DIMA, *Submissions*, p. S113.

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

57 Amnesty International, *Submissions*, p. S25.

58 Amnesty International, *Submissions*, p. S25.

2.55 RILC believed that any fee, including the $30 fee for primary determination, was "another unacceptable imposition upon Australia's obligation to provide an accessible refugee determination process."[59]

2.56 The Campbelltown Legal Centre and the Kingsford Legal Centre both maintained that regulation 4.31B breached Article 29 of the Refugees Convention. This provided:

> The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2.57 Both Centres saw a parallel between the RRT and the other tribunals such as the Administrative Appeals Tribunal (AAT), the Social Security Appeals Tribunal and HREOC.[60] As none of these tribunals imposed fees on applicants, Australian nationals in similar circumstances did not have to pay any charges. For this reason, regulation 4.31B arguably breached Article 29.[61]

2.58 The ASICJ cited Article 7 of the Universal Declaration of Human Rights and Article 26 of the ICCPR as guarantees of the right to equal treatment before the law. It claimed that regulation 4.31B could breach these Articles because it discriminated against persons seeking review before the RRT.[62]

2.59 In response, DIMA provided two extracts of legal advice from the Attorney-General's Department claiming that the fee did not breach any of Australia's international obligations. The first extract stated:

> The mere imposition of a fee for the assessment of protection visa applications or applications to the RRT would not, of itself, place Australia in breach of any of its international obligations.

2.60 The second specifically confirmed that the fee was consistent with equality of access to courts and tribunals:

> I have searched the decisions of the United Nations Human Rights Committee on communications under the Optional Protocol to the ICCPR and of the European Court of Human Rights under the European Convention on Human Rights and I have been unable to locate anything to indicate that the post application fee is inconsistent with the right of equality before courts and tribunals, nor access to them.

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59 RILC, *Submissions*, p. S47.

60 Campbelltown Legal Centre, *Submissions*, p. S37.

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

62 ASICJ, *Submissions*, p. S56.

> As outlined above, there is no requirement that a person seeking review by the RRT of a primary decision on his or her protection visa pay an upfront fee. Only those persons who are unsuccessful in their proceedings before the RRT are required to pay the fee. In my view, this is consistent with the principle of access, or equality of access, to courts and tribunals in Article 14.1 of the ICCPR.[63]

2.61 To counter evidence from the Campbelltown and Kingsford Legal Centres and the ASICJ, DIMA also provided details of fees before other review bodies. It pointed out that review by the Migration Internal Review Office and the Immigration Review Tribunal cost $500 and $850 respectively. Furthermore, while most AAT reviews were free, that tribunal charged $51 for Small Taxation Claims Tribunal hearings and $505 for appeals to the Taxation Appeals Division. Federal Court charges were even dearer: it cost $505 to initiate an appeal, and $1011 if the appeal was from the AAT.[64]

2.62 The department added that the cost of accessing many of these forums was even higher than any fees suggested, because their adversarial procedures often required applicants to obtain legal counsel. The RRT, on the other hand, was non-adversarial; and DIMA did not argue in favour of its primary decision.[65]

Alternatives to the fee

2.63 During the inquiry, a number of submissions and witnesses suggested alternatives to the fee. In this section, the Committee considers the following proposals:

- Granting the RRT the power to impose the fee only on vexatious applicants or to waive the fee in compelling circumstances;
- Strengthening the migration agents regulatory scheme;
- Introducing an onshore humanitarian stream;
- Making certain applicants ineligible for refugee processing;
- Reducing processing times; and
- Providing procedural fairness at the primary determination stage.

63 Exhibit 2, Part A.

64 Exhibit 2, Part A.

65 Exhibit 2, Part A.

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

2.64 Two submissions proposed giving the RRT the power to impose the fee only on vexatious applicants. HREOC contended that regulation 4.31B violated Australia's obligation of non-refoulement by denying access to an effective determination procedure for some genuine applicants.[66] To remedy this, it recommended that the fee should be modified so as not to penalise all unsuccessful applicants:

> If the Government is concerned that some applicants to the RRT are 'unmeritorious' or 'abusing the system' the appropriate response is not to penalise all unsuccessful applicants, as the present Regulation does, but to give the Tribunal discretion to impose a fee where it finds that an application is vexatious or an abuse of process.[67]

2.65 RILC approached the issue with more reservation. It objected to a fee upon applicants, but stated that if the penalty fee were to be retained, it should be targeted more carefully. It framed its proposal in these terms:

> The Minister has stated that his aim in introducing the penalty is to deter abusive applicants. It cannot be argued that all unsuccessful applicants are abusive without perverting the definition of abuse. The UNHCR already has guidelines on what it considers may constitute 'abuse' of the determination process, the focus of their definition being on fraud. Any penalty should only be levied on those whom the RRT find to have put forward an abusive application and that finding should be contained in the decision. Guidelines on what constitutes an abusive application can be put together and made available.[68]

2.66 RILC added that the proposal would not increase litigation in the Federal Court and give failed applicants more time in Australia. This was because a decision to impose the fee would not affect a person's migration status, and it could be excluded from judicial review under the Part 8 of the Migration Act.[69]

2.67 IARC, on the other hand, submitted that, if the fee were retained, there should be discretion to waive the $1,000 in compelling circumstances.[70] It did not elaborate on this proposal.

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66 HREOC, *Submissions*, p. S20.
67 HREOC, *Submissions*, p. S21.
68 RILC, *Submissions*, p. S51.
69 RILC, *Transcript*, pp. 54-55.
70 IARC, *Submissions*, p. S63.

2.68 DIMA rejected all these proposals. It argued that the idea of restricting the fee to vexatious applicants "erroneously [assumed] that, in order to be a deterrent for *mala fide* review applicants, the fee must be a penalty and must be targeted solely at that group of applicants."[71] It pointed out that the concepts of deterrence and penalties were separate, and stressed that the mere existence of the fee could deter people who knew they were not refugees and were aware that they would have to pay. It further noted that the distinction between a fee and penalty was confirmed in legal advice from the Australian Government Solicitor.[72]

2.69 Besides rejecting the concept that the fee was a penalty, DIMA emphasized that the $1,000 was both a deterrent and an attempt to give effect to the user-pays principle. This principle required that people should pay for the cost of services with which they had been provided; and the principle remained valid irrespective of whether the protection visa application was manifestly unfounded, vexatious or based on subjective but ill-founded fear.[73] The department explained its position in these terms:

> Persons who seek to enter Australia as a student, as a temporary resident, as a migrant, as a visitor from some countries; those persons who seek to extend their stay in Australia; and those people who seek to change their status while in Australia are asked to contribute towards the cost to the Australian taxpayer of a process involving a non-taxpayer.
>
> In respect of a failed applicant for refugee status at review stage, we do not charge and we do not seek cost recovery at the primary stage. But, having had it asserted by a decision maker that you are not a refugee and having decided to proceed to review and failing at review level, we seek a contribution towards the cost.[74]

2.70 DIMA also quoted from other legal advice suggesting that the proposal to limit the fee to vexatious applicants would require extensive amendments to the Migration Act. Part 8 of the Act, in particular, would have to be amended to ensure that a decision to impose the fee could not be challenged in the Federal Court. Even with such an amendment, it would

71 DIMA, *Submissions*, p. S120.

72 DIMA, *Submissions*, p. S120. The advice relevantly provided: "A penalty is…'a punishment imposed or incurred for a violation of law' (Macquarie Dictionary, 2nd ed. p. 721). The trigger for a liability to pay a RRT review fee under draft regulation 4.31B is that the RRT has made a decision in relation to an application for review. No violation of the law is involved. Although it may be argued that a person is, in effect penalised by having to pay an RRT-review fee because he or she was an unsuccessful applicant for review I do not think this is sufficient, as a matter of law, to make the RRT-review fee a penalty."

73 DIMA, *Submissions*, p. S120.

74 DIMA, *Transcript*, pp. 108-109.

still be possible to seek review of such a decision in the High Court because of s.75 of the Constitution.[75] For DIMA, these implications were problematic:

> [T]his sort of variation on the procedure for the imposition of the $1,000 post decision RRT fee would add considerably to the Tribunal's workload and would be a distraction from their main business of assessing applicants against the Refugee Convention. Any risk that the Tribunal could be involved in litigation as a result of making such a decision is considered to be highly undesirable.

2.71 The department added that there was another implication of the proposal: applying the fee only to those whose applications were considered to be vexatious or manifestly unfounded suggested that the fee was a 'penalty' rather than a method of cost recovery.[76] It regarded this as inappropriate.

2.72 In response to the suggestion that the RRT be empowered to waive the fee, DIMA argued that this approach involved the same difficulties as the previous one:

> [This] type of approach supports the perception of the fee as a 'penalty' (which it is not), detracts from the main business of both the department and the RRT and opens the process to further judicial review. Statutory mechanisms already exist for debts to the Commonwealth to be waived in special circumstances. Importantly, DIMA officers have considerable discretion in setting up 'suitable arrangements to pay' such debts.[77]

Strengthening the migration agents regulatory scheme

2.73 Several submissions argued that the migration agents regulatory scheme should be strengthened. RILC, for instance, regarded migration agent registration issues as lying at the core of problems with the refugee determination process. It stated that reform of the scheme was essential for reducing abuse:

> [My] first suggestion would be reform of the whole migration agent registration scheme. I think that that is the thing that has to

75 See, for example, *Abebe v Commonwealth; Re Minister for Immigration and Multicultural Affairs* [1999] HCA 14. That case involved the RRT's decision to affirm a refusal to grant a protection visa. After the applicant had appealed to the Federal Court, she then challenged the validity of Part 8 of the Migration Act and claimed prerogative relief under s.75(v) of the Constitution. All the judges of the High Court noted that the jurisdiction of the Court under s.75(v) was available even if appeals to the Federal Court were more limited under Part 8 of the Act.

76 DIMA, *Submissions*, p. S119.

77 DIMA, *Submissions*, p. S187.

> happen before we are going to see significant improvements in terms of the abuse problem throughout the process.[78]

2.74 RILC suggested that reform could begin with removing profits from the system. This would eliminate the financial interest that some agents had in lodging unmeritorious applications. It put forward this suggestion as follows:

> [For] a start, take 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.[79]

2.75 The Federation of Ethnic Communities' Councils of Australia (FECCA) also called for changes to the regulatory scheme. In its view, the crucial problem was that the migration agents industry was self-regulating, which meant that the department did not control schedules for fees and many other matters. FECCA claimed to possess considerable anecdotal evidence that agents were putting in bogus claims in the hope of earning more money. It recommended that DIMA should again be given responsibility for regulating the sector, and that the Migration Agents Registration Authority (MARA) should be abolished.[80]

2.76 RCOA echoed some of these concerns about agents. It noted that the practice of lodging applications without fully explaining the process to clients was once widespread, but it was now less prevalent because of changes to the law and education campaigns. However, it suggested that some high profile prosecutions might have some value.[81]

2.77 The Thai Welfare Association, in addition, suspected that many agents did not discourage applicants from putting in unmeritorious applications. It observed that agents had no incentive to do so, because they generally received their fees whether or not their clients were successful.[82] It recommended that the fee should be imposed upon agents rather than applicants:

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78 RILC, *Transcript*, p. S53-54.

79 RILC, *Transcript*, p. 53.

80 FECCA, *Transcript*, pp. 33-34.

81 RCOA, *Submissions*, p. S7.

82 Thai Welfare Association, *Submissions*, p. S1.

> Economics suggests that in situations where the applicant comes from an identified non-refugee country, and via a migration agent, it should be the migration agent who is responsible for the post decision fee for unsuccessful applications. In this case perhaps the fee should be higher and regulations should be made prohibiting the agent passing the fee on to their client. For most agents, this would be a significant business impost and may reduce frivolous claims through them.[83]

2.78 Other organisations, however, seemed to question the need to strengthen or alter the regulatory scheme. The ASICJ, for example, stated that registered agents were responsible for some unfounded claims, but most abuse could be traced to non-registered people giving immigration advice:

> In my experience, the larger element of fraud comes not from the migration agents, but from the movers and shakers out there in the community, the people who are glibly telling people that they know what to do. They are the people who are largely conning many innocent people.[84]

2.79 The Adelaide Justice Coalition, moreover, stated that stringent steps had been taken to eliminate malpractice. Citing the requirements for professional development, it expressed the view that it would be difficult for many unethical agents to meet the rules that had been put in place.[85]

2.80 DIMA generally agreed with these views. It rejected suggestions that migration agents were principally responsible for abuse in the system, and it noted, in particular, that 39% of review applicants had no "adviser" (whether a community organisation, a migration agent or any other person). It was therefore hard to suggest that migration agents had misled such people.[86]

2.81 In the same vein, DIMA drew attention to the composition of migration agents. It pointed out that before the introduction of statutory self-regulation in 1998, approximately 50% of registered migration agents were lawyers, 17% were voluntary agents, and 33% were sole proprietors and their employees. This mix, it suggested, had probably not changed since self-regulation began. The department remarked:

> There is nothing to suggest, that a lawyer who is operating in a professional and responsible manner in respect of the non-migration agent aspects of their work should suddenly become

83 Thai Welfare Association, *Submissions,* p. S1.

84 ASICJ, *Transcript,* p. 84.

85 Adelaide Justice Coalition, *Transcript*, p. 46.

86 DIMA, *Submissions,* p. S116.

> irresponsible and unprofessional when turning their mind to the migration aspects of their work.[87]

2.82 DIMA made a number of other points about the problem of abuse among advisers. It stated that it concentrated its efforts on preventing unregistered people from giving immigration advice and assistance, because this was a larger problem than that of unscrupulous agents.[88] It also outlined the actions that had been taken by itself and by MARA to improve the quality of the migration agents profession. MARA, for example, had:

- referred 24 complaints to DIMA because they concerned unregistered practice;
- cancelled the registration of two agents;
- suspended the registration of another agent; and
- deregistered 810 people, largely because they did not meet statutory requirements for registration renewal.[89]

2.83 In respect of the suggestion to impose the fee upon migration agents, DIMA commented that the proposal raised many difficulties. It was, for example, probable that migration agents would simply add $1,000 to their base fee for protection visa assistance, and it was not clear whether the fee should be imposed on the agent if he or she had clearly warned their client of the prospects of failure. It was also unclear who would pay the fee when no migration agent had been involved, and what would occur if the agent did not pay the fee.[90] In DIMA's opinion, such problems made adopting the proposal undesirable.

Introducing an onshore humanitarian stream

2.84 Several submissions argued for the introduction of an onshore humanitarian stream to cut down on numbers applying for refugee status. RCOA noted that the Refugees Convention defined refugees very narrowly. People who had well-founded fears of returning to their countries because of generalised violence or natural disasters, for instance, did not fall within the Convention. The current system forced such applicants to apply to RRT, thereby burdening the refugee determination process:

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87 DIMA, *Submissions*, p. S116.

88 DIMA, *Transcript*, p. 6.

89 DIMA, *Submissions*, p. S117.

90 DIMA, *Submissions*, pp. S187-188.

> These people have very good reasons to be applying to stay in this country and the only way they can do so is to go through the refugee status determination procedure and, if they are rejected by that, turn to the minister and hope he will exercise his discretionary powers in their favour. The absence of an administrative humanitarian stream…is something that we feel overburdens the refugee status determination procedures.[91]

2.85 The Council added that a humanitarian stream would be preferable to giving the minister a power to intervene at an earlier stage.[92]

2.86 The ASICJ mounted a similar argument. It noted that the 1990 regulations had provided for a class of visa centred on "extreme hardship" or "irreparable prejudice", but this class no longer existed. It suggested that DIMA could reconstruct a visa category based on that terminology to cater for non-refugees who should be permitted to stay on humanitarian or compassionate grounds. A ministerial policy statement could provide guidance on interpreting the criteria, and failed applicants could seek the minister's intervention under s.351 of the Act.[93]

2.87 The ASICJ stated that, in its understanding, Australia was one of the few countries in the world without an onshore humanitarian stream.[94] It claimed that the absence of such a stream meant that applicants had to apply as refugees to access the minister's intervention power. This was not acceptable:

> We are bastardising the term of a refugee by saying to a person, 'If you want to access the minister's discretion, you have got to go through the refugee process.' It is not the way to do it and, indeed, as a practitioner under the migration agents code of conduct, I have a problem because I cannot encourage the lodgment of a non-bona fide application.[95]

2.88 RILC also argued for changes to help humanitarian applicants. It noted that the ministerial power of intervention was the only mechanism for people whose rights might be threatened under different conventions. It suggested that such a mechanism was inadequate and that a humanitarian visa should be reintroduced; however, it commented that allowing earlier

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91 RCOA, *Transcript*, p. 65.

92 RCOA, *Transcript*, p.74.

93 ASICJ, *Transcript*, pp.89-90. Section 351 of the Act gives the Minister to set aside an adverse decision of the Immigration Review Tribunal and to substitute a decision favourable to the applicant.

94 ASICJ, *Transcript*, p.90.

95 ASICJ, *Transcript*, p.90.

access to the minister for humanitarian applicants would be an improvement to the system.[96]

2.89 In response, DIMA argued that the creation of a new humanitarian visa class would not necessarily reduce the numbers of protection visa applicants. It pointed out that creating a humanitarian visa class had the potential to generate many problems, among which were the following:

- judicial review might extend the applicability of the class beyond its intended narrow parameters (this had occurred with the previous onshore system);
- the misuse problem from the protection visa system might be duplicated or transferred to the new class;
- the new class would allow people to extend their time in Australia by adding another layer to the current process; and
- the class might contribute to a belief that it was acceptable to enter Australia under false pretences (ie avowing an intention to depart).

2.90 DIMA also observed that Australia had not operated an onshore humanitarian category for almost a decade, and creating such a category would be a significant shift from the policy of successive governments.[97]

Making certain applicants ineligible for refugee processing

2.91 Tribal Refugee Welfare of Western Australia submitted that one way in which to reduce abuse would be to preclude applicants from certain countries from applying. It suggested that the political background and the human rights situation in a country should be the criteria for deciding ineligibility. On this basis, applicants from, say, the United Kingdom and the United States of America (USA) would not be accepted for processing at all.[98]

2.92 The Committee received no other direct evidence on this proposal. However, it did receive evidence about a closely related issue. That issue was whether it was possible to identify an application as manifestly unfounded simply because the applicant was from the USA. In response to that, RCOA stated:

> I think it is important to recognise that there is no country from which somebody could not be considered to be a refugee.[99]

96 RILC, *Transcript*, p.56.

97 DIMA, *Submissions*, p. S122

98 Tribal Refugee Welfare, *Submissions*, p. S3.

99 RCOA, *Transcript*, p. 65.

2.93 The Council gave the example of an American woman who was witness to a gangland crime, and who could not be protected by the local authorities. She fled to Canada before coming to Australia and lodging an application for refugee status. The Council added:

> I am not commenting on whether or not she would be a refugee, but there was somebody from the United States who had genuine fears; and similarly for many European countries where there is organised crime, and somebody is a victim of that crime and the local authorities cannot protect them. In that sense, we cannot say there are countries that are 'white countries', as our European countries are trying to do in relation to refugee status.[100]

Reducing processing times

2.94 RILC argued that the measures to minimise abuse on the part of applicants had to focus on processing times. It noted that DIMA and the RRT had already taken action that would significantly reduce the period spent on processing, and this would inevitably act as a disincentive for abusive applicants. However, it claimed that more could be done. It suggested that processing of abusive applications was being slowed down because priority had to be given to applicants in detention and in financial hardship, as well as applicants who had survived torture and trauma. The government could alleviate these problems by changing some of its policies:

> The pressure upon [DIMA and the RRT] to process detention and financial hardship cases as matters of priority over others (including abusive applications) are matters within the Government's control. A change in policies regarding the detention of some asylum seekers and the restoration of work rights and eligibility for asylum seekers assistance, would alleviate the pressure to process these applications at the expense of processing times on other (including abusive) applications. With the processing times generally sped up, the incentive for abusive applicants to lodge protection visa applications, would decrease.[101]

2.95 DIMA did not respond directly to this proposal. It did, however, point out that processing times in the department and the RRT had dropped very significantly. The average time for processing primary applications had fallen from 261 days in 1995-96 to 41 days in the first six months of

100 RCOA, *Transcript*, p. 65.

101 RILC, *Submissions*, p. S51. See also RILC, *Transcript*, p. 54.

1998-99; and the RRT handled review applications in 55 days, down from 285 days in 1995-96.[102]

2.96 DIMA also noted that, as part of strategic management, officers aimed to process all primary applications within 12 weeks of lodgment, particularly for applicants from low refugee producing countries. It added, however, that top priority was still given to applicants in detention, victims of torture and trauma, and those in receipt of asylum seekers assistance.[103]

Providing procedural fairness at the primary determination stage

2.97 The ASICJ argued that one of the main reasons for the number of applicants to the RRT was the lack of procedural fairness in the department's decision-making. It claimed that procedural fairness no longer applied at the primary stage, since most applications were decided on the papers and applicants were not given an opportunity to comment on adverse information. The result was that asylum seekers were driven to apply to the RRT. As the ASICJ explained:

> Most applications are determined "on the papers". Consequently, applicants are not provided with an opportunity to explain their claims and provide clarification of personal details…In this context, it is understandable that many asylum seekers and responsible practitioners who must advise them, consider that the first substantial examination of their claims occurs at the RRT, not the departmental level. For many the departmental procedure is a mere preliminary formality before applicants access the real review stage.[104]

2.98 DIMA rejected this assessment of its processing at the primary stage. It argued that, if these claims were true, there should be a general escalation in the flow-on rates. It reasoned that if the primary determination process were as meaningless as suggested, then more people might be expected to challenge the decision on review. That, however, was not occurring.[105]

2.99 Furthermore, DIMA drew attention to the obligations in the Migration Act. It noted that s.57 of the Act required departmental officers to give applicants the opportunity to comment on adverse material specific to them, while s.58 described how applicants were to be invited to comment. According to the department, these provisions codified and gave structure to the common law concept of natural justice. DIMA remarked:

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102 DIMA, *Submissions*, pp. S83, S121.

103 DIMA, *Submissions*, p. S121

104 ASICJ, *Submissions*, p. S53.

105 DIMA, *Transcript*, p. 22.

If there are details to substantiate assertions made before the Committee, that DIMA decision-makers in some cases have not followed their statutory obligations, the appropriate remedy may be sought in the courts.[106]

106 DIMA, *Submissions*, p. S189.