The Parliament of the Commonwealth of Australia

2003 Review of Migration Regulation 4.31B

Joint Standing Committee on Migration

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Canberra

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Foreword

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

The Committee reviewed the operation of the regulation in 1999 and again in 2001 and reported its conclusions and recommendations to Parliament. In both reviews the Committee concluded that the effect of the regulation was difficult to establish and recommended the retention of the sunset clause and further reviews when the regulation had been in operation for a longer period.

In December 2002 the Minister requested that the Committee review the operation of the regulation again, prior to its expiry date of 30 June 2003.

The review was advertised in the national press on 5 February 2003. Prior to this the Committee had invited all those who had made submissions to the previous inquiries in 1999 and 2001 to participate in the 2003 review.

Those who chose to provide submissions are listed in Appendix B. The Committee held two public hearings in Canberra and took evidence from four organisations. Details of the hearings and witnesses are in Appendix C.

Ms Teresa Gambaro, MP
Chair

Membership of the Committee

Chair	Ms Teresa Gambaro, MP
Deputy Chair	Mr Bernie Ripoll, MP
Members	Mr Laurie Ferguson, MP
	Mrs Joanna Gash, MP
	Mrs Julia Irwin, MP
	Mr Don Randall, MP
	Senator Andrew Bartlett
	Senator Alan Eggleston
	Senator Linda Kirk
	Senator Tsebin Tchen

Committee Secretariat

Secretary	Mr Richard Selth
Inquiry Secretary	Dr Steve Dyer
Administrative Officer	Mr Peter Ratas

Terms of reference

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

> I am referring the further review of regulation 4.31B to the JSCM at this time to enable the Committee to consider and report on this matter in sufficient time for regulation amendments to be made should they be necessary. I would appreciate that the Committee complete its review and report to Parliament before 30 April 2003.

Referred to the Committee by the Minister on 10 December 2002.

Adopted by the Committee on 12 December 2002.

List of abbreviations

ACMRO	Australian Catholic Migrant and Refugee Office
Amnesty	Amnesty International Australia
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
HRP	High Refugee Producing Nationalities
IARC	Immigration Advice and Rights Centre
JMVS	Justice Migration & Visa Services
LIV	Law Institute of Victoria
LRP	Low Refugee Producing Nationalities
MARA	Migration Agents Registration Authority
MIA	Migration Institute of Australia
PPV	Permanent Protection Visa
PV	Protection Visa
RCOA	Refugee Council of Australia
RRT	Refugee Review Tribunal
TPV	Temporary Protection Visa

Glossary

BONA FIDE

*A*pplicants who genuinely fear for their safety if they were to return to their country of origin or have legitimate grounds to seek Ministerial consideration in their case They need not, however, meet the Refugee Convention definition of a refugee.[1]

HIGH REFUGEE PRODUCING NATIONALITIES (HRP)

'HRP' nationalities are those nationalities from which, over each of the seven financial years 1995/96 to 2001/02, ten or more applicants have applied for PV and the grant rate is 50% or above. DIMIA expected *bona fide* applicants to be concentrated in this group. [NOTE this grouping is an analytical tool that used only for the purposes of DIMIA's submission on this regulation.] [2]

LOW REFUGEE PRODUCING NATIONALITIES (LRP)

'LRP' nationalities are those from which, over each of the seven financial years 1995/96 to 2001/02, ten or more applicants have applied for PV and the grant rate is below 2% (DIMIA Submission, para 5.5.13).

DIMIA expected applications from persons who have no grounds for protection to be concentrated in this group[3] [NOTE this grouping is an analytical tool that used only for the purposes of DIMIA's submission on this regulation.] [4]

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1 DIMIA, Submission No 2, para 5.4.4

2 DIMIA, Submission No 2, paras 5.5.11, 5.5.13; Evidence, p. 59

3 DIMIA, Submission No 2, para 5.5.12

4 DIMIA, Evidence, p. 59

MALE FIDE

Applicants who do not genuinely fear for their safety and are accessing the Protection Visa system for other reasons.

NON-REFOULEMENT

The Convention relating to the Status of Refugees (1951) states, under Article 33. Prohibition of expulsion or return ("refoulement"), that:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[5]

PROTECTION VISA (PV)

This visa is issued to applicants who the Minister is satisfied Australia has protection obligations under the Refugees because:

- they have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion;
- are outside the country of their nationality; and
- are unable or, owing to such fear, are unwilling to avail themselves of the protection of that country.

A Permanent Protection Visa (PPV) gives a refugee:

- permanent residence;
- access to Australia's public health system;
- permission to work;
- access to welfare benefits;
- permission to travel and enter Australia for five years after grant; and
- eligibility to apply for citizenship after two years permanent residence.

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5 http://www.unhchr.ch/html/menu3/b/o_c_ref.htm

A Temporary Protection Visa (TPV) gives a refugee:

- three year temporary residence in the first instance. TPV holders are able to apply for a further protection visa which may be granted after 30 months if they still need protection at that time;
- access to Australia's public health system;
- permission to work;
- access to a limited range of welfare benefits (including Special Benefit, Rent Assistance, Maternity and Family Allowances and Family Tax Payment); and
- eligibility for referral to the early health assessment and intervention program and torture and trauma counselling.

The TPV provides no rights for people to bring their families into Australia and does not provide an automatic right of return to Australia.[6]

REFUGEE

According to the 1951 Convention Relating to the Status of Refugees, a refugee is a person who: "owing to a well-founded fear of being persecuted for reasons of:

- race,
- religion,
- nationality,
- membership in a particular social group, or
- political opinion,

is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country." [7]

TAKE-UP RATE Refugee Review Tribunal (RRT)

The proportion of unsuccessful primary applicants who have taken their cases to the RRT.

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6 DIMIA, Submission No 2, p 40

7 http://www.unhcr.ch/cgi-bin/texis/vtx/home

List of recommendations

Chapter 8 Imposition of the fee

Recommendation 1

The Committee recommends that Migration Regulation 4.31B remain in operation subject to a two year sunset clause, commencing on 1 July 2003, and that its operation be reviewed by the Committee in 2005.

Recommendation 2

The Committee recommends that the fee applied under Migration Regulation 4.31B be raised to $1,400, which is in line with the fee levied for an application for a review by the Migration Review Tribunal.

Recommendation 3

The Committee recommends that additional resources be made available to the Refugee Review Tribunal to provide more expeditious hearing and finalisation of cases coming before it.

1

REPORT BACKGROUND

Regulation 4.31B

1.1 Migration Regulation 4.31B came into effect on 1 July 1997 and imposed a fee of $1,000 on unsuccessful applicants to the Refugee Review Tribunal.

Origins

1.2 On 20 March 1997, the Minister for Immigration and Multicultural and Indigenous Affairs, Hon Philip Ruddock MP, announced extensive changes in the refugee determination process.[1] The changes affected the framework for work rights, the review application periods, and the review application fee for refugees. They also included a more strategic approach to Protection Visa applications, with DIMIA to give greater priority to straightforward applications and to use more streamlined methods, such as reduced documentation.[2] The Minister explained that:

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

2 At the time, the portfolio covered only immigration and multicultural affairs. Indigenous affairs was added in November 2001

> What we are seeking to do is to remove the incentives that are now current in the system that make it wide open to this form of abuse.[3]

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

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

Implementation

1.4 The fee, and the other changes in SR 109, was scheduled to take effect on 1 July 1997.

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

- extending the 14 day application period for the RRT to 28 days;
- ensuring that refugee applicants could have access to work rights if they applied within 45 days of entering Australia[4];
- enabling the Minister to remove groups of people from the restriction on work rights where circumstances in their home country had changed since their arrival; and
- imposing a two year sunset clause on the $1,000 post-decision fee for unsuccessful RRT applicants.

1.6 The sunset clause for the $1,000 post-decision fee commenced on 1 July 1997 and was accompanied by the Government's undertaking to ask the Joint Standing Committee on Migration to review the issue in 1998.

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3 *Hansar*d, House of Representatives, 19 June 1997, p. 5858.

4 As opposed to the original 14 days

Operation of Regulation 4.31B

1.7 Regulation 4.31B provides that unsuccessful applicants to the RRT must pay the $1,000 fee within seven days of receiving notice of the RRT decision. Where RRT applications have been combined, however, only one fee per family is imposed, irrespective of the number of applicants, and there are two exceptions where the fee is to be refunded or waived.[5]

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

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

1.9 Applicants who later seek to return to Australia but who have not paid or made arrangements to pay the $1,000 fee would therefore have their applications refused.

1.10 More detailed information concerning the refugee determination process can be found in Appendix D.

Previous reviews by the Committee

1.11 The Committee tabled a review of Migration Regulation 4.31B in May 1999 which recommended that it continue, but be subject to a three year sunset clause commencing on 1 July 1999. Subsequently the duration of the sunset clause was reduced to two years, expiring on 30 June 2001.

1.12 The Committee again reviewed Migration Regulation 4.31B in April 2001, and recommended further extension of the sunset clause to 30

5 Regulation 4.31C provides that the fee must be refunded or waived if:

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

June 2003.[6] It also recommended that the Regulation be subject to further review prior to that date.

6 Dissenting reports in both 1999 and 2001 recommended that Regulation 4.31B cease to operate.

2

Current Review

2.1 This Committee's current review of migration Regulation 4.31B takes place more than five years after the regulation was introduced.

2.2 On 10 December 2002 the Minister for immigration and Multicultural and Indigenous Affairs requested that the Committee again review the regulation and report to parliament by 30 April 2003.

2.3 In December 2002, the Committee sought submissions from all those who had made submissions to the previous two inquiries, and also advertised the review in *The Australian* on 5 February 2003.

Responses

2.4 The Committee received nine submissions:

- three supported retention of the fee (Department of Immigration and Multicultural and Indigenous Affairs {DIMIA}, Mr G Kimberley and Justice Migration and Visa Services {JMVS}).
- submissions from the Australian Catholic Migrant and Refugee Office (ACMRO); the Refugee Council of Australia (RCOA); the Immigration Advice and Rights Centre (IARC); the Law institute of Victoria (LIV); and Amnesty International Australia (Amnesty) urged that the fee be abolished.
- two submissions proposed modifications to the way in which the regulation might be administered: IARC urged that, if the fee was

not abolished, there should be provision to waive it, and the Migration Institute of Australia (MIA) proposed that the fee not apply to unsuccessful applicants from specific countries.

Retain the fee

2.5 DIMIA argued that the fee imposed by Regulation 4.31B fee was "effective in controlling applications from people who have no grounds for protection".[1]

2.6 Mr Kimberley supported the fee as a deterrent "which may be the only way of reducing… abuse" and observed that it might even be increased.[2]

2.7 JMVS urged that the fee be "paid up front and the amount increased to $2,000", with a refund to successful applicants.[3]

Modify the fee

2.8 MIA proposed that unsuccessful applicants from countries where there were well founded fears of persecution should not be charged the fee, but that a fee of "somewhere in the order of $3,000" should apply to other unsuccessful applicants. [4]

2.9 IARC, while opposing the fee, proposed that if it was to be retained, there should be provision "to waive… in compelling circumstances".[5]

Abolish the fee

2.10 ACMRO argued against the fee remaining in force because it was "out of character with the purposes and spirit of the Refugee Convention" and constituted "a fine on the process". [6]

2.11 RCOA agreed that:

> the imposition of the fee would be seen as a punishment for those who have compelling reasons why they are unable to

1 DIMIA, Submission No 2, , para 7.3.2

2 Kimberley, Submission No 1, p. 1

3 Submission No 4, JMVS, para 6.

4 MIA, Submission No 9, p. 2

5 IARC, Submission No 6, Recommendation 2

6 The submission did not address the issue of abuse of the PV arrangements. ACMRO, Submission No 5, p. 1

> return to their country of origin, but are not found to be refugees on Convention grounds.[7]

2.12 RCOA opposed the regulation on those grounds and because, it claimed, the fee had not achieved its objective,[8] and also because it was their belief that:

> in reality, the $1000 decision fee is less likely to discourage intentionally fraudulent applicants, as they will possibly have a greater capacity to absorb the costs.[9]

2.13 IARC, Amnesty and LIV all questioned the effectiveness of the fee and recommended that Regulation 4.31B be repealed. [10] Amnesty emphasised that because the RRT might be the first time an applicant was able to make their case in person, it was important that they should not be discouraged by the possibility of having to pay a fee.[11]

Conclusion

2.14 As in the Committee's previous reviews of Regulation 4.31B, there was disagreement in the submissions and evidence about whether there should be a fee and also concerning its effectiveness in reducing abuse of Australia's Protection Visa (PV) arrangements.

The review

2.15 The Committee considered that the objections to the fee raised key issues which needed to be addressed in relation to the operation of the regulation:

- abuse of the protection visa system;
- the effect of the fee on that abuse; and
- the effect of the fee on bona fide applicants.

2.16 The Committee examines these and other issues in subsequent chapters.

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7 RCOA, Submission No 3, p. 1
8 RCOA, Submission No 3, p. 6
9 RCOA, Submission No 3, p. 3
10 IARC, Submission No 6, Recommendation 1; LIV, Submission No 8, p. 1, para 5
11 Amnesty, Submission No 7, pp 3-4; Evidence, p. 39

3

Abuse of the protection visa arrangements

3.1 The PV process is intended to meet Australia's obligation to permit refugees to gain Australia's protection and Migration Regulation 4.31B is intended to prevent abuse of that process. As LIV pointed out, there was

> abuse in every system in which people are accessing a right to review and appeal and to have their case heard.[1]

Possible motivations

3.2 The submission from JMVS suggested that applicants might pursue an appeal to the RRT because:

> the appeal system allows them to keep staying in Australia legally with Work Right. A few years later, even if their cases fail at the High Court, by the time they should have made at least a small fortune before heading back home.[2]

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1 LIV, Evidence, p. 33

2 JMVS, Submission No 4, para 5

3.3 RCOA noted that there were some:

> people wishing to extend their stay in Australia (for economic or lifestyle reasons) who apply for a Protection Visa in full knowledge that it is not applicable to them.[3]

To what extent does abuse exist?

3.4 DIMIA's view was that there were *bona fide* applicants who genuinely fear for their safety but there were others who did not genuinely fear for their safety and who were misusing the PV system for other reasons.[4]

3.5 Amnesty concurred, stating that, like asylum determination systems elsewhere, Australia's was subject to a certain level of abuse, [5] and that there were nongenuine applicants.[6]

3.6 Examination of the fate of applications for review by the RRT indicates that the Tribunal set aside (i.e. disagrees with DIMIA's refusal of a PV) only one in 10 applications between 1995/96 and 2001/2 (See Table 3.1 below)

3.7 This did not mean that the other 90 percent of claims which failed in their RRT appeal were attempts to abuse the PV process. As Amnesty pointed out in its submission:

> an application to the RRT may be unsuccessful; it does not necessarily indicate that the claim was unfounded or was not legitimate… there will be instances where asylum-seekers with legitimate fears of being subjected to serious human rights violations upon forcible return may fall outside of the scope of the Refugee Convention.[7]

3 RCOA, Submission No 3, p. 2
4 DIMIA, Submission No 2, para 5.4.4
5 Amnesty, Submission No 7, p. 3
6 Amnesty, Evidence, p. 45
7 Amnesty, Submission No 7, p.3.

Table 3.1 Total Number of Protection Visa Applicants and Results by Financial Year

Year of PV application	PRIMARY APPLICATION			RRT Lodged	RRT Set Aside
	RECEIVED	GRANTED	REJECTED		
1995/96	8,100	1,195	6,382	5,142	596
1996/97	11,171	869	10,043	8,496	998
1997/98	8,155	693	7,246	6,216	800
1998/99	8,407	983	7,237	6,412	668
1999/00	12,172	4,221	7,485	6,755	812
2000/01	13,127	3,325	8,914	8,115	828
2001/02	8,670	1,431	6,526	5,734	247
TOTAL	**69,802**	**12,717**	**53,833**	**46,870**	**4,949**

Source Protection visa cohort data in DIMIA, Submission No 2, Table 5.1.1T

3.8 Amnesty also concluded, on the basis of its casework and data from the Refugee Advice and Casework service, that some refusals at the RRT stage also indicated that the applicants might have suffered from misinformation or from being unrepresented.[8]

3.9 DIMIA identified *bona fide* applicants as including those who:

- genuinely feared for their safety if they were to return to their country of origin (whether or not they might meet the Refugee Convention criteria for refugee status);or
- had legitimate grounds to seek Ministerial consideration in their case.[9]

3.10 RCOA identified two groups of applicants who would not engage Australia's protection under the Refugee Convention but whose applications were not attempts to exploit the process. These were applicants with:

> well founded fears of returning to their country for non-Convention reasons, such as the fact that their country is in a state of civil war and they fear generalised violence;[10] or with

8 Amnesty, Evidence, p. 41

9 DIMIA, Submission No 2, para 5.4.4

> compelling family or medical reasons to remain in Australia which should properly be brought to the Minister's attention.[11]

3.11 IARC provided more information about the latter category, where for:

> people who… do not meet the criteria for a particular visa subclass, the only option is to access the minister's discretion…[through] the lodgement of a protection visa application.[12]

3.12 The Committee considered that these groups also fitted DIMIA's description of *bona fide* applicants.

Abuse of the system can be described…

3.13 According to DIMIA, the abuse of the process was by

> applicants who do not genuinely fear for their safety and are misusing the PV system for other reasons, such as work rights and Medicare cover, prolonging lawful stay and/or the possibility of obtaining permanent residence through provision of fraudulent claims.[13]

3.14 However, RCOA also identified a group which might fit DIMIA's description of those misusing the process criteria, but claimed that these applicants were not deliberately abusing the process. These, RCOA said, were applicants who had:

> a desire to extend their stay and who have sought advice from agents who have promised them a "work visa" (usually at considerable expense). [BUT] Commonly in such cases the applicant had no knowledge that this involved an application

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10 RCOA, Submission No 3, p. 2 "While they may not neatly fit the Convention definition of a refugee there are compelling reasons why they should not be returned to their country of origin. In the absence of an administrative humanitarian stream, the only option for Ministerial consideration under s417 of the Migration Act is to access the Protection Visa application process."

11 RCOA, Submission No 3, p.2. "while they may be aware that they do not meet the definition of a refugee, have no alternative mechanism for Ministerial consideration of their case other than to apply for a Protection Visa and be rejected."

12 IARC, Evidence, p. 15. Amnesty, Evidence, pp 46-7 cites as an example East Timorese now applying for PVs "knowing that they really need to appeal to the minister first and foremost".

13 DIMIA, Submission No 2, para 5.4.4

> for a Protection Visa or that their conduct was in fact abusive.[14]

3.15 This group, the Committee considered, might also fit the description of *bona fide* applicants if indeed their perceived abuse of the system arose from the actions of their advisors, rather than from a deliberate intent to exploit the PV appeal system.

… but not measured

3.16 DIMIA does not keep data which would permit the identification of the *bona fide* and other applicants, and argued that to attempt to do so would involve the case manager making an assessment of an applicant's motivations in applying for protection.[15]

3.17 The Committee considered that such judgements were not an appropriate undertaking for DIMIA, and that its concern should be with the relevance of the information provided to the criteria applicable to PV applications.

Indicators of abuse

Implicit indications

3.18 DIMIA claimed "the evidence points to continuing misuse of the PV system"[16] and argued that while some applicants might:

> "unwittingly pursue an asylum claim either through lack of knowledge or because of misleading information from advisors… It would appear realistic to conceive that a substantial percentage of the 50,857 protection visa applicants found not to be refugees over the last 7 years held some degree of knowledge as to their lack of refugee claims."[17]

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14 RCOA, Submission No 3, p.2. "not intentional abusers of the system but victims of unethical and unregistered agents who seek to gain financially from those who may be vulnerable and poorly informed."

15 DIMIA, Submission No 2, para 5.4.5

16 DIMIA, Submission No 2, para 5.4.5

17 DIMIA, Submission No 2, para 5.5.4

Failure to pursue RRT opportunities

3.19 DIMIA also pointed out that since the introduction of the fee in mid 1997, one third[18] of adverse PV decisions were affirmed by the RRT without the applicant appearing to give evidence. This was despite unsuccessful applicants being offered the opportunity to appear because the RRT was considering making an unfavourable decision. DIMIA argued from this evidence that a:

> *bona fide* applicant, truly believing that a mistake has been made in the primary assessment of their refugee application could be expected to ensure that they provide evidence to the RRT to support their case[19]…
>
> The most reasonable explanation is that in the majority of these cases the applicants are not seriously pursuing their claim for refugee status. This is evidence of the existence of continuing misuse of the PV process even after the introduction of the package of which the fee is a part.[20]

Conclusion

3.20 All submissions received by the Committee and which commented on the issue of abuse of protection visa arrangements agreed that abuse existed.

3.21 The Committee concluded that, although the scale could not be precisely determined, there was evidence of abuse of the PV system.

3.22 The Committee therefore examined options which might be available to counter such abuse as existed.

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18 33.9% DIMIA, Submission No 2, Table 5.5.1T

19 DIMIA, Submission No 2, paras 5.5.5.-7

20 DIMIA, Submission no 2, para 5.5.23

4

Options to discourage abuse

4.1 Submissions and evidence to the Committee proposed a number of means by which abuse of the PV system might be reduced.

Identification of unfounded applications

4.2 RCOA urged the abolition of the fee and proposed instead that:

> new procedures be introduced to identify and expeditiously process manifestly unfounded applications to the RRT and therefore reduce the incentive to lodge an abusive claim. [1]

4.3 Similarly, JMVS proposed that applicants and agents filing "a refugee claim without prima facie evidence should be punished severely".[2]

4.4 The Committee noted that the existing sequence of primary consideration by DIMIA and the appeal process at the RRT already identified unfounded applications or those which did not make a *prima facie* case. It was the assessment that the applicants had not made their case which generated some appeals because the applicants did not share the assessor's view.

4.5 The Committee did not, therefore, believe that another layer of assessment would improve the existing means of testing applicants' claims to Australia's protection obligations. Further, an additional

1 RCOA, Submission No 3, p. 6, 4th recommendation.

2 JMVS, Submission No 4, para 8

step in the process would create another opportunity for potentially delaying appeals.

4.6 MIA offered a possible solution under which countries where DIMIA was aware that there was:

> a well founded fear of persons being persecuted could be gazetted whereby the $1,000 post RRT fee would not apply.[3]

4.7 DIMIA emphasised to the Committee that its use of the concepts of "high-refugee-producing" and "low-refugee-producing countries" was an analytical tool used only for the purposes of its current submission to the Committee. It foresaw that:

> if you start distinguishing between potential source countries in a formal sense, you do start to raise… foreign policy issues about the values of those judgments and… also raise the expectation that you are making a prima facie decision about people from certain countries as opposed to others.[4]

4.8 The Committee agreed that such a procedure of apparent pre-judgement of applications was not appropriate.

Conclusion

4.9 In the Committee's view, the proposals to identify unfounded applications was unlikely to improve the existing assessment process. The Committee therefore concluded the suggested approaches should not be adopted.

Alternative financial sanctions

4.10 MIA suggested that, rather than a fee, a bond might be appropriate, to be refunded if the application was successful.[5]

Conclusion

4.11 The Committee did not pursue this proposal because it would create a further layer of administration.

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3 MIA, Submission No 9, p. 2

4 DIMIA, Evidence, pp 59-60

5 MIA, Submission No 9, p .2 – the bond was a suggested component of the proposed gazettal of certain countries to which a fee would not apply.

Expeditious processing

4.12 In evidence to the Committee, LIV maintained that:

> there should be a quick and efficient method of the appeal going through the RRT… that would probably solve the problem of people… trying to stay in Australia with a work permit and Medicare… The only way to control it is by being quick and efficient about it, but ensuring, of course, that natural justice prevails all the time.[6]

4.13 In 2001/2 the RRT was composed of 40 full-time members and 25 part-time members who between them finalised 5,865 cases.[7]

4.14 The Tribunal's caseload management strategy gives priority to applicants in detention, aiming to finalise their cases within 70 days. The RRT timeframe for applicants not in detention was 118 days. In 2001/2 nearly three quarters of those cases were finalised within the 118 day timeframe.[8] Within those broad strategies the RRT focused its attention on old cases and also on countries where:

> the applicants rarely attend hearings and set aside rate is very low.[9]

4.15 In its Annual Report the RRT noted that productivity was limited by, among other issues, increasing complexity in the caseload, and the need to ensure that the written decisions take into account emerging Federal Court decisions and evolving legislative provisions.[10]

Conclusion

4.16 On the basis of the RRT's annual report the Committee thought that it sought to provide expeditious consideration to the types of claims which appeared to the Committee to be those likely to lack merit. The Committee had observed the Tribunal's operations and hearing arrangements and believed that its strategies were appropriate.

4.17 The Committee concluded that faster processing at the RRT would require additional resources.

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6 LIV, Evidence, p. 32
7 Refugee Review Tribunal, *Annual Report 2001-2002*, p. 2
8 Refugee Review Tribunal, *Annual Report 2001-2002*, p. 21
9 Refugee Review Tribunal, *Annual Report 2001-2002*, p. 1
10 Refugee Review Tribunal, *Annual Report 2001-2002*, pp 2-3

Non-financial sanctions

4.18 IARC and LIV[11] recommended repeal of the fee on the grounds that it was not needed to deter non genuine claims because, as IARC put it there was

> provision to restrict the right to work for applications made outside 45 days of entry, and the bar on subsequent on shore visa applications

were sufficient.[12]

4.19 The fee was a part of a group of related measures which took effect on 1 July 1997. They included:

- restriction in the provision of permission to work to applicants who have been in Australia for less than 45 days in the 12 months before the date of their protection visa application;
- restriction on access to Medicare to applicants who have been in Australia for less than 45 days in the 12 months before the date of their protection visa application; and
- the adoption of more strategic processing of applications to deal with unmeritorious claims expeditiously.[13]

4.20 A further sanction was that, under the Act, unsuccessful applicants for PVs cannot apply for any other visa onshore.[14]

4.21 According to DIMIA, sanctions such as the restriction on the right to work were designed to affect the primary application level. The fee, on the other hand, was "targeted at those applicants considering pursuing unmeritorious applications to the review stage."[15]

4.22 The Committee observed that the removal of the right to work applied only to applications made by those who had been in Australia more than 45 days. Since this sanction was imposed on 1 July 1997 the proportion of applications outside this deadline had fallen. It therefore might be assumed that it was becoming less effective as a deterrent. Applicants whose motivation was to exploit the PV

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11 LIV, Evidence, p. 32

12 IARC, Submission No 6, p. 2

13 DIMIA, Submission No 2, para 5.2.1

14 Section 98A -see DIMIA, Submission No 2, para 4.1.11

15 DIMIA, Submission No 2, para 5.2.2.

arrangements to work in Australia could be expected to meet the 45-day deadline.

Table 4.1 Percentage of Applicants who applied for a PV 45 days or more after Entry

	1995/6	1996/7	1997/8	1998-99	1999/00	2000/01	2001/02
Average of all Nationalities	58.45	64.10	44.78	38.17	43.34	39.64	38.12

Source DIMIA, Submission No 2, Table 5.2.1T

4.23 In addition, as DIMIA indicated, lack of work rights did not prevent a person from finding work.[16]

Conclusion

4.24 The Committee was not convinced that it would be prudent to rely only on sanctions such as the work and Medibank exclusions, particularly if the fee was working as a disincentive.

4.25 The Committee considers the evidence of the fee's effectiveness in the next chapter.

16 DIMIA, Submission No 2, , para 5.11.2

5

Effectiveness of the fee

5.1 DIMIA claimed that the fee had achieved its aim; however other evidence challenged this view.

Overview

5.2 In its submission DIMIA pointed to a 32.5% decrease in the number of applications lodged with the RRT in 2001/2 compared with 1996/7 as evidence of the impact of the fee (see Table 5.1 column 5 below).[1]

5.3 RCOA disputed this interpretation[2], and the Committee noted that DIMIA's conclusion depended on which year was chosen for comparison. Had 2000/1, for example, been compared with 1996/7, then the number of applications lodged would have decreased by only 4.5 per cent (see Table 5.1 column 5 below).

5.4 RCOA focussed instead on other DIMIA data which showed that PV applications fell from 11,171 in 1996/7 to 8,670 in 2001/2:

> a 22% decrease, which could clearly account for a significant proportion of the decrease in applications to the RRT [see Table 5.1, column 1 below].[3]

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1 DIMIA, Submission No 2, para 5.3.5

2 RCOA, Submission No 3, p. 3 disputes DIMIA, Submission No 2, para 5.3.5 citing Table 5.3.1T showing 1996/7 = 8,496, 2001/2 = 5,734

3 RCOA, Submission No 3, p. 3, citing DIMIA, Submission No 2, Table 5.1.1T

Table 5.1 PV applications and appeals to RRT 1995/6 – 2001/2

Column 1	2	3	4	5	6
Year of PV Application.	**Primary Received**	**Primary Rejected**	**Primary Granted**	**Lodged RRT**	***% Primary Rejected who lodge with RRT***
1995/96	8,100	6,382	1,195	5,142	*80.1*
1996/97	11,171	10,043	869	8,496	*84.6*
1997/98	8,155	7,246	693	6,216	*85.8*
1998/99	8,407	7,237	983	6,412	*88.6*
1999/00	12,172	7,485	4,221	6,755	*90.2*
2000/01	13,127	8,914	3,325	8,115	*91.0*
2001/02	8,670	6,526	1,431	5,734	*87.9*

Source: Protection visa cohort in DIMIA, Submission No 2, Table 5.1.1T

5.5 Consequently, RCOA suggested that a:

> more accurate analysis of the impact of the fee would be the rates at which those applicants who were rejected at the primary stage sought a review of that decision at the RRT. For the period 1996-1997, 85% of those who received a primary rejection lodged at the RRT. The similar rate for 2001-2002 was 88% and this figure peaked at 91% during the previous financial year [see Table 5.3, column 6 above]. [4]

5.6 Amnesty echoed this view[5] and RCOA argued that the increased proportion of :

> those seeking a review of their primary decision would indicate that there has not been a general deterrence as might be expected with the introduction of $1000 fee.[6]

4 "Figures calculated from DIMIA Submission to the Joint Standing Committee on Migration on Migration Regulation 4.31B, February 2003, p. 15, Table 5.1.1T" RCOA, Submission No 3, p. 3

5 See: Amnesty, Evidence, p. 39

6 RCOA, Submission No 3, p. 3

5.7 JMVS also concluded that "the deterrent effect of the $1,000 fee has diminished". [7]

5.8 The Committee agreed that the proportion of unsuccessful applicants appealing to the RRT had increased since the fee was introduced in July 1997.

5.9 In assessing the meaning of this data, the Committee noted that the national composition of the applicant population was not constant from year to year. The origins of the applicants and their confidence in the validity of their asylum claims, even after initial rejection, would thus have an effect on the proportion appealing to the RRT in any one year.

5.10 Amnesty's critique was that:

> if they want to abuse the system, they will apply to the Refugee Review Tribunal because it will extend their stay and then they can leave without paying the fee.[8]

5.11 This, argument, the Committee concluded, held only for those whose aim was to remain until their appeal avenues were exhausted. It did not mean that those who wanted to stay on in Australia would not be deterred.

Conclusion

5.12 Significantly, in the Committee's view, neither RCOA nor JMVS claimed that the fee was ineffective. Rather their position was that, as it currently operated, it was less effective than might be expected.

5.13 The Committee concluded that the high proportion of RRT applications in any one year was not necessarily evidence that the fee was ineffective. In assessing the situation the Committee observed that the proportion of unsuccessful PV applicants seeking RRT intervention may now be stable, and possibly falling.

Detailed evidence

5.14 At a more detailed level, DIMIA analysed appeals from nationalities which historically had statistically significant application rates but a PV grant rate below two per cent. According to DIMIA, these "low

7 JMVS, Submission No 4, para 6

8 Amnesty, Evidence, p. 40

refugee producing (LRP) nationalities"[9] were those in which non-genuine applications for RRT review could be concentrated, and:

> If the fee has been effective in reducing applications to the RRT from persons who have no grounds for protection, that effect should be identifiable in the RRT take-up rate for applicants of 'LRP' nationality from 1997/98 onwards.[10]

5.15 Over the period in which the fee had operated, DIMIA claimed that:

- the absolute numbers of LRP applications to the RRT fell;[11]
- the proportion of LRP in the RRT's caseload declined;[12] and
- the proportion of unsuccessful applicants from LRP countries proceeding to the RRT stopped rising and stabilised:[13]
  - ⇒ in the year prior to the introduction of the fee, LRP review take-up rates were increasing from 74.4% to 82.2%;
  - ⇒ this proportion could be expected to continue to rise quickly if no measures were introduced to counter it; **but**
  - ⇒ in the year following the fee's introduction increase was markedly reduced, rising from 82.2% to only 82.7%; **and**
  - ⇒ in subsequent years the proportion had been relatively stable at between 85.3% and 88.6% (see Table 5.2 below).[14]

5.16 DIMIA concluded that:

> the RRT take-up rate for people of 'LRP' nationalities, who have a greater proportion of claimants who have no grounds for protection, would clearly be significantly higher without the fee.[15]

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9 *Low Refugee Producing* ('LRP') groups... "are those nationalities from which, over the seven financial years 1995/96 to 2001/02… ten or more applicants have applied for PV and the grant rate is below 2%." DIMIA, Submission No 2, paras 5.5.12-13

10 DIMIA, Submission No 2, para 5.6.1

11 In 1996/7 there were 4,300 applications from people from low refugee producing countries for review. In 2001/2 there were fewer than 2,000. DIMIA, Submission No 2, Table 5.6.2T, Evidence, p. 57

12 In 1996/7, 52% of its caseload was processing people from low refugee producing countries, by 2001/2, it was 33%. DIMIA, Submission No 2, Table 5.6.2T, Evidence, p. 57

13 In 1995/6 the proportion was 74.4%; 1996/7 = 82.2%, thereafter in the range 85.3% - 88.6%. DIMIA, Submission No 2, Chart 5.6.1.C, Evidence, p. 57

14 DIMIA, Submission No 2, para 5.6.3.

15 DIMIA, Submission No 2, para 5.6.3

Table 5.2 RRT Take-up Rates 'High Refugee Producing' (HRP) and 'Low Refugee Producing' (LRP) Nationalities

Nationalities	1995/6 (%)	1996/7 (%)	1997/8 (%)	1998/9 (%)	1999/00 (%)	2000/1 (%)	2001/2 (%)
High Refugee Producing	85.9	89.8	95.3	96.4	95.2	96.3	94.5
Low Refugee Producing	74.4	82.2	82.7	85.4	88.5	88.6	85.3
All nationalities	*80.1*	*84.6*	*85.8*	*88.6*	*90.2*	*91.0*	*87.9*

Source DIMIA Submission No 2, Table 5.6.1T Protection visa cohort Table 5.1.1T

5.17 RCOA objected that:

> DIMIA appears to equate 'abusive' applicants with those from Low Refugee Producing (LRP) Nationalities who may not have grounds for protection on Convention grounds… [but] while an applicant may not meet the criteria of a Convention refugee he or she should not be viewed as 'abusive'.[16]

5.18 Consequently, RCOA:

> would question the validity of such an analysis in determining the efficacy of Migration Regulation 4.31B.[17]

5.19 The Committee examined this objection and concluded that DIMIA did not identify applications from Low Refugee Producing Countries as abusive. Rather, DIMIA's position was that:

> Applications from persons who have no grounds for protection can be expected to be concentrated more in the group of nationalities with low success rates.[18]

Conclusion

5.20 The Committee concluded that DIMIA was not necessarily equating LRP nationalities with abusive applications.

16 RCOA, Submission No 3, pp 3-4 and citing DIMIA, Submission No 2, para 5.6.3.

17 RCOA, Submission No 3, p. 3

18 "A lower approval rate tends to point to any adverse situation in their countries of origin being less severe or widespread from a perspective of human rights abuses than that in other countries…. low refugee producing' ('LRP') groups... are those nationalities from which, over the seven financial years 1995/96 to 2001/02… ten or more applicants have applied for PV and the grant rate is below 2%." DIMIA, Submission No 2, paras 5.5.12-13

5.21 In addition, the Committee noted the proportions of those of LRP nationalities appealing the RRT remained below those of the HRP nationalities.

Summary

5.22 The Committee accepted that DIMIA's analytical approach of identifying "low refugee producing" nationalities was a useful, if imprecise, tool in assessing the possible impact of the fee on possibly abusive applications.

5.23 The Committee consequently accepted DIMIA's assertion that the RRT take-up rate for people of LRP nationalities, who have a greater proportion of claimants who have no grounds for protection, would be significantly higher without the fee.

5.24 The Committee further concluded that, as non-*bona fide* or abusive claimants might be expected to be concentrated in the LRP group, the consistently lower proportions of these nationalities proceeding to the RRT was evidence that the fee was a disincentive.

5.25 The Committee then considered whether the fee might deter *bona fide* applicants from seeking RRT review.

6

Effect of the fee on *bona fide* applicants

6.1 LIV raised the point that, because an effective deterrent will deter, then:

> if the fee does work to deter applicants there is no way of assuring that it only deters those who are abusers of the system.[1]

Access to the RRT

6.2 The Committee, in this and its earlier reviews, had been concerned that the fee should not discourage unsuccessful PV applicants from pursuing review by the RRT.[2] The Committee therefore sought evidence on the degree to which *bona fide* applicants might be deterred and was given contradictory advice.

6.3 DIMIA's submission on this issue focussed on the statistics of applicants of high refugee producing nationalities, (those most likely to have a concentration of *bona fide* applicants)[3], and concluded that the:

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1 LIV, Submission No 8, para 4.2

2 See Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*, pp 17-22; *2001 Review of Migration Regulation 4.31B*, pp 17-20

3 "those nationalities from which, over the seven financial years 1995/96 to 2001/02, ten or more applicants have applied for PV and the grant rate is 50% or above" There could be expected to be a" concentration of *bona fide* applicants within the group of 'HRP' nationalities". DIMIA, Submission No 2, paras 5.5.13; 5.7.3 respectively

> data strongly suggests that people with a fear of persecution, whether subjective or objective, are not deterred from making an RRT application by the existence of a post review decision fee. [4]

6.4 RCOA also concluded that:

> there is no concrete evidence to suggest that the introduction of the decision fee has prevented bona fide applicants from seeking a review of their decision.[5]

6.5 In his submission, Mr G. Kimberly agreed that there was

> no evidence to suggest that Regulation 4.31B has deterred genuine refugees[6]

6.6 However, in the opinion of Amnesty:

> these people do not have much money… So, in informing them that if they go ahead with the appeal to the Refugee Review Tribunal they might be up against a $1,000 fee or will be in debt to the government, it is clearly not going to have a good effect on the bona fide claimants because there is such a low acceptance rate at the tribunal.[7]

6.7 The Committee accepted that DIMIA's analytical approach of identifying "high refugee producing" nationalities was a useful tool in assessing the possible impact of the fee on potentially *bona fide* applications.

6.8 The Committee noted that the two submissions (LIV and Amnesty) which concluded that the fee discouraged bona fide applicants from pursuing a review at the RRT did so on the basis of a potential effect, rather than offering concrete examples.

6.9 DIMIA also argued in support of its contention that the fee did not affect *bona fide* applicants:

> it is unlikely that a person would be deterred from applying for review by a $1000 fee they did not expect to have to pay because they were genuine refugees. [8]

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4 DIMIA, Submission No 2, paras 5.7.4-5
5 RCOA, Submission No 3, p. 3
6 Kimberley, Submission No 1, p. 1
7 Amnesty, Evidence, p. 45
8 DIMIA, Submission No 2, paras 5.7.4-5

Conclusion

6.10 The Committee therefore concluded that it did not appear that the fee discouraged bona fide applicants from pursuing an RRT review.

6.11 The Committee was, however, aware that a number of submissions highlighted what they considered were adverse effects of the fee.

Other effects

6.12 Although they agreed that the fee did not appear to have discouraged *bona fide* applicants, RCOA and IARC were concerned about what RCOA described as:

> the adverse impact the $1000 decision fee on the psychological wellbeing and financial capacities of genuine applicants. [9]

6.13 In the words of IARC:

> the post decision fee can have harsh consequences on Australian families who are financially, culturally or otherwise disadvantaged…
>
> the effect of s48 of the Migration Act, which bars the making of further visa applications in Australia following a visa refusal, means that it is specifically those financially disadvantaged applicants who comply with the law and leave Australia to make a further visa application from offshore who may be adversely affected by the post decision fee.[10]
>
> ultimately the only people who are really compelled to pay the fee are those who seek to return to Australia following an unsuccessful protection visa claim.[11]

6.14 Amnesty, in its submission, also raised the issue of potential negative consequences of the fee, saying that, because the fee cannot be waived on the ground of financial hardship:

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9 RCOA, Submission No 3, p. 3

10 "This occurs in the situation where they are unable to afford to pay the fee, and therefore have an outstanding debt to the Commonwealth. More likely than not, these will be offshore spouse applications and therefore an Australian permanent resident or family unit is adversely affected by this provision." IARC, Submission No 6, p. 2

11 IARC, Evidence, p. 14

> for many asylum seekers, who won't have the money to pay their debt, this means that they don't have an option to obtain another, non-humanitarian, visa.[12]

6.15 LIV echoed this concern that the fee imposed "unduly harsh penalties" on applicants with few available financial resources. [13]

6.16 IARC suggested that some of these implications might be avoided if the applicant could withdraw the application, and make a new application for another type of visa while remaining in Australia.

6.17 DIMIA, in response to the Committee's inquiry, indicated that:

> the impediment to getting a further visa… disappears if you have entered into an agreement… satisfactory to the Commonwealth, to pay off the debt.[14]

Conclusion

6.18 The Committee was not inclined to pursue the IARC suggestion that applications for PVs might be withdrawn and thus permit applications for other visas to be made because this could imply that a PV application was merely an opening bid to remain in Australia. This is at odds with its prime purpose, which is to provide an avenue for those seeking to engage Australia's protection obligations.

6.19 The Committee noted that there could be adverse financial outcomes from an unsuccessful application for review. This would affect both the *bona fide* applicants and abusers of the PV arrangements, unless they were able to make payment arrangements with the Commonwealth.

6.20 However, the Committee was more concerned that *bona fide* applicants should not be dissuaded from seeking review of an adverse decision, and there was no evidence offered that this was occurring.

6.21 Prior to assessing the application of the fee itself, the Committee addressed a number of other issues which had been raised during the review. These are discussed in the following chapter.

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12 Amnesty, Submission No 7, p. 4

13 LIV, Submission No 8, paras 2.7, 2.1

14 DIMIA, Evidence, p. 51

7

Issues raised by Regulation 4.31B

7.1 In addition to evidence on the three key issues which the Committee examined, a number of related issues were raised in submissions and evidence to the Committee.

7.2 The Committee examined these, some of which, as *italicised* below, had been raised during previous reviews of Migration Regulation 4.31B:[1]

- the fee as a tax;
- *the fee was a disguised penalty;*
- *the fee was in conflict with Australia's international obligations;*
- *there should be provision to waive the fee;*
- *creation of an onshore humanitarian stream; and*
- *Migration Agents' activities.*

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1 Issues considered in 2001 were: filtering of claims; more flexibility in responding to asylum seekers' concerns; increased resources for DIMA's compliance activities; relaxation of the grounds for removing some visa conditions; granting the RRT power to waive the fee; introducing an onshore humanitarian stream; reduction of processing times; providing procedural fairness at the primary determination stage; and strengthening the regulation of migration agents. Joint Standing Committee on Migration, *2001 Review of Migration Regulation 4.31B*, pp 21-29

Fee as a Tax

7.3 LIV advanced some case law examples to argue that the fee could be said to meet the test defining a tax, because it could be considered as:

> a compulsory extraction of money by a public authority for public purposes, enforceable by law, and… not a payment for services rendered.[2]

7.4 If that was the case, LIV argued, then:

> there should be a separate act of parliament and it should not be hiding in a regulation.[3]

7.5 The Committee did not receive a view from DIMIA on this issue.

Conclusion

7.6 The Committee considered that this matter was outside the immediate focus of the review. The Committee would, however, continue to pursue the issue with DIMIA.

The fee a penalty

7.7 ACMRO raised the argument that the fee constituted "a fine on the process".[4]

7.8 Amnesty claimed that Regulation 4.31B imposed a penalty because the fee:

> creates a perceived and/or financial burden on all applicants, regardless of their *bona fides*[5]…
>
> simply penalises unsuccessful asylum claims without reference to the circumstances of the application... impeding and deterring asylum seekers from appealing negative primary decisions.[6]

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2 LIV, Evidence, p. 26, citing an unspecified High Court Judgement
3 LIV, Evidence, p.27
4 ACMRO, Submission No 5, p. 1
5 Amnesty, Submission No 7, p. 3
6 Amnesty, Submission No 7, p. 3

7.9 Amnesty's stance in its submission to the Committee was that:

> asylum-seekers with legitimate fears of being subjected to serious human rights violations upon forcible return may fall outside of the scope of the Refugee Convention…. should not be penalised.[7]

7.10 LIV also considered that the fee was a penalty. Fees, it contended, generally applied to all, but the Regulation 4.31B fee applied only to unsuccessful applicants, not to each applicant.[8] And, unlike other fees, it was levied only for a particular outcome.[9] This arrangement thus penalised:

> non-convention defined refugees who are validly and genuinely seeking asylum from persecution with legitimate fears of being subjected to serious human rights violations.[10]

7.11 Further, LIV contended that, on the basis of a case currently on appeal to the High Court, if the fee could be considered as a punishment, then it may not be able to be imposed under the migration act.[11]

7.12 DIMIA's view was that the fee was "a non-punitive partial cost recovery mechanism."[12]

Conclusion

7.13 On the question of whether the fee was penalty, the Committee noted that no case had been resolved and therefore it could not form a view on this.

International responsibilities

7.14 ACMRO, in its submission, simply stated that the fee "is out of character with the purposes and spirit of the Refugee Convention". [13] Amnesty International Australia developed the theme that the fee placed Australia in breach of Australia's international responsibilities because it:

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7 Amnesty, Submission No 7, p. 3
8 LCV, Submission No 8, para 1.1
9 LCV, Submission No 8, para 1.2
10 LCV, Evidence, p.25
11 LIV, Evidence, p. 28
12 DIMIA, Submission No 2, para 5.11.8
13 ACMRO, Submission No 5, p. 1

> effectively impedes the right of all applicants to seek and enjoy in Australia asylum from persecution, as stated in Article 14 of the Universal Declaration of Human Rights, by deterring asylum seekers from appealing negative primary decisions.[14]

7.15 LIV endorsed a statement by the Human Rights and Equal Opportunity Commission to the Committee (during the 1999 consideration of Regulation 4.31B)[15] that access to an effective procedure to determine asylum seekers' claims:

> cannot be made dependent upon the capacity of the applicant to pay. Nor can it be discouraged [by] being made subject to a penalty in the event the applicant has misapprehended his or her situation in light of the Refugee Convention or has been unable to muster the evidence require to establish his or her case.[16]

7.16 In evidence to the Committee Amnesty stated that:

> within the refugee convention and other human rights mechanisms, there is no provision for recouping costs in the asylum process.[17]

7.17 DIMIA, on the other hand, cited the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, which states that:

> the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status.[18]

7.18 DIMIA noted that, therefore it was for:

> signatory States to the Refugees Convention to develop and apply their procedures in accordance with their own legislative and administrative framework[19]... [and] Fees are by no means uncommon as part of the refugee determination processes in other countries.[20]

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14 Amnesty, Submission No 7, p. 3, as corrected in Evidence, p. 44

15 LIV, Submission No 8, para 3.1

16 LIV, Submission No 8, para 3.2

17 Amnesty, Evidence, p. 43

18 Office of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status*, January 1992, para 189, p45; quoted in DIMIA, Submission No 2, para 2.4.1

19 DIMIA, Submission No 2, para 2.4.2

20 DIMIA, Submission No 2, para 2.4.6

7.19 The only comparative payments of which DIMIA was able to advise the Committee were that New Zealand charged an up-front fee of $700 for review and that the USA charged $US110. [21]

7.20 The Committee observed that the imposition of fees by other countries indicated that Australia was not alone in maintaining that such measures did not breach international responsibilities.

7.21 DIMIA concluded that Australia's refugee review process is both fair and efficient, quoting in support a statement made by the Office of the Regional Representative of the UNHCR that:

> as a State party to the Convention, Australia fulfils its international obligations scrupulously and fairly. [22]

Conclusion

7.22 In the Committee's view, the arguments alleging breaches of international responsibilities assumed that the fee had deterred *bona fide* claimants from applying for a review. This view, the Committee concluded, had not been demonstrated.

Waiving the fee

7.23 IARC reiterated its earlier, 1999, contention that there should be discretion to waive the imposition of the post decision fee in "compelling circumstances".[23] A suggested mechanism was for:

> an unsuccessful applicant to be sent a letter asking them to give reasons why they think a post-decision fee ought not apply. [24]

7.24 MIA proposed that:

> countries where there is a well founded fear of persons being persecuted…would be gazetted whereby the… fee would not apply.[25]

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21 DIMIA, Evidence, p. 53

22 Office of the United Nations High Commissioner for Refugees in - Senate Legal and Constitutional References Committee *Submissions to Inquiry into the Operation of Australia's Humanitarian and Refugee Program, Volume VII,* 1999, Submission No. 83, p 1432, quoted in DIMIA, Submission No 2, para 2.4.3

23 IARC, Submission No 6, Recommendation 2

24 IARC, Evidence, p. 18; pp 22-3, suggests that the appropriate agency is DIMIA

25 MIA, Submission No 9, p.2

7.25 When asked, LIV specifically rejected the concept of a waiver because it would "unnecessarily complicate the system" and was at odds with the Institute's firm view that the fee should be abolished.[26]

7.26 Amnesty, too, raised the issue of adding "another costly element to the system", but thought if the fee was to continue, then a waiver should be available to those in detention. [27]

7.27 DIMIA's view of a provision to waive was that it raised a range of issues:

> questions of review of the decision, complexity, imposing an additional decision-making step on the process, the dilution of the role of the RRT and an outcome that provides more opportunity and encouragement to people who are not refugees to seek to prolong their stay in Australia.[28]

Conclusion

7.28 The Committee concluded that the evidence presented to it did not raise any considerations not addressed in its previous report and, as DIMIA suggested, would add further opportunities for exploitive use of any arrangement in order to prolong residence in Australia. Therefore the Committee reiterated its previous decision[29] not to endorse the proposal to permit waiving of the fee.

Introducing an onshore humanitarian stream

7.29 Amnesty recommended an unspecified arrangement to protect those not recognised as refugees but who may face serious human rights violations if they returned to their country of origin.[30]

7.30 The Committee noted that arrangements existed in the 1980s which permitted entry if there were"strong compassionate or humanitarian

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26 LIV, Evidence, p. 31

27 Amnesty, Evidence, p. 43

28 DIMIA, Submission No 2, para 5.11.9

29 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*, pp 25, 40; *2001 Review of Migration Regulation 4.31B*, p. 37

30 Amnesty, Submission No 7, p. 61

grounds". These provisions had, however, been difficult to interpret and apply and had been repealed in 1987.[31]

Conclusion

7.31 As in its 1999 and 2001 reports, and in the absence of a clear alternative proposition, the Committee concluded that the problems associated with a previous onshore 'humanitarian' visa system were such that this was not merited.[32]

Migration Agents' activities

7.32 The Committee, having considered evidence concerning some migration agents in 2001, recommended that:

> the activities of migration agents be brought under closer continuing scrutiny by DIMA and the Migration Agents Registration Authority.[33]

7.33 During the current review, the Committee's attention was drawn to continuing concern about the activities of some migration agents. RCOA mentioned:

> unethical and unregistered agents who seek to gain financially from those who may be vulnerable and poorly informed… a significant problem requiring continued attention.[34]

7.34 RCOA identified a number of practices by some migration agents which operated to the detriment of applicants. These included agents who:

- promise a "work visa" (i.e. a PV application) to people who have sought their advice and who have no reason to remain in Australia other than a desire to extend their stay;[35]

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31 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*; pp. 30-32; DIMA, Submission No 18 (2001), pp 45-6

32 Joint Standing Committee on Migration, , *Review of Migration Regulation 4.31B*; p. 41; *2001 Review of Migration Regulation 4.31B*; p. 25

33 Joint Standing Committee on Migration, *2001 Review of Migration Regulation 4.31B*, Recommendation 2, para 3.47

34 RCOA, Submission No 3, p. 3

35 RCOA, Submission No 3, p. 2

- misinform their clients that -
  - ⇒ payment of the fee will ensure that the Minister will consider their case;
  - ⇒ a favourable decision by the Minister under s417 is dependent upon payment of the fee; and
  - ⇒ if the fee is not paid and a 'debt to the Commonwealth' is incurred then this will lead to a criminal charge;[36]
- do not inform their clients of the regulation and add $1000 to typically exorbitant fees;[37] or
- inform their clients of the fee, offer to administer the payment on their behalf, but fail to forward payment to the RRT, regardless of the decision.[38]

7.35 The Committee was aware that migration agents were under pressure from clients (sometimes with limited *bona fides*) who were themselves eager to take advantage of the PV process.

7.36 JMVS added that:

> it is well-known… one can pay A$200 for a [PV] form 866 to be filled out and submitted[39]

7.37 The Migration Institute of Australia acknowledged that it was aware of complaints through the Migration Agents Registration Authority:

> regarding protection visa applications from applicants where there is absolutely no way of concluding that that person meets the definition of a refugee.[40]

7.38 DIMIA indicated that, following a review of the industry in 2001/2, it is anticipated that legislation will be introduced to give the MARA increased powers to take action against the small but unscrupulous end of the industry that lodges a high number of vexatious applications.[41] DIMIA also stated that since 1 March 2003 registered

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36 RCOA, Submission No 3, p. 4

37 According to RCOA "Many applicants only become aware of the existence of the fee when they receive a letter from the RRT affirming the DIMIA's primary decision." RCOA, Submission, 3, pp 4-5

38 RCOA, Submission No 3, p. 5

39 JMVS, Submission 4, para 4

40 MIA, Submission No 9, p. 1

41 DIMIA, Evidence, p. 52. Migration Legislation Amendment (Migration Agents) Act No. 35, 2002, provides for barring former registered agents from being registered for up to 5 yeas (s311A) http://scaleplus.law.gov.au/html/comact/11/6492/pdf/0352002.pdf

migration agents were required to give new clients information about what they can expect from the industry and there may be moves to provide more information to consumers.[42]

Conclusion

7.39 The Committee noted that the regulation of migration agents was subject to impending legislation, and therefore did not wish to make any recommendations on the subject.

7.40 The Committee will, however, continue to monitor future developments in this area.

42 DIMIA, Evidence, pp 54-5

8

Imposition of the fee

8.1 Currently the fee is imposed after the RRT has decided not to set aside the DIMIA conclusion that the applicant did not warrant a PV.

Time of imposition

8.2 JMVS proposed that the fee should be paid up-front as a further deterrent, and refunded in the case of successful applications. [1] Similarly, MIA suggested that if its proposal for a bond was taken up, that it would be required at the time of application.[2]

8.3 LIV maintained that to have the fee payable at the time of application:

> would be a severe risk that this breaches further our international obligations…[because] to enforce an application fee at the initial application stage would be very detrimental to proper access to the justice system.[3]

8.4 When asked about up front fees, DIMIA's position was that it would place a:

> barrier in between the person and the appeal, because they must find the money before they can actually exercise the appeal. Under the current system, you can have your appeal

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1 JMVS, Submission No 4, para 6

2 MIA, Submission No 9, p. 2

3 LIV, Evidence, p. 30

> and the only issue you have to consider is that you may have a debt later if you are unsuccessful.[4]

Conclusion

8.5 The Committee was reluctant to require the fee prior to any decision because it considered that this would unnecessarily expand its deterrent effect. This could have a possible detriment to *bona fide* applicants which was not the case under the current arrangements.

Level of fee

8.6 The fee, when introduced in 1997, was set at $1,000. Several submissions addressed the current level of the fee.

8.7 Three submissions to the Committee suggested that the fee should be increased.[5] JMVS proposed that the new fee be $2,000[6] and part of MIA's submission envisaged a fee of $3,000.[7]

8.8 DIMIA commented that, when the fee was introduced it was a:

> delicate balance between not putting barriers in the way of people applying for asylum and, in relation to the appeal process, sending a message to people who do not have any real case and want to use the appeal process as a way of staying in the country.[8]

8.9 DIMIA indicated that the Department of Finance and Administration provides the RRT with funding of $2,400 per application finalised,[9] and that it cost the Department approximately $120,000 to maintain the cost recovery process each year.[10] DIMIA commented that:

> the current level of the post review decision fee at $1000 is considered to be reasonable and appropriate. It represents a significant, but still only partial, contribution to the cost of

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4 DIMIA, Evidence, p. 59

5 G. Kimberley, (Submission No1, p. 1); JMVS, MIA.

6 JMVS, Submission No 3, p. 1

7 MIA, Submission No 9, p. 2

8 DIMIA, Evidence, p. 58

9 "Refugee Review Tribunal, *Annual Report 2001-2002*, p21. For the purposes of the Purchasing Agreement, one finalised case equates to 1.34 applications" quoted in DIMIA, Submission No 2, para 5.8.2

10 DIMIA, Evidence, p. 51

> review decisions by people who are found not to be refugees. Importantly, the current level represents a significant cost of review still being borne by the taxpayer.[11]

8.10 The Committee was aware that $1,000 fee had remained unchanged for more than five years since being introduced in 1997. Its relative value had therefore declined, potentially eroding some of its deterrent effect. Some DIMIA fees are indexed[12] and had this fee been indexed it would have been in excess of $1,000 in 2003.[13] The Committee observed that at the Migration Review Tribunal the applicable fee was $1,400.[14]

Conclusion

8.11 The Committee was aware that most other submissions argued for the removal of the fee, rather than any increase.

8.12 The Committee believed that it was appropriate for the fee to be raised because part of its deterrent effect depended on its relative value being maintained.

Summary

8.13 The fee being considered by the Committee was imposed by Regulation 4.31B which, under a sunset clause provision, would cease to have effect on 1 July 2003

8.14 The Committee looked to the underlying rationale of the fee, which was to reduce acknowledged abuse of the PV system. In the absence of any evidence that *bona fide* applicants were deterred by the fee from pursuing an RRT review, and in the light of data which indicated that the fee was deterring non-genuine applications, the Committee concluded that the fee was probably serving its purpose and should remain, but with a further review.

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11 DIMIA, Submissions No 2, para 5.8.2.

12 DIMIA, Evidence, p. 59

13 ABS *Consumer Price Index Australia* shows the CPI in 2001/2 (latest full year data) was 136.0 compared with 1997/8 = 120.3. On this basis $1,000 in 1997 would be the equivalent of $1,130 in 2002. ABS *Average Weekly Earnings Australia* (seasonally adjusted, all persons full-time adult total) Aug 97 = $749.20; Aug 2002 = $919.90 $1000 = $1, 227 in 2002.

14 Migration Review Tribunal at: http://www.mrt.gov.au/forms/mrt10_march2003.pdf

Recommendation 1

8.15 **The Committee recommends that Migration Regulation 4.31B remain in operation subject to a two year sunset clause, commencing on 1 July 2003, and that its operation be reviewed by the Committee in 2005.**

8.16 The Committee concluded that it was appropriate to increase the fee.

Recommendation 2

8.17 **The Committee recommends that the fee applied under Migration Regulation 4.31B be raised to $1,400, which is in line with the fee levied for an application for a review by the Migration Review Tribunal.**

8.18 In the broader context of the review process, the Committee concluded that a more expeditious RRT hearing process would both benefit bona fide applicants and also provide an additional disincentive to those using the system to prolong their stay in Australia. This, the Committee believed, could be achieved without threatening the integrity of the review process if more resources were available to the RRT.

Recommendation 3

8.19 **The Committee recommends that additional resources be made available to the Refugee Review Tribunal to provide more expeditious hearing and finalisation of cases coming before it.**

Dissenting Report: Senator Bartlett

The Committee has recommended that Migration Regulation 4.31B continue in force.[1] It has now gone further than in its two previous reviews of the regulation, which extended the sunset clause.

The position of the Department of Immigration and Multicultural and Indigenous Affairs is that the fee is a deterrent. [2] But at the same time, the Department admits that it is not possible to be sure of its effectiveness because it is part of a package of measures designed to reduce abuse of the Protection Visa system.[3]

Nevertheless, despite this ambiguity, the Department claims that the fee is sufficiently effective to merit continuation.[4]

The Committee concurs with the Department, on the basis that the fee does indeed deter abuse, (despite the unknowable contribution of the other parts of the package) and there is no evidence that bona fide applicants for Protection Visas (PV) are being deterred.[5]

The other parts of the package are not being reviewed by the Committee, only the fee. Therefore this dissenting report concentrates on the fee, examining its effectiveness and therefore its desirability from the points of view of the weight of informed opinion, logic, statistics, equity and pragmatism

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1 Joint Standing Committee on Migration, 2003 Report on Regulation 4.31B, Recommendation No 1

2 "the fee is acting as a disincentive for applicants who have no grounds for protection proceeding to the RRT". Department's submission at paragraph 7.2.1

3 "It is difficult to specifically ascribe changes in the profile of PV applicants to individual policy measures contained within the package, as the package operates as a whole". Department's submission at paragraph 5.5.28

4 "on all the evidence, the most appropriate course would be to remove the sunset provision from Regulation 4.31B". Department's submission at paragraph 7.3.3

5 Joint Standing Committee on Migration, 2003 Report on Regulation 4.31B, paragraphs 5.24, 6.20 respectively

The weight of informed opinion

In 1999, and again in 2001, and yet again in 2003, most submissions opposed the fee. In 2003, as in previous years, the opposition came from national and international bodies with expertise in refugee and migration matters. The Australian Catholic Migrant and Refugee Office (ACMRO); the Refugee Council of Australia (RCOA); Immigration Advice and Rights Centre (IARC); the Law Institute of Victoria (LIV); and Amnesty International Australia (Amnesty) all urged that the fee be abolished. [6]

Yet, despite the significant expertise and clear analysis of many of these groups, the Committee has not accepted their arguments, some of which are reviewed below.

A question of logic

The Law Institute of Victoria made the point that:

> *if the fee does work to deter applicants there is no way of assuring that it only deters those who are abusers of the system.*[7]

The Committee has not followed this logic. Instead it has accepted the arguments that the fee not only deters non-*bona fide* applicants, but simultaneously fails to deter *bona fide* ones.

Logically, if bona fide applicants are not to be deterred, the fee should not exist.

Slippery statistics

Statistically, the Department argues, and the Committee accepts, that the fee has had a discernable effect on non-*bona fide* applicants for review at the RRT.[8]

But, as the Refugee Council of Australia pointed out (using the Department's own statistics), the proportion of those refused asylum who seek review at the RRT has been increasing since the fee was imposed.

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6 Opponents of the fee in 2001 included: National Council of Churches in Australia, the Federation of Ethnic Communities' Councils of Australia, Amnesty International Australia and the Australian Section of the International Commission of Jurists, Australian Catholic Migrant and Refugee Office, Refugee Advice and Casework Service (Australia) Inc, Migration Institute of Australia, Network for International Protection of Refugees, Young Lawyers' Law Reform Committee, and Kingsford Legal Centre.

7 Law Institute Of Victoria at paragraph 4.2 of its submission (No. 8)

8 *bona fide* in this context includes not only those who are found to be refugees, but also those who apply to the RRT but who, despite their plight, do not meet the Refugee Convention requirements to be considered refugees.

> *For the period 1996-1997, 85% of those who received a primary rejection lodged at the RRT. The similar rate for 2001-2002 was 88% and this figure peaked at 91% during the previous financial year… this increase… would indicate that there has not been a general deterrence as might be expected with the introduction of $1000 fee*[9]

The clear conclusion is that, on the Department's own data, the fee has not had a significant effect.

The Department, however, made a more detailed argument in support of its case. It identified different trends in different applicant groups to sustain its argument that the *bona fide* applicants were not being deterred, but the abusive were.

This Departmental assessment of the effect on *bona fide* applicants depended on assessing the statistics relating to High Refugee Producing (HRP) nationalities. These were said to be a proxy for *bona fide* applicants. In the Department's view, the absence of any deterrent effect on *bona fide* applicants can be assumed from continued rise in the proportion of those unsuccessful HRP asylum seekers who seek RRT review.[10] The Department's claim seems to be that, in the case of bona fide applicants, the fee should continue to exist because it has no effect.

Self evidently, the same result could be achieved by having no fee.

The Department's counter to this line of thought was that the fee was necessary because of its measurable effect on abusive applications, as portrayed by the behaviours of their proxies, the Low Refugee Producing (LRP) countries.

The Department claimed that the fee discouraged non *bona fide* applicants because the proportion of unsuccessful applicants from LRP nationalities seeking RRT review was lower than the proportion from the HRP group.[11]

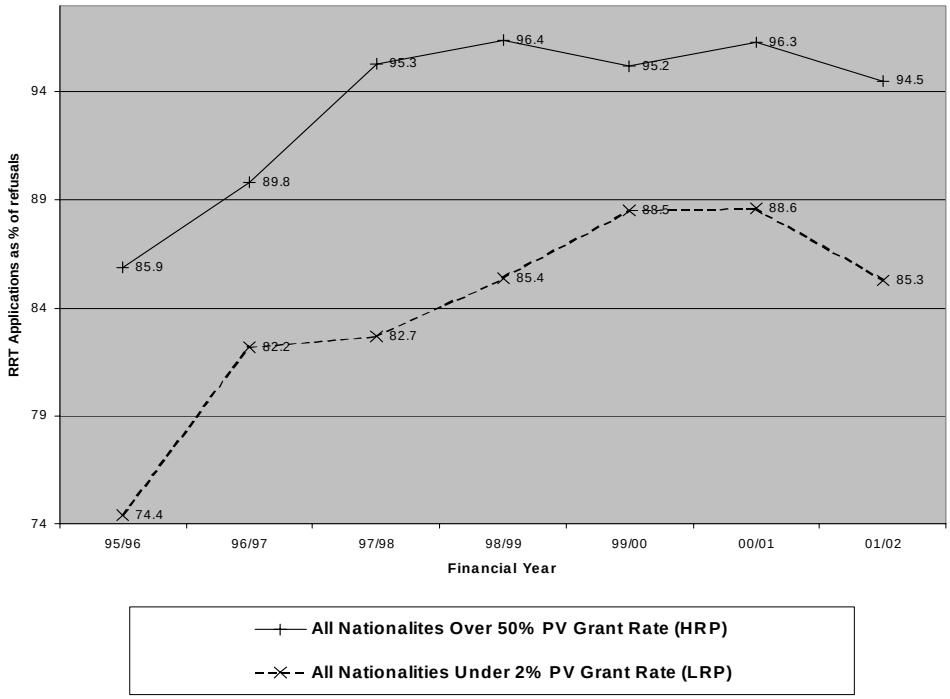
But this evidence is not conclusive, as can be seen in the Department's graph reproduced below. Firstly, the proportion of unsuccessful LRP asylum seekers applying to the RRT continued to increase immediately after the fee was introduced. Secondly, this LRP proportion is currently only marginally lower that the pre-fee HRP review application rate.

9 Refugee Council of Australia, Submission, page 3, using figures calculated from Table 5.1.1T in the Department's submission.

10 Department's submission at paragraphs 5.7.2- 5.

11 Department's submission at paragraph 5.6.3

5.6.1C RRT Take-up Rates 'High Refugee Producing' (HRP) and 'Low Refugee Producing' (LRP) Nationalities



Source: Department's submission, Graph 5.6.1C, data from Protection visa cohort.

Thus, for three of the five years of the fee's operation the proportion of the supposed abusive LRP group applying to the RRT has equalled or exceeded the proportion of pre-fee *bona fide* HRP applicants.

This is not convincing evidence that the fee has discouraged non *bona fide* asylum seekers from seeking RRT review.

The Department's counter argument was that the fee had slowed the growth of applications from unsuccessful applicants of LRP origins which would have occurred without the fee:

> *Continuing the dotted line between 1995-96 and the point at which the fee was introduced, you would have had low refugee producing countries at the same point in around 1998-99. That has not happened, and I think that is probably the most telling indication of the impact of the fee.*[12]

This argument is unconvincing because it assumes that the 1995/96-1996/97 LRP trend would have continued had the fee not been introduced.

Looking at the broad trends, therefore, it is difficult to see where the fee has had the significant impact claimed.

12 Department's evidence, p.57

Equity

Amnesty International Australia made the important point that the fee was an impediment to those vulnerable people who are seeking to gain Australia's protection as refugees because:

> *in informing them that if they go ahead with the appeal to the Refugee Review Tribunal they might be up against a $1,000 fee or will be in debt to the government, it is clearly not going to have a good effect on the bona fide claimants because there is such a low acceptance rate at the tribunal.*[13]

It is not appropriate to hold the threat of a fee (or fine) over some of our most vulnerable potential immigrants, particularly when there is doubt that it is achieving its purpose of deterring spurious appeals.

Pragmatic points

The Department claimed that if the fee was discontinued: it would "send inappropriate messages" to the Australian community in general.[14]

My view is to the contrary. Removing the fee would send a positive message to the Australian community that, as the Department claims, "the Australian Government is strongly committed to helping refugees and people who face serious abuses of their human rights."[15]

It is difficult to credit that removing the fee would, as the Department claims, send an inappropriate message to "those who are contemplating making an attempt to stay here for non-refugee related reasons", both in Australia and overseas,[16] when there is no convincing evidence that the existing fee is dissuading such applicants.

The revenue case for retaining the fee is also weak. The Department claims that:

> *the fees received have steadily increased to a significant level. Conservatively, cessation of the operation of the fee would result in*

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13 Amnesty, Evidence, p. 45

14 Department's submission at paragraph 6.1.1

15 DIMIA, Fact Sheet 60. *Australia's Refugee and Humanitarian Program,* http://www.immi.gov.au/facts/60refugee.htm

16 Department's submission at paragraphs 6.1.1 -6.2.3

> *revenue reduction of some $650,000 per annum. The potential loss in future years could be higher but is difficult to estimate.*[17]

The flaw in this argument is that the revenue stream hardly exists. More than 24,000 people have been found to be liable for the imposition of the $1,000 post review decision fee,[18] yet only $3,324,521 of the possible $24,000,000 has been collected. [19]

Table 5.8.2T – Net Revenue Received – 1997/98 to 2001/02

	1997/98	1998/99	1999/00	2000/01	2001/02
Net Revenue Received ($)	104,000	381,855	832,600	1,356,791	649,275

Source: Department's submission: Annual financial activity from the Departments financial information management system (SAP).

The Department also fears that removal of the fee could bring "a probable increase in unmeritorious primary applications"[20] and "costs to the RRT increasing significantly if 'LRP' flow on rates rise to 'HRP' levels".[21]

According to the Department there were 1,986 LRP applications for review at the RRT in 2001/2.[22] This represented 85.3per cent of those LRP being refused PVs.[23] If the proportion had in fact equalled that of HRP (94.5%)[24], as the Department speculated, the number of LRP applying would have been 2,200 or an increase of just 214 applications.

According to the Annual Report of the Refugee Tribunal, this would equate to the workload of approximately two full-time Tribunal members.[25]

As the Committee has, quite rightly, recommended an increase in resources for the RRT, the workload argument fails.[26]

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17 Department's submission at paragraph 6.3.1
18 Department's submission at paragraph 5.8.4
19 Department's submission, Table 5.8.2T
20 Department's submission at paragraph 6.4.1
21 Department's submission at paragraph 6.4.2
22 Department's submission, Table 5.6.2T
23 Department's submission, Table 5.6.1T
24 Department's submission, Table 5.6.1T
25 Refugee Review Tribunal's Annual Report for 2001/2, p. 3 (average target/full time Sydney member = 125 cases)
26 Joint Standing Committee on Migration, 2003 Report on Regulation 4.31B, Recommendation No 3

Conclusion

In 1999 and in 2001 no clear evidence was presented to this committee, which proved that the introduction of a fee for access to review contributed to a reduction of abuse of the PV process. Once again the overwhelming evidence is that the fee does not counter abuse of the system and imposes unnecessary strain on applicants. Whilst I agree with recommendation No 3, that the Refugee Review Tribunal be given additional resources to carry out their duties expeditiously, I don't agree with the primary recommendations of the committee.

I recommend that the fee cease to operate and that resources be directed to ensuring review decisions are made promptly and correctly.

Recommendation

I recommend that the sunset clause for Migration Regulation 4.31B remain and that, therefore, the regulation ceases to apply after 30 June 2003.

Andrew Bartlett
Australian Democrat Senator for Queensland

Appendix A: Regulation 4.31B. Review by the Refugee Review Tribunal - fee and waiver

Reg 4.31B.

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

(2) The fee is payable within 7 days of the time when notice of the decision of the Tribunal is taken to be received by the applicant in accordance with section 441C of the Act.

Note Under regulation 4.40, notice of a decision of the Tribunal is given by one of the methods specified in section 441A of the Act.

(3) However, if:

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

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

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

(5) This regulation applies in relation to a review of a decision only if the application for review was made on or after 1 July 1997 and before 1 July 2003.

B

Appendix B: List of submissions[1]

No.	Individual/Organisation
1	Mr Gareth Kimberley#
2	Department of Immigration and Multicultural and Indigenous Affairs*#
3	Refugee Council of Australia*
4	Justice Migration and Visas Services#
5	Australian Catholic Migrant and Refugee Office#
6	Immigration Advice and Rights Centre*
7	Amnesty International Australia*#
8	Law Institute of Victoria#
9	Migration Institute of Australia Ltd*#

1 * = Submission in 1999; # = Submission in 2001

C

Appendix C: List of hearings & witnesses

Friday, 7 February 2003 - Canberra

DIMIA

Mr Peter Hughes, First Assistant Secretary, Refugee and Humanitarian Division

Mr Robert Illingworth, Assistant Secretary, Onshore Protection Branch

Ms Julie Campbell, Acting Director, Migration Agents Policy and Liaison Section

Friday, 21 March 2003 - Canberra

Immigration Advice and Rights Centre

Ms Meena Sripathy, Director / Principal Solicitor

Law Institute of Victoria

Ms Claire Mahon, Chair, Young Lawyers Law Reform Committee

Mr Erskin Rodan, Member Law Institute of Victoria Council

Amnesty International Australia

Ms Juliette Engelhart, Volunteer Refugee Case Worker

Ms Edwina Thompson, Acting Campaign Coordinator

DIMIA

Mr Peter Hughes, First Assistant Secretary, Refugee and Humanitarian Division

Mr Robert Illingworth, Assistant Secretary, Onshore Protection Branch

Ms Julie Campbell, Acting Director, Migration Agents Policy and Liaison Section

D

Appendix D: The Refugee Determination Process

Overview[1]

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

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

1.2 Asylum seekers in Australia are assessed against the Refugees Convention. If they arrive lawfully in the Australian migration zone, and are found to require protection, they may be granted a Protection Visa (PV) which enables them to live permanently in Australia. If they arrive in the Australian migration zone unlawfully, that is, without authority, and lodged a protection application on or after

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1 This chapter is based on the Committee's 1999 report on Migration Regulation 4.31B

20 October 1999, and they are found to have protection needs, they will only be eligible for a Temporary Protection Visa (TPV). This provides temporary residence for three years in the first instance.[2]

Primary Stage

1.3 At the primary stage, the asylum seekers apply for a PV and pay a $30 fee unless they are not immigration cleared and in immigration detention. The fee applies to each application, whether there is only one applicant or a whole family. With the exception of those detained as unauthorised arrivals or who cleared immigration with fraudulent documents[3], asylum seekers receive a bridging visa upon lodging a PV application. If those who receive a bridging visa had been in Australia for fewer than 45 days in the 12 months prior to lodging the PV application, they are permitted to work in Australia until their PV application is finalised.

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

> acting as a delegate of the Minister for Immigration and Multicultural Affairs, decides if the applicant engages Australia's obligations under the UN Refugees Convention. This is done by assessing the claims against the definition of a refugee set out in that Convention.
>
> All applications are assessed on an individual basis. Where further clarification is required, the officer may interview the applicant using an interpreter if necessary.
>
> The interviews are conducted in a non-adversarial environment, using all available and relevant information concerning the human rights situation in the applicant's home country. Applicants are given opportunities to comment on any adverse personal information, which is taken into account when considering a claim.
>
> Submissions made on behalf of the applicant by migration agents can also form part of the material to be assessed.

2 DIMIA Fact Sheet 62, *Assistance for Asylum Seekers in Australia,* (at 13 February 2003)

3 DIMIA, Submission No 2, Attachment A, p.38

> Applications are treated in confidence. No approach is made to a home government (including that country's embassy in Australia) about an individual asylum seeker.
>
> An officer then makes the decision on the application for a PV.[4]

1.5 A PV confers on an asylum seeker:

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

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

Review Stage

1.7 Those who fail to be granted a PV or TPV by DIMIA can appeal to the Refugee Review Tribunal (RRT). It again assesses the application against the Refugees Convention, and can accept any new information not previously available to the primary decision-maker.

1.8 The RRT can decide to affirm, vary or set aside the original decision, depending on the merits of the case.

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4 As described in the November 1999 DIMA Fact Sheet 41, *Seeking Asylum in Australia*. See also DIMIA, Submission No 2, Attachment A, p. 39

5 *Migration Act 1958*, s.66

1.9 If the RRT cannot make a decision favourable to the applicant on the written evidence available, it must give the applicant the opportunity of a personal hearing. This hearing is non-adversarial.[6] The applicant may be accompanied by an adviser.[7] Appropriate interpreters are provided to assist applicants where required

1.10 The RRT hearings are not bound by technicalities or rules of evidence to enable the applicant to present their claims and provide responses to Tribunal questions without formality. Hearings are held in private to protect the applicant's privacy and safety.[8]

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

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

Minister's power of intervention to grant a visa

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

1.14 Unique or exceptional cases may involve Australia's obligations under the Convention Against Torture, the International Covenant on

6 *Migration Act 1958*, s.429.

7 A registered migration agent or person assisting the applicant may come to the hearing. A person appearing before the Tribunal to give evidence is not entitled to be represented before the Tribunal by any other person or to cross-examine any other person appearing before the Tribunal to give evidence (s427(6)), however, the applicant is entitled to give evidence and present arguments in support of his or her claims (s425(1)). The Tribunal may invite an adviser to make oral submissions at the conclusion of the hearing and / or in writing following the hearing. The Tribunal will determine the time frame in which any written submissions are to be lodged. RRT *Practice Directions: 8.7 Representation. http://www.rrt.gov.au/practice.htm*

8 DIMIA, Submission No 2, Annex A, p. 41

9 *Migration Act 1958*, s.430.

Civil and Political Rights, and the Convention on the Rights of the Child. They may also involve strong compassionate circumstances, such as hardship to Australian citizens.

1.15 A copy of the guidelines is at Appendix E.

Judicial review

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

Bridging visas

1.17 DIMIA will grant bridging visas to asylum seekers who arrived lawfully which enable them to remain lawfully in Australia until their PV application has been processed. A bridging visa ceases 28 days after DIMIA notifies the person of the decision to refuse the PV. If a person appeals to the RRT within that time, the bridging visa continues to operate. It will then cease either on the grant of the PV by the RRT or 28 days after notification by the Tribunal that the person is not a refugee.[10]

10 DIMIA, Submission No 2, Annex A, p. 42

E

Appendix E: Ministerial guidelines for intervention

The following are the Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s.345/351/391/417/454 of the *Migration Act 1958*.[1]

1 Purpose

1.1 The purpose of these Guidelines is to:

- inform Department of Immigration and Multicultural Affairs officers of the unique or exceptional circumstances in which I may wish to consider exercising my public interest powers under s345*, 351*, 391*, 417 or 454 of the Migration Act 1958, as the case may be, to substitute for a decision of the relevant decision maker, a decision more favourable to the person concerned in a particular case;
- set out the unique or exceptional circumstances in which I may wish to consider exercising those powers;
- inform Department of Immigration and Multicultural Affairs officers of the way in which they should assess whether to refer a particular case to me so that I can decide whether to consider such intervention;
- inform people who may wish to seek exercise of my public interest powers of the form in which a request should be made.

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1 DIMIA, Submission No 2, Attachment C

2 Legislative Framework

2.1 I have power, but no duty to consider whether to exercise that power, under sections 345, 351, 391, 417 and 454 of the Migration Act 1958 (the Act), as the case may be, to substitute a more favourable decision, for a decision of the Migration Internal Review Office (MIRO)*, the Immigration Review Tribunal (IRT)*, the Administrative Appeals Tribunal (AAT) in respect only of IRT or RRT reviewable decisions, or the Refugee Review Tribunal (RRT), if I consider such action to be in the public interest. For example:

2.2 Section 417. Minister may substitute more favourable decision

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

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

3 When the public interest power is not available

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

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

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

3.4 It would not usually be appropriate to consider substitution of a more favourable decision for that of a MIRO officer while an IRT application were in progress. Unusual circumstances would need to be established to suggest

that exercise of my public interest power should be considered prior to the IRT making a decision on the matter.

4 Unique or Exceptional Circumstances

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

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

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

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

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

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

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

'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third

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

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

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

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

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

- issues relating to Article 23.1 of the Convention are raised. Article 23.1 provides:

"The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State."

4.2.5 Circumstances that the legislation could not have anticipated;

4.2.6 Clearly unintended consequences of legislation;

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

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

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

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

4.2.11 The age of the person; or

4.2.12 The health and psychological state of the person.

5 Other Considerations

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

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

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

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

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

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

Outcome of my Consideration

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

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

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

6 Application of these Guidelines

6.1 I direct that the following procedures be applied to ensure the effective and efficient administration of my powers under s345, 351, 391, 417 and 454 (hereafter referred to as my public interest powers):

Post-decision procedures

6.2 When a case officer receives notification of an IRT, RRT or AAT3 decision that is not the most favourable decision for the applicant they are to assess that person's circumstances against these Guidelines and:

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

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

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

Requests for the exercise of my public interest powers

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

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

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

'Repeat' requests for the exercise of my public interest powers

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

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

No limitation of the Minister's powers

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

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

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

7 Removal Policy

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

Philip Ruddock

31 Mar 1999