Additional comment—Senator Jim McKiernan

During the course of the Committee's inquiry into Migration Regulation 4.31B it was found that the current on-shore system of application for protection visas was being abused by some. I accept that many witnesses disagree with Minister Ruddock and DIMA on the level of abuse that exists.

Australia's peak refugee agency, the Refugee Council of Australia (RCOA), agreed that some abuse of the system was occurring. The RCOA in its submission stated that some applications for refugee status in Australia came from '*people wishing to extend their stay in Australia (for economic or lifestyle reasons) and who apply for a protection visa knowing full well that it is not applicable to them'*. Other groups, identified by the RCOA as not being legitimate applicants, were '*those with compelling family or medical reasons to remain in Australia'* and *'people who have no reason not to return other than a desire to extend their stay and who have sought advice from agents who have promised them a work visa*'.[1]

The Secretary-General of the Australian Section of the International Commission of Jurists, Mr David Bitel, also believes the refugee system is being abused but is qualified in the reasons why this abuse occurs.

> They (the asylum seekers) have not the faintest idea what they have applied for, have not the faintest idea what a refugee is. Nobody has ever explained it to them and all they think is that a bridging visa is a legitimate means by which people can obtain extended stay in Australia. That is my experience. Now, of course, I do not condone it – do not think I do – but that is just the experience I have come across. [2]

Mrs Grace Gardner from the Adelaide Justice Coalition in agreeing that this was a measure of abuse in the system said:

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1 RCOA, *Submissions*, p. S65.

2 ASICJ, *Transcript*, p. 87.

> Yes, I understand that there is, but I believe strongly, as does the Adelaide Justice Coalition, that it is a minority and I do not believe the sins of the few should be visited on the genuine.[3]

Some witnesses offered suggestions on how the abuses could be curtailed, accommodated or otherwise handled. There was no consensus that the $1,000 fee for a failed application was the solution to overcome the problem.

Options offered during the course of the inquiry to overcome the abuses are canvassed in the body of the report and I will not repeat the arguments in this brief commentary.

I was keen, during the course of the inquiry, to discover if the $1,000 fee had affected or may have impacted upon applications from persons who had *bona fide* and genuine reasons under the United Nations Refugee Convention to claim protection in Australia.

At the conclusion of the inquiry I record the fact that no witness presented evidence that the post-decision fee had prevented a person who would have been granted a protection visa in Australia from applying for such a visa.

I am comforted by the words of the representative of the Refugee and Immigration Legal Centre, Ms Carolyn Graydon, at the Melbourne hearings:

> From my own personal knowledge, I am not aware of any cases where I thought a person had very strong prospects of success but had been deterred by applying due to the $1000 penalty fee. Some people are driven by such strong subjective fear that I do consider it to be unlikely that someone who faces persecution, or has a well-founded fear of persecution, in their home country would be deterred. [4]

I addressed similar questions to other witnesses and was not told of any genuine person being prevented or deterred from making an application. Mr Bitel from the International Commission of Jurists gave the Committee an example of the inconvenience caused by the fee to a failed asylum seeker from the Philippines.[5] That the failed asylum seeker, in this case, was able to return safely to her homeland, is possibly a ratification of the decision on her application for protection under the refugee convention. That she was later allowed to leave her homeland to return to Australia must also be taken into account in deciding if the imposition of a fee for a failed application could be justified.

Ms Biok, also from the International Commission of Jurists, gave the Committee an example of her convincing a family from Sri Lanka to continue with a refugee

3 AJC, *Transcript,* p. 45.

4 RILC, *Transcript,* p. 52.

5 ASICJ, *Transcript,* p. 85.

review application when the family became concerned about them later being liable to pay the $1,000 fee.[6] The family, on Ms Biok's advice, continued with the review application to the Refugee Review Tribunal, where their appeal was successful. They were granted protection visas and no fee was applicable.

Ms Jennifer Burn in the submission from the Immigration Advice and Rights Centre also provided a case study which described the inconvenience caused to a failed asylum seeker who had later returned to Australia under a different visa class.[7] Whilst I do not know all the details and facts of the case, I have formed a preliminary conclusion that the person in question should have, in the first instance, applied for permanent residence in Australia under the spouse category rather than trying to use the refugee system to gain permanent residence. Had he adopted this course rather than apply for protection he would not have been liable for the $1,000 fee and would have avoided all the difficulty that the debt to the Commonwealth caused him.

I note the fact that the person in question was able to make arrangements to pay off the debt over a period of time. The $1000 debt did not prevent further application for migration or his later lawful migration to Australia.

I am very conscious of the Minister's discretionary powers under section 417 of the Migration Act. This interventionist power is a safety valve on the refugee determination system that is used by failed asylum seekers. In effect the ministerial discretion provides a third tier of review of their application for protection in Australia. This sometimes is a fourth tier, if the applicant had earlier chosen and lost a challenge to the lawfulness of an earlier Refugee Review Tribunal decision in the Federal Court of Australia.

Failed asylum seekers are aware that this option is available to them. There were 5126 requests for the Minister's intervention in 1997-98 and a further 2539 requests were made in the last six months of 1998. The Minister has exercised his power to intervene and substitute a more favourable decision on 55 occasions in 1997-98 and again on 88 occasions in the last six months of 1998. The fee is waived (refunded if previously paid) if a favourable decision is substituted by the Minister. I note the evidence that many failed asylum seekers are making repeat requests to the Minister (in extreme cases – on 10 occasions) to intervene in their cases.[8]

Whilst the weight of evidence might lead to a conclusion that the $1,000 fee for failed protection applications may be helping to protect the system, I have formed the opinion that it is too early to judge its effectiveness properly. It has been in operation for less than two years.

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6 ASICJ, *Transcript*, p. 85.

7 IARC, *Submissions*, p. S3.

8 DIMA, *Submissions*, p. S20.

For this reason and for the fact that no evidence has been presented to prove that the fee prevents or inhibits *bona fide* applicants from applying for protection in Australia, I believe that the present sunset clause should be extended. I support the Committee's recommendation that the fee be reviewed again in less than three year's time.

SENATOR JIM MCKIERNAN
DEPUTY CHAIR

MAY 1999