

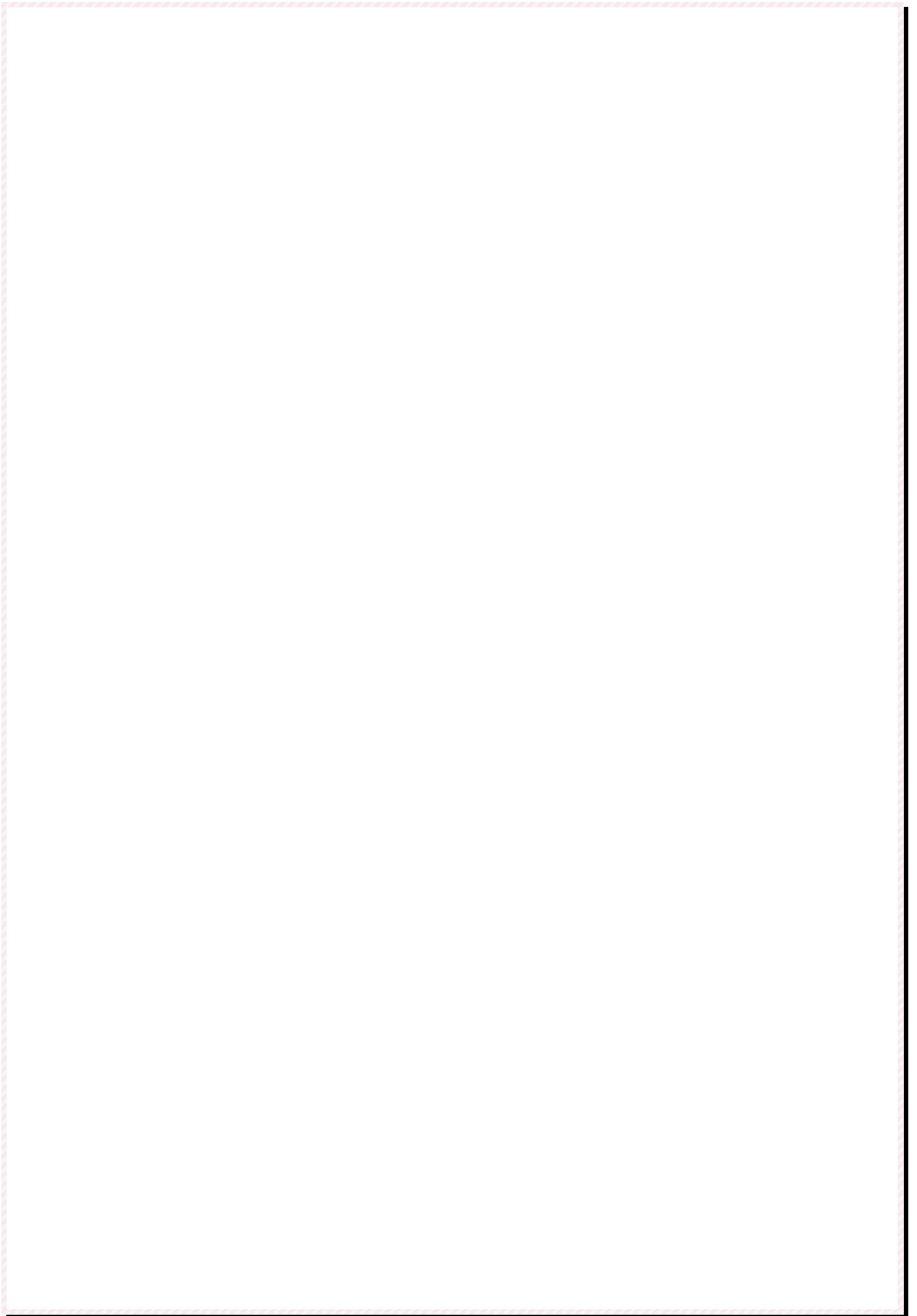


*ARRA*

*Australian Refugee Rights Alliance*  
*“No Compromise on Human Rights”*

Obligations to Protect

**THE HUMAN FACE  
OF AUSTRALIA’S REFUGEE POLICY**





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## OBLIGATIONS TO PROTECT ASYLUM SEEKERS

### Background

It is a fundamental human right for all persons to seek and to enjoy in another country asylum from persecution.<sup>i</sup> Yet all too often security concerns and national interests overshadow the legitimate protection interests of individuals, with the result that refugees are being returned to situations of persecution, and/or suffering a breach of the elementary human right to privacy and freedom from arbitrary or unlawful interference.

The 1951 Convention sets out the minimum obligations of signatory countries towards refugees. One of the most important of these is Article 33, Prohibition of Expulsion or Return (“Refoulement”), which holds that no State can expel or return a refugee against his or her will to a territory where he or she fears persecution. Article 3 is also significant as it provides that the terms of the Convention must be applied to refugees without discrimination, which includes treating refugees and asylum seekers on equal terms when they seek protection.

Whilst the Convention does not specifically mention confidentiality, under international human rights law everyone is guaranteed the right to privacy and individual protection from arbitrary or unlawful interference.<sup>ii</sup> Best State practice incorporates a strict confidentiality policy at every stage of the asylum process, and no asylum application information should be shared with the country of origin.<sup>iii</sup>

### Case Study<sup>iv</sup>

In May 2005, the Australian Department of Immigration and Multicultural Affairs (DIMA) allowed three Public Security Bureau (PSB) officials from the Peoples’ Republic of China, each from a different province, to interview 68 long-term Chinese detainees in Villawood and Baxter Immigration Detention Centres. DIMA stated that the interviews were needed to identify long-term detainees.

The PSB officials were provided with a Chinese Interpreter but they did not identify themselves to the detainees and taped the interviews without the consent of the detainees. A DIMA officer or Global Solutions Limited guard stood outside the interview room. The PSB officials asked detainees if their visa applications were made in Australia and whether they worked in Australia and sent money back to China. DIMA failed to retrieve all the taped interviews and will not divulge whether PSB officials were allowed to take notes or to take the notes with them on their return to China.

DIMA was aware that all of the 68 detainees had lodged protection visa applications citing fear of persecution by Chinese authorities. Some of them had ongoing applications before the Federal Court at the time they were interviewed. Nevertheless, DIMA allowed the PSB officials to interview them in contravention of confidentiality provisions of the Australian Migration Act and UNHCR provisions relating to the confidentiality of asylum information. To date, a small number of the detainees have been successful in their protection applications and granted temporary or permanent protection visas. One of the 68 protection visa applicants has been deported to the Peoples' Republic of China.

### ***Non-refoulement***

The significance of Article 33 to the humanitarian character of the Convention cannot be underestimated. '*Non-refoulement*' has been described as a cardinal principle of refugee protection and has been repeatedly affirmed in Conclusions by the Executive Committee over the past 25 years.<sup>v</sup> It has been described by the High Commissioner for Refugees as so fundamental that no reservations can be made to it.<sup>vi</sup> A Conclusion was adopted in 1982 which noted that "the principle of *non-refoulement*....was progressively acquiring the character of a peremptory rule of international law".<sup>vii</sup> In the Declaration adopted at the December 2001 Ministerial Meeting of States Parties the principle was described as being "embedded in customary international law".<sup>viii</sup>

It is clear that the principle applies equally to asylum seekers and refugees. In UNGA Resolution 55/74 of 12 February 2001 it states *inter alia*, that the General Assembly:

"6. *Reaffirms* that, as set out in Article 14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution, and calls upon all States to refrain from taking measures that jeopardise the institution of asylum, particularly by returning or expelling refugees or asylum seekers contrary to international standards...

....

10. *Condemns* all acts that pose a threat to the personal security and well-being of refugees and asylum seekers, such as *refoulement*...<sup>ix</sup>

Within the preamble to the Agenda for Protection it is held that consistent with the principle of *non-refoulement*, any voluntary repatriation of asylum seekers must be done with safety and dignity.<sup>x</sup> Pursuant to Goal 5 States are to ensure that all refugees are given the opportunity to make a free and fully informed decision regarding return and to individually sign the Voluntary Repatriation Form, all the while respecting the need for confidentiality.

### **Confidentiality**

In the case of asylum seekers, confidentiality is tremendously important because the very nature of the claim for protection presupposes a fear of persecution by the authorities of the country of origin. In addition there is a need to ensure that asylum seekers feel safe to share their personal information in an environment of security and trust, particularly when the person may be apprehensive about dealing with authorities as a result of past experiences.<sup>xi</sup> States are obliged to register all asylum seekers having regard to confidentiality requirements in relation to the use of data, and to ensure that this is adhered to at every stage of the refugee status determination process.<sup>xii</sup>

In an Advisory opinion recently prepared by UNHCR it was affirmed that a country of asylum is bound by the principles of confidentiality and any personal data on an individual asylum claim must not be disclosed to the country of origin.<sup>xiii</sup> It is only under limited exceptional circumstances that disclosure might be justified, such as combating terrorism. In all other cases it is against the spirit of the Convention to share information relating to asylum seekers with the authorities of the country of origin. To do so would potentially jeopardise the safety of the asylum seeker, violate his/her human rights and endanger any relatives or associates of the asylum seeker who remain in the country of origin. Even where it is deemed exceptionally necessary to contact the authorities, where there is suspicion of terrorist involvement and no other means of obtaining the required information, “there should be no disclosure of the fact that the individual has applied for asylum”.<sup>xiv</sup>

In Australia the principle of confidentiality is outlined in s.336F of the Migration Act 1958, and it provides that no officer may disclose identifying information to the authorities of a foreign country if the person to whom the information relates is an asylum seeker or a refugee.<sup>xv</sup> However should the protection claim be rejected, Australia has retained the right to then disclose this information. Interestingly when looking to amend the Act in 2003, Australian authorities sought the advice of UNHCR on the draft bill. UNHCR concluded that s.336F(5), relating to disclosure if the asylum claim failed, was too harsh and could amount to a risk of human rights violation and a breach of the principle of *non-refoulement*.<sup>xvi</sup> This recommendation was not taken up by the Australian government.

## **Conclusion**

It would appear that in some instances the Australian Government's treatment of asylum seekers is dictated not by the principles of the UN Refugee Convention of which Australia is a signatory but by political agendas.

## **Recommendations**

- All States ensure that all stages of the RSD process are consistent with established UNHCR policies and international law relating to confidentiality and treatment of vulnerable asylum seekers.
- The principle of *non-refoulement* be recognised by all States as a cardinal principle of refugee protection, and adhered to accordingly.
- All States incorporate into domestic legislation the fundamental principles of non-refoulement and confidentiality.
- Appropriate measures be taken against States which fail to adhere to the principles of *non-refoulement* and confidentiality, noting the serious repercussions which may result for individual asylum seekers and their families in instances where these principles are not upheld.

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## Endnotes

- <sup>i</sup> Universal Declaration of Human Rights 1948 Article 14 (1).
- <sup>ii</sup> See Article 12 of Universal Declaration of Human Rights; Article 17 of ICCPR.
- <sup>iii</sup> UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, Global Consultations on International Protection, 2<sup>nd</sup> Meeting, EC/GC/01/12, 31 May 2001, para.50(m).
- <sup>iv</sup> Case Study, details provided to ARRA by Ms Michaela Byers, Immigration Lawyer
- <sup>v</sup> Lauterpacht, Sir E & Bethlehem, D, 2003, "The scope and content of the principle of *non-refoulement*. Opinion", in E Feller, V Turk & F Nicholson (eds), *Refugee Protection in International Law*, Cambridge University Press, UK, p.107; also see Conclusion No.15 (XXX) 1979 para.(b), Conclusion No.16 (XXXI)1980 para.(e), Conclusion No.17 (XXXI) 1980 para.(b); Conclusion No.65 (XLII) 1991 para.(c); Conclusion No.79(XLVII) 1996 para.(j).
- <sup>vi</sup> Introductory note of High Commissioner for Refugees to 1951 Convention Relating to the Status of Refugees.
- <sup>vii</sup> Conclusion No.25 (XXXIII) 1982, para.(b).
- <sup>viii</sup> UNHCR, Declaration of Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol, December 2001; see also Preamble to Agenda for Protection, 2002 adopted at 53<sup>rd</sup> session of ExCom.
- <sup>ix</sup> Lauterpacht, Sir E & Bethlehem, D, 2003, "The scope and content of the principle of *non-refoulement*. Opinion", see note 4, p.115.
- <sup>x</sup> UNHCR, October 2003, Agenda for Protection, 3<sup>rd</sup> Edition, p.28
- <sup>xi</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1979, re-edited Geneva 1992, paras 198 & 200.
- <sup>xii</sup> See Agenda for Protection, Goal 1; Conclusion No.91 (LII), para.(f); Procedural Standards for RSD under UNHCR's Mandate, 2005, Unit 2.
- <sup>xiii</sup> UNHCR Representation in Japan, 31 March 2005, Advisory opinion on the rule of confidentiality regarding asylum information.
- <sup>xiv</sup> UNHCR paper, 2001, "Addressing Security Concerns without Undermining Refugee Protection – UNHCR's perspective", para 11.
- <sup>xv</sup> Migration Act (Cth) 1958, s.336F
- <sup>xvi</sup> Submission of UNHCR on Migration Legislation Amendment (Identification & Authentication) Bill 2003, [http://wopared.aph.gov.au/Senate/committee/legcon\\_ctte/](http://wopared.aph.gov.au/Senate/committee/legcon_ctte/)