Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions+

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A *Introduction*

Australia acceded to the 1951 Convention relating to the Status of Refugees[1] on 21 January 1954 and acceded to the 1967 Protocol relating to the Status of Refugees[2] on 13 December 1973.[3] The prohibition on refoulement is the key provision of the Refugee Convention. Article 33(1) provides that no 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'. Article 33(2) provides that the benefit of article 33(1) cannot be invoked by a refugee 'whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.' If it can be said of any particular person that he or she is a 'refugee',[4] it can be said also that Australia has

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+ This article is derived from a thesis to be submitted by the author for the degree of PhD. Many government officials and others interviewed for the purposes of the thesis spoke on condition of anonymity. The interviews to which references are made are recorded on tape and copies of the tapes are held at the author's office at the Law Faculty, Monash University. All persons interviewed were well qualified to speak on the matters about which they were interviewed.

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1 28 July 1951, 189 UNTS 150 (hereinafter 'Refugee Convention').

2 31 January 1967, 606 UNTS 267 (hereinafter 'Refugee Protocol').

3 PH Rohn, *World Treaty Index Main Entry Section Part 2 1960-1980* (2nd ed, 1983) III, p 1394.

4 The term 'refugee' for the purposes of the Refugee Convention is defined by article 1A of the Refugee Convention as modified by articles 1D, 1E, and 1F of the Refugee Convention and article I(2) of the Refugee Protocol. Article 1A(1) of the Refugee Convention provides that for the purposes of the Convention, the term 'refugee' applies to any person who:

expressly undertaken the non-refoulement obligation in article 33(1) of the Refugee Convention in relation to that person (unless the exception in article 33(2) applies).

Article 33 of the Refugee Convention imposes an obligation of result.[5] Australia's domestic legal and administrative regime considered as a whole must attain the 'international standard of reasonable efficacy'[6] in implementation of article 33 of the Refugee Convention. If Australia does not meet the standard of reasonable efficacy in the implementation of article 33, it will be in violation of article 33 whether its mistakes are made deliberately or made honestly.[7]

'Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation'.

Article 1A(2) of the Refugee Convention provides that for the purposes of the Convention, the term 'refugee' applies also to any person who,

'[a]s a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

The temporal limitation was removed by article I(2) of the Refugee Protocol which provides that for the purposes of the Protocol, the term 'refugee' means any person within the meaning of the Refugee Convention as if the words '[a]s a result of events occurring before 1 January 1951 and' and the words 'as a result of such events', in article 1A(2) were omitted.

Articles 1D, 1E and 1F of the Refugee Convention provide for the exclusion from the application of the Convention of persons who would otherwise fall within the definition in article 1A.

The phrase 'Refugee Convention definition' will be used as a shorthand reference to the definition of 'refugee' contained in these articles. See JC Hathaway, *The Law of Refugee Status* (1991) for detailed consideration of the Refugee Convention definition.

5 GS Goodwin-Gill, *The Refugee in International Law* (1983) pp 142-43.

6 Id at pp 147-48.

7 Of course, to the extent that its 'mistakes' are deliberately made, a State would not be acting with the good faith that is required by the principle of pacta sunt servanda. See also articles 26 and 31 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331. Australia acceded to this treaty on 13 June 1974. It came into force on 27 January 1980.

This article is concerned to examine whether Australia is violating the non-refoulement obligation in article 33 of the Refugee Convention by failing to identify persons who are entitled to the benefit of that article, ie 'refugees'. In particular, the purpose of this article is to establish that some of the greatest factors undermining the accuracy of any refugee status determination process are likely to be informational deficiencies of one sort or another; to outline the minimum procedural standards necessary to avoid these informational deficiencies; and to consider whether on-shore refugee status claimants in Australia at present are sufficiently safeguarded from having valid claims incorrectly rejected because of deficiencies in the information used by the decision maker or deficiencies in the information made available to claimants.

B Informational Deficiencies Faced by Persons Making Refugee Status Determinations

Any refugee status determination involves two basic steps: the facts of the case must be established and then the decision maker must judge whether the facts established are such as would bring the claimant within the Refugee Convention definition of refugee. For instance, it is not sufficient for a refugee status claimant (under article 1A(2) of the Refugee Convention[8]) to convince the decision maker that he or she has a subjective fear of being persecuted in his or her country of origin. He or she must have a 'well-founded' (ie objectively justified) fear of being persecuted on one of the grounds set out in the Refugee Convention. How does a refugee decision maker go about finding out whether there is an objective foundation for refugee status claimants' fears that they will be persecuted in their country of origin for reasons of race, religion, nationality, social group or political opinion? One way is to find out whether other persons of the claimant's race, religion, nationality, social group or political opinion are being persecuted in the claimant's country of origin and to extrapolate to the claimant's situation. Another way is to ascertain whether the claimant himself or herself has been persecuted in the past for a Convention reason and to extrapolate into the future.

It can be seen that part of the relevant facts usually concern general conditions in the claimant's country of nationality. In most cases, however, the decision maker would not have experienced, or recently experienced, those conditions first hand and must rely on the reports of the claimant and others. These reports may be few, if the claimant's country of nationality does not have a free media and its

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8 See note 4 above.

citizens are too afraid to speak freely to anyone about conditions in the country.[9]

The remainder of the relevant facts usually concern events which have taken place in the claimant's country of nationality and in which the claimant himself or herself has been involved. Most information sources which would be accessible to a decision maker would usually only be able to provide informational materials on general human rights conditions in refugee producing countries rather than materials providing independent evidence of specific events involving the claimant, so that the claimant will be the only source of information about those events. There are, of course, exceptions to this general position. For instance, the events involving a particular claimant may have been of such notoriety as to have been reported in newspapers; or the events may have been witnessed by persons other than the claimant and the decision maker may be in a position to contact some of those witnesses.

The usual absence of independent proof of specific past events described by refugee status claimants means that, where a claimant is relying on his or her history as the objective foundation of a fear of future persecution, the decision makers are likely to give weight to that history in proportion to the degree to which it corresponds to their impressions of the general human rights conditions in the claimant's country of origin and the extent to which the claimant's testimony comes across as being intrinsically credible. In such a context, it is all too easy to lose sight of the fact that the 'objective truth' is often just the dominant perspective. Even in Australia, there are 'excluded groups' whose members have encountered State repression and brutality in the past and expect to do so in the future.[10] Their experiences are no less real and their fears have no less objective foundation than those of other Australians but their voices are not given the opportunity to contribute to the mainstream narratives

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9 NP Pfeiffer, 'Credibility Findings in INS Asylum Adjudications: A Realistic Assessment' 23 *Texas Int'l LJ* 139 at 142 (1988). In most cases, of course, the country determining the refugee status claim would have diplomatic representatives stationed in the claimant's country of origin. Although diplomatic representatives are able to cultivate local contacts etc, factors such as the absence of a free media and a general fear of speaking would still be considerable obstacles to their information gathering efforts. Moreover, diplomatic representatives have their own agenda (set by their country's foreign affairs department). The information which they provide to persons outside the department is likely to be 'coloured' by that agenda.

10 V Plumwood, 'Globalization, Liberal Democracy and Repression' (unpublished paper, Law and Society Conference, Sydney, 11-12 December 1993).

about the qualities of Australian society.[11] The same silencing occurs all over the world, though in some countries more apparently and awfully than in others. Moreover persons who are silenced as a group are often, individually, persons who, by their circumstances, have been rendered unable to articulate their experiences in a convincing manner. A decision maker who dismisses an asylum seeker's claim to refugee status on the basis that his or her fears are foolish (in the light of 'known' conditions in his or her country of origin) or must be feigned (in the light of his or her poor performance as a witness) risks being a partner in a very effective silencing. This does not mean that a decision maker must always accept an asylum seeker's version of the facts. It does mean that the decision maker should not reject a refugee status claim on the basis of information which is less complete than it realistically could be. It also means that the decision maker should not reject the refugee status claim on the basis that the refugee status claimant's testimony (usually the decision maker's primary source of information) is untrue unless lack of veracity is the only possible explanation for flaws in that testimony.

C Procedures for Overcoming Informational Deficiencies Faced by Persons Making Refugee Status Determinations

This section suggests minimum procedural standards for overcoming deficiencies in information available to those making refugee status determinations at the primary stage (thereby increasing the likelihood that they will correctly identify valid claims); considers whether Australia meets those minimum procedural standards; and argues that, to the extent that Australia fails to meet these minimum procedural standards, it risks breaching the non-refoulement obligation in article 33 of the Refugee Convention.

1 Information Obtained From Sources Other Than the Claimant

(a) The need for an independent documentation centre with up-to-date, easily accessible information from a diversity of reliable sources

The *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*[12] acknowledges that, in principle, the burden of proof is on

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11 Ibid; I Duncanson, 'The Rule of Law and Other Stories' (unpublished paper, Law and Society Conference, Sydney, 11-12 December 1993).

12 (UNHCR, 1979) (hereinafter cited as 'UNHCR Handbook'), reissued in 1988 without significant changes to the text: G Lombard, 'An International Perspective on Refugee Determination Activities: Alternative Review and Accountability Models' (unpublished address, Public International Law Conference, University of New South Wales, 10 October 1992) p 3. State parties to the Refugee Convention and

the applicant for recognition of refugee status but points out that often an applicant will not be in a position to support his or her statements by documentary or other proof.[13] It states that, for this reason, the decision maker shares with the applicant the duty of ascertaining the relevant facts.[14]

In some countries, decision makers draw on information available from the country's foreign affairs department but draw also on information gathered by such non-governmental organisations as Amnesty International.[15] Different information sources will take different slants on the same events, depending on the interest groups they serve.[16] The goal of accuracy in decision making requires decision makers to have access to a diversity of information sources by reference to which the objective truth of each item of information upon which they rely can be confirmed and reconfirmed.[17]

It is often difficult to get any information at all about conditions in refugee producing countries. The need to confirm and reconfirm each item of information adds enormously to the difficulties of the task of information gathering. It would be impossible to do it properly, given time and resource constraints, if information had to be collected afresh for each case. Therefore, the maintenance of a central collection of information by a State's refugee status determination authority is nothing short of a necessity. Some State authorities responsible for refugee status determinations do maintain their own collections of reports on conditions in refugee producing countries

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Protocol have undertaken to facilitate UNHCR's duty of supervising the application of the provisions of the Refugee Convention and Protocol: Refugee Convention article 35(1); Refugee Protocol article II(1). The UNHCR Handbook was produced by UNHCR in response to a request made by the Executive Committee of the High Commissioner's Programme (EXCOM) for a handbook 'for the guidance of Governments': UNHCR Handbook p 1. Thus the publication of the UNHCR Handbook can be regarded as an act of UNHCR in discharge of its duty of supervision and States are bound by the Refugee Convention and Protocol to regard the guidelines to interpretation and implementation of those treaties contained in the Handbook as, at the least, highly persuasive.

13 UNHCR Handbook para 196.

14 Ibid.

15 For example the Netherlands: Netherlands Ministry of Justice, *Aliens Policy* (June 1991) p 4.

16 F Houle, *The Documentation Centre of the Immigration and Refugee Board: A Study of the Use of Documentary Evidence in the Determination of Claims for Refugee Status* (unpublished Master of Laws thesis, Queen's University, Kingston, Ontario, Canada, 1992) p 53.

17 Ibid.

drawn from a wide range of sources.[18] This practice is not universal[19] but is becoming more and more widespread.[20] In fact, some State parties to the Refugee Convention have established formal documentation centres in order to discharge their duty of seeking out information relevant to the claims presented to them.[21] The usefulness of the information maintained by a documentation centre in establishing the facts relevant to a claim depends entirely on the relationship of the centre to the executive arm of government, the nature of the sources from which the centre collects information, and the timeliness and accessibility of that information. A documentation

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18 For example, the Federal Refugee Office in Germany: M Fullerton, 'Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany' 4 *Georgetown Immigration LJ* 381 at 391 (1990). The UK's Home Office's Refugee Section also has a Research Unit which collects country information: *Vilvarajah v United Kingdom* (1992) EHRR 248 at 270.

19 For example, the French refugee determination agency, OFPRA, does not maintain its own database of information on countries of origin of refugee status claimants: D Matas and I Simon, *Closing the Doors: The Failure of Refugee Protection* (1989) p 235.

20 For instance, Norway is in the process of establishing a database of information on refugee producing countries: Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Summary Description of Asylum Procedures in States in Europe, North America and Australia* (April 1992) p 60. Finland too is compiling a collection of material relating to refugee producing countries, including material from newspapers, NGOs and the Finnish Ministry for Foreign Affairs: id at 31.

21 For instance, Canada has a documentation centre which gathers 'publicly available and verifiable' information on conditions in refugee producing countries: Immigration Review Board, *Annual Report For the Year Ending 31 December 1991* p 32. It provides this information to all participants in the refugee status determination process and to members of the public: RGL Fairweather, 'Canada's New Refugee Determination System' (1989) 27 *Canadian Ybk Int'l L* 295 at 302. The Canadian Documentation Centre was created by the Chairperson of the IRB pursuant to the Chairperson's authority to direct the work of the IRB staff and to allocate the IRB operating budget: F Houle, op cit n 16, at 46. More recently established is the US Resource Information Center, which, inter alia, collects information on the human rights records of countries around the world and makes this information available to asylum officers (GA Beyer, 'Establishing the United States Asylum Officer Corps: A First Report' (1992) 4 *Int'l J Refugee L* 455 at 472-3), and immigration judges (J Ruppel, 'The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants' 23 *Col Human Rights L Rev* 1 at 17 (1991)). The Resource Information Center is administered by the INS Central Office for Refugees, Asylum and Parole: Ruppel, loc. cit.

centre must be independent of the executive arm of government;[22] collect from a diverse range of sources, including reliable non-governmental sources;[23] keep its materials up-to-date; and be user-friendly if it is to serve the function of providing information which increases the likelihood that decision makers will correctly identify valid refugee status claims.

How does Australian practice measure up? The perception of practitioners is that officers of the Determination of Refugee Status Branch of DIEA[24] (DORS officers) rely almost exclusively on that information which is obtained, directly or indirectly,[25] from the Department of Foreign Affairs and Trade (DFAT).[26] DIEA has itself stated that the advice of DFAT, 'as the Government's expert adviser on issues pertaining to other countries', is an important factor in assessing a claimant's risk of persecution if returned.[27] However, it has also asserted that 'it is entirely feasible' that, after taking into account

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22 For much the same reasons that the decision makers themselves must be independent. Moreover if the government controls the information used by decision makers, even the use of independent decision makers would be little more than window dressing.

23 For instance, German administrative judges reviewing asylum cases use Foreign Ministry reports as simply one of a variety of sources of country information: T Alienikoff, 'Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States' 17 *U Mich J L Reform* 183 at 207 (1984). Several of these judges have stated that they place as little reliance as possible on Foreign Ministry reports, as such reports are bound to have been written with more diplomacy than honesty: ibid.

24 The Department of Immigration and Ethnic Affairs used to be the Department of Immigration, Local Government and Ethnic Affairs. The new name is used throughout, except in case names where the title of the Department is reproduced as it appears in the case.

25 Sometimes DORS officers contact DFAT directly to make inquiries; if the answer to such an inquiry is fairly obvious it is answered by DFAT on the spot; otherwise, the inquirer is redirected to the Country Information Service (see below): interview with DFAT official, 14 July 1992. However, the Country Information Service obtains much of its information from DFAT: letter from A Rice, Director of the Country Information Service, DIEA, 6 July 1992.

26 A Krohn, 'Present On-shore Process for Asylum Seekers' (paper delivered at 'Asylum Seekers in Australia: Finding a Better Way', a forum sponsored by the Ecumenical Migration Centre, RACS (Vic) and the Australian Council of Churches, 14 May 1992).

27 Commonwealth of Australia, *Parliamentary Debates*, Senate Estimates Committee F, 11 May 1993, F39-F40 (evidence of J Beddlington).

information from all available sources, a decision maker may come to a risk assessment which is contrary to the advice of DFAT.[28]

The author has been informed that, while in the past DFAT mostly relied on information from its own missions[29] and on US State Department Reports,[30] its sources of information have broadened considerably to include information from relevant journals and magazines, such as Amnesty International reports and so on.[31] Whatever its sources of information, however, foreign affairs departments are apt to provide information which is congruent with the country's foreign policies and excessive reliance upon it is unlikely to be conducive to accurate fact finding. For instance, Australia was an architect of the Cambodian peace process. In consequence, the tone of DFAT reports on Cambodia could have been influenced by its enormous desire that the peace process work and that it could be that it was not prepared to commit to paper any material which might have jeopardised this end if it ended up in the 'wrong hands'.[32] It would have been most unsatisfactory, therefore, if DORS officers relied exclusively or largely on DFAT reports in assessing whether Cambodian asylum seekers have a well-founded fear of being persecuted on return to Cambodia. The problem is not limited to Cambodia. Practitioners fear that Australia's interests in the sphere of trade and foreign relations may affect most country information provided by DFAT, potentially leading to rejection of the claims of persons who are in fact Convention refugees.[33] This fear is not unfounded. One of DFAT's stated reasons for its involvement in the provision of information to the refugee status determination process is to ensure that 'foreign policy considerations [are] taken into account in

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28 Ibid at F40.

29 Reports from Australian missions overseas are, in turn, based on the direct experience of officials at the mission and on information gathered by those officials by talking to officials of other international missions, talking to local contacts, talking to journalists and so on: interview with DFAT official, 14 July 1992.

30 The US State Department is not known for writing reliable reports. The US courts have long suspected that the content of State Department submissions in asylum cases is influenced by political considerations (DE Anker, *The Law of Asylum in the United States: A Guide to Administrative Practice and Law* (2nd ed, 1991) p 38 note 190), and the settlement of the case of *American Baptist Churches v Thornburgh* demonstrated that their suspicions were more than justified.

31 Interview with DFAT official, 14 July 1992.

32 DFAT, of course, denies that the factual judgments it provides to the refugee determination process are 'tailored' in such a fashion: ibid.

33 A Krohn, op cit note 26.

Australia's handling of refugees, immigration and people seeking asylum.'[34]

DIEA's Country Information Service provides DORS officers with documentation on refugee producing countries. DORS officers consult this documentation on 'a daily basis', seeking background information, assessments, or confirmation of particular facts.[35]

The Country Information Service tries to select staff with experience in refugee status decision making.[36] However, Country Information Service staff avoid playing the role of experts in relation to the situations in refugee producing countries.[37] As a general rule they do not generate their own reports about such situations.[38] They merely gather reports generated by other persons and organisations and facilitate access to those reports. This approach is to be commended as it prevents the introduction of an extra source of bias into the process which converts the objective facts into the information product actually used by the decision maker.

The aim of the Country Information Service is to gather 'relevant, credible, authoritative, up-to-date' information.[39] However, the experience of Australian Lawyers for Refugees Incorporated (ALRI) at the time that the Joint Standing Committee on Migration Regulations was holding its inquiry into on-shore refugee status determinations was that the Country Information Service's country files were 'out of date and incomplete', so that much publicly available information was 'not available to delegates when they made their primary decisions on particular refugee applications.'[40] This criticism is valid up to a point. The information held by the Country Information Service is of necessity incomplete in that it cannot function as a repository for all the information ever produced on

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34 DFAT, *Annual Report 1991-92*, p 88.

35 Letter from A Rice, note 25 above.

36 Interview with A Rice, 23 February 1993.

37 Ibid.

38 Ibid, which draws attention to the contrary practice of the Swiss documentation co-ordination centre, and to the exception to the general rule, namely, that the Director of the Country Information Service sometimes attends classified briefings - Defence Intelligence briefings, for example - and then writes up the information in a way that allows it to be released to refugee status claimants, except where it proves impossible to declassify it (when it is used but not released).

39 Ibid.

40 Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance between Refuge and Control* (August 1992) p 133 (citing in camera evidence, 15 June 1992, p 51).

human rights in refugee producing countries and all other relevant information.[41] The question is whether the Country Information Service provides DORS officers with easy access to enough up-to-date information from a sufficiently diverse range of credible sources to ensure that Refugee Convention refugees are correctly identified.

The so-called country files attacked by ALRI are really archives containing newspaper clippings, DFAT cables and so on dating from 10 or 12 years ago to the present.[42] The country files represent only part of the material available to DORS officers through the Country Information Service.[43] However, DIEA was forced to concede, when giving evidence before the Joint Standing Committee on Migration Regulations, that its country files and other available data were, at that stage, 'still fairly limited, in the sense that what we call a documentation centre is still in its formative stages.'[44] This situation should improve fairly rapidly as the Country Information Service is increasing annual expenditure on acquisitions.[45]

DFAT provides the Country Information Service with 'purpose-written situation papers' and, in addition, the Section monitors the cables, which are exchanged by DFAT and Australia's diplomatic missions.[46] The Section sometimes receives or seeks information from DIEA officers overseas, information from other Australian Government Departments[47] and intelligence material.[48]

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41 This was very rightly emphasised by the Director of the Country Information Service in interview with him on 23 February 1993.

42 Interview with A Rice, 23 February 1993, from which it appears that the main problem with these country files is that they are large and unorganised. It is not easy to find information in such large files unless the material is organised into subtopics. The Country Information Service is in the process of organising the country files into subtopics.

43 Ibid.

44 In camera evidence, 21 July 1992, p 347 quoted in Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance between Refuge and Control* (August 1992) p 134.

45 Interview with A Rice, 23 February 1993. In the financial year 1991-92, the Country Information Service spent about $14,000 on books, journals and newspapers. It anticipated spending up to $25,000 on books, journals, serials, periodicals, newspapers and maps in the financial year 1992-93.

46 Letter from A Rice, 6 July 1992.

47 For instance the Office for National Assessments within the Department of Prime Minister and Cabinet has the task of providing the Australian Government with up-dates and analyses of events in countries around the world, and the Office for National Assessments

Information gathered by DIEA officers on their own initiative is also passed on to the Country Information Service.[49]

As well as all this Australian government-sourced information, the Country Information Service gathers information from the Canadian IRB's Document Centre;[50] from news magazines and newspapers and specialist publications, such as *Africa Today*; and from academics, NGOs and others with relevant expertise.[51] It also keeps US State Department Country Reports on Human Rights Practices; material produced by Amnesty International, Human Rights Watch, Minority Rights Group and other human rights organisations; and such reference books as *Keesing's Contemporary Archives*.[52] Finally, the Country Information Service has on-line access to the Reuters data base, Lexis-Nexis and Pegasus.[53]

Where an issue is the subject of strong controversy,[54] it appears that competing points of view tend to be represented as a matter of practice.[55] However, the Country Information Service does not actually have a policy of ensuring that divergent points of view on any given situation are represented.[56] This is a definite weakness.

Unlike the Canadian Documentation Centre,[57] the Country Information Service does not of its own motion systematically seek out

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provides information to the Country Information Service on request: interview with A Rice, 23 February 1993.

48 Letter from A Rice, 6 July 1992.

49 Ibid.

50 And, infrequently, from other such documentation centres in other western countries: ibid.

51 Ibid.

52 Ibid.

53 Interview with A Rice, 23 February 1993. Pegasus is a world wide network that the small human rights agencies tend to use for their information sharing. The Co-ordinator of RACS (Victoria) has never encountered a DORS assessment or statement of reasons for decision which has named any on-line data base as being the source of information relied upon by the officer: interview with E Lester, Co-ordinator of the Refugee Advice and Casework Service (Victoria), 5 May 1993. She has the impression that none of the on-line data bases to which DIEA has access are being used effectively by DORS officers.

54 For instance, the implementation of China's one child policy: interview with A Rice, 23 February 1993.

55 Ibid.

56 Ibid.

57 F. Houle, op cit note 16, at 98.

corroboration of all information gathered.[58] Nor does the Country Information Service systematically flag information for which corroboration is unavailable.[59] However, it does seek out corroboration of information or up-dates of information if a specific request is made by a DORS officer.[60] It appears that most DORS officers do request corroboration and up-dates of information.[61] If DORS officers can be relied on to do this all the time, Australian practice is in fact superior to Canadian practice in this respect because (other things being equal) Australian decision making will in theory be achieving the same level of accuracy as Canadian decision making while applying resources more efficiently.

While the Country Information Service is the repository of an enormous amount of information, the manner in which the information is held makes difficult the thorough and quick use of locating and assessing all the information relevant to a particular case. The Country Information Service realises this and has plans to make as much of its unclassified information holdings as possible available on its own on-line data base.[62] It also plans to have an on-line index which will index not just the material available on-line but also material which is, for reasons of copyright or sheer volume, available only in hard copy.[63] The data base may also incorporate brief commentaries on the items held.[64]

Australia's establishment of a documentation centre is without doubt a step in the right direction but it has a long way to go. Although the Country Information Service's information collection is as up-to-date as can be expected, the Section is part of a government department and collects a lot of government-sourced information. Moreover, information retrieval is not as thorough, quick and easy as it could be and needs to be, though an enormous effort is being made to remedy this. In other words, the Country Information Service currently fails to meet some of the minimum procedural standards set out above and is, accordingly, likely to provide decision makers with information of uncertain reliability. The price of using low quality information in the refugee status determination process is, of course, the endangering of the lives of those genuine refugees who are

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58 Interview with A Rice, 23 February 1993.

59 Ibid.

60 Ibid.

61 Ibid.

62 Ibid.

63 Ibid.

64 Ibid. For instance, there may be cross-references to other material held which either confirms or challenges the view presented in a given report.

incorrectly rejected and returned to their countries of origin on the basis of that information.[65]

(b) The need to seek information which supports a refugee status claim

The UNHCR Handbook states 'in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application'.[66] There is a very good reason for imposing such an obligation on the decision maker: the decision maker will often be in a better position than the refugee status claimant to seek out supporting information. This is an obvious proposition in relation to information about general conditions in the country of origin subsequent to the claimant's departure. However, even in relation to information about specific past events in which the claimant had involvement, it may be the decision maker rather than the claimant who is in the better position to seek out the information. The claimant may, for instance, know of the existence of sources of corroboration (eye-witnesses, documentation, etc) for his or her version of the events but lack the resources to procure that corroborating information. Since commonsense suggests that the goal of accuracy in identifying valid claims is best promoted by decision makers having before them all existing information which supports a refugee status claimant's case as well as all existing information which undermines it, it follows that what the claimant is unable to do the decision maker should endeavour to do.

Under general principles of Australian administrative law, an administrative decision can be set aside upon judicial review if it is shown that relevant considerations were not taken into account in the making of the decision.[67] The decision maker must take into account not only those relevant factors of which he or she is aware but also those relevant factors of which he or she ought reasonably to be aware.[68] Furthermore, the decision maker is required to make inquiry into the facts where concerns arise about matters in relation to which the applicant cannot reasonably be expected to supply the necessary information. For instance, in the case of *Singh v Minister for*

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65 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 October 1992, p 2048 (Mr Sinclair).

66 UNHCR Handbook para 196.

67 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; EI Sykes, DJ Lanham and RRS Tracey, *General Principles of Administrative Law* (3d ed, 1989) p 105.

68 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30-31 per Gibbs CJ, 45 per Mason J (Dawson J agreeing), 66 per Brennan J (Deane J agreeing); Sykes, Lanham and Tracey, op cit note 67, at p 111.

Immigration and Ethnic Affairs,[69] Mr and Mrs Singh alleged that members of the Sikh community were persecuted in India. Wilcox J observed, obiter, that the Immigration Review Panel could not expect Mr and Mrs Singh to provide the necessary information as it was in a better position to procure that information than were Mr and Mrs Singh. '[T]he failure to make enquiries where there are certain facts which are readily available to the delegate, for example to clarify doubts in the delegate's mind,' may be unreasonable in the *Wednesbury* sense.[70] This is especially so in the context of refugee status decision making where wrongful rejection can have particularly grave consequences.[71]

In the past, these administrative law principles were burdensome on DIEA as each of its DORS decision makers was taken by the courts to have constructive knowledge of all information held by every part of DIEA, including its overseas offices.[72] From 1 September 1994, the burden will be much reduced in practice, if not in theory. From that date, DORS primary stage decisions will no longer be subject to judicial review by the Federal Court of Australia.[73] It is only where a refugee status claimant seeks and obtains judicial review of the primary decision in the High Court under section 75(v) of the Constitution[74] that the failure to take into account relevant considerations and unreasonableness will be available as grounds of review and hence that constructive knowledge or unreasonable failure to make enquiry will become live issues.

It is hardly surprising that DORS does not consider its officers to have a responsibility to go beyond DIEA's information holdings and other readily accessible sources in seeking information relevant to a claimant's case.[75] The Federal Court of Australia appears to be of the same view. In *Singh (Heer) v Minister for Immigration and Ethnic Affairs*,[76] the applicant claimed that he was a refugee. In support of

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69 (1985) 9 ALN 13.

70 *Premalal v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 117 at 141. See also *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-70 per Wilcox J.

71 The *Premalal* case, note 70 above, at 141.

72 Interview with A Rice, 23 February 1993.

73 Section166LA(2)(d) the *Migration Act* 1992 (Cth) achieves this by stating that RRT reviewable decisions are not judicially reviewable. The commencement date of this provision is 1 September 1994.

74 The constitutionally entrenched jurisdiction of the High Court of Australia.

75 Interview with a member of the now defunct Refugee Status Review Committee, 15 January 1992.

76 (1987) 15 FCR 4.

this claim, the applicant stated that he had been constantly arrested and ill-treated by Indian police because of his political activities, that a warrant for his arrest issued in the Punjab in 1982 was still outstanding and he would face in India trial, imprisonment and perhaps death on account of his political activities.[77] Forster J observed that the applicant had not provided corroborating evidence for these allegations of fact and held that it was 'no part of the duty of the decision-maker to search about for evidence in support of the applicant's case.'[78] On the other hand, it has been held that, where an applicant makes a specific claim supported by some corroborative evidence, the decision maker cannot dismiss the claim without attempting to investigate its truth. To do so amounts to a failure to have adequate regard to a relevant consideration.[79] In *Lek v Minister for Immigration, Local Government and Ethnic Affairs*, one of the applicants claimed that his uncle had been arrested in consequence of his (the applicant's) illegal departure from Cambodia.[80] The applicant produced two letters from his relatives in corroboration of his claim. The applicant argued that the ill-treatment of his uncle indicated that he too would be ill-treated on return.[81] The decision maker dismissed this claim on the basis of evidence of the general situation in Cambodia.[82] Wilcox J held that the delegate had not given the matter proper consideration. He acknowledged that '[p]roper consideration of the specific claims may involve the making of inquiries in Cambodia' but said 'that is no reason to absolve the delegate from the task of investigating them.'[83]

The attitude of DIEA described above seems, in itself, to offend against the spirit of the UNHCR Handbook guidelines, which urge the decision maker 'to use all the means at his disposal to produce the necessary evidence in support of the application.' However, there is some evidence that, at times, the DIEA attitude is one which offends even more seriously against the spirit of the UNHCR Handbook guidelines. The attitude to which reference is made can best be described through some examples. The first example relates to the assessments made by DORS officers of the cases of several Cambodian asylum seekers. The officers used extracts from

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77 *Singh (Heer) v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 4 at 9.

78 Ibid. See also *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 170 per Wilcox J.

79 *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 455 at 472-74.

80 Id at 472-3

81 Id at 472.

82 Id at 473

83 Ibid.

a report on the political situation in Cambodia by Mr Dennis Shoesmith, an academic,[84] to support the assertion that the Cambodians should not be recognised as Convention refugees. Mr Shoesmith has stated, however, that, in the assessments his report was 'used extremely selectively'.[85] The argument in Mr Shoesmith's report, 'supported by the overwhelming majority of evidence presented in it', was that the fear of the Cambodian asylum seekers that they would face persecution if returned to Cambodia was well-founded.[86] Yet the Departmental officers chose to quote from his report evidence that supported rejection of the applications and to ignore the evidence in it which supported the acceptance of the applications. The next example also relates to the Cambodian asylum seekers. DIEA has in the past rejected Cambodian asylum seekers' claims to be refugees saying that they could have sought redress for the wrongs committed against them through the Cambodian courts.[87] At the time the assessments were made, there was no Cambodian Criminal Code,[88] and the absence of legal structures in Cambodia at that time was attested in a written summary of a seminar on Cambodia presented by an aid worker who was in Cambodia. When the summary was obtained through use of the Commonwealth's freedom of information legislation,[89] it was found to contain the statement that '[t]here is almost a total absence of a legal system in Cambodia, with something in the order of 5 trained lawyers in the whole country'. As far as the author is aware, this information has not been used in DORS officers' assessments in support of granting applications.[90] On several

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84 Of the Politics Department, Faculty of Arts, Northern Territory University.

85 Letter from Dennis Shoesmith to E Lester, 20 November 1991.

86 Ibid.

87 'Four Corners', television broadcast by the Australian Broadcasting Corporation, Melbourne, 23 March 1992.

88 Letter from Professor DA Donovan, Director of the Asian Pacific Legal Studies Program, School of Law, University of San Francisco, to Ms L Hunt, Legal Aid Commission of NSW, 22 January 1992 (copy on file). A draft Criminal Code existed which was expected to be enacted into law in 1992. The substantive criminal law was contained in Decree No 2, issued in 1980. Decree No. 2 had twelve articles, three of which dealt with counter-revolutionary crimes.

89 The summary was obtained by RACS (Vic). The department blacked out the name of the presenter and information about the dates between which the presenter had been in Cambodia. A copy of the summary is on the author's files.

90 The contents of this seminar were quoted by some DORS officers as containing evidence *against* the stories of some Cambodian asylum seekers: E Lester speaking at RACS (Vic), Cambodian Asylum Seekers Workshop, held at 24 Victoria Street, Prahran, Victoria on 1 July 1992.

occasions the content of the aid worker's seminar on Cambodia has been misquoted in another material respect. Decisions citing the seminar have stated '[i]n twelve years of conflict the Khmer Rouge have not targeted civilians unless they are *prominently* connected with the government' (emphasis added), while the summary of the seminar contains the statement that '[t]he Khmer Rouge (KR) do not target individuals unless they are *in some way* connected to the government' (emphasis added).[91]

It is probably the case that the attitude of some DORS officers in relation to Cambodian refugee status claimants were motivated in part by Australia's involvement in the Cambodian peace process. And there may be foreign policy or other motivations, whether unique to a particular country or not, for distorting evidence in relation to refugee status applications from the citizens of other countries. As proof of this, the final example is a case in which a decision maker quoted from the chapter on Vietnam in the US State Department's *Country Reports on Human Rights Practices for 1991* as evidence against an applicant's story that persons, who had departed Vietnam illegally, risked being persecuted upon return to Vietnam. The quotation, which was included in the letter of rejection sent to the applicant, was part of a longer passage. The passage is set out below, with the words omitted by the decision maker reinserted and italicised:

> Vietnamese who emigrate are generally free to return. The Vietnamese Government regards overseas Vietnamese both as a valuable potential source of foreign exchange and expertise *and as a potential security threat.* Thus, the Government generally granted visas to overseas Vietnamese and encouraged them to visit Vietnam whether they emigrated legally or had been granted permanent resettlement after illegal departure from Vietnam. *At the same time the public Security Police keep an eye on them, especially those who come under suspicion as a result of their acts and associations. During the year some Overseas Vietnamese were arrested, detained, and deported for activities deemed to be subversive as described ... above.*[92]

Apparently, this particular distortion has been used several times.[93] Vietnam is, of course, a country with which Australia wishes to trade.

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91 Refugee Council of Australia (RCOA), *Open Submission to Joint Standing Committee on Migration Regulations*, 29 July 1992, p 37.

92 Example cited in RCOA, *Briefing Paper on the Boat People* (May 1992) p 10 and RCOA, *Open Submission to Joint Standing Committee on Migration Regulations*, 29 July 1992, pp 34-5.

93 RCOA, *Open Submission to Joint Standing Committee on Migration Regulations*, 29 July 1992, p 35.

Thus, there are clear dangers that decision makers may not only actively fail to seek information in support of refugee status claims, but even selectively use such information as is available and fail to draw the attention of claimants to that information. These dangers jeopardise Australia's chances of correctly identifying valid refugee status claims and hence its chances of meeting the standard of reasonable efficacy in the implementation of article 33 of the Refugee Convention.

(c) Recommendations

Australia should replace the Country Information Service of DIEA with a documentation centre which is independent of the executive government, in particular DIEA and DFAT. It should be sufficiently well-funded to maintain up-to-date collections of information gathered from a diversity of reliable sources. It should ensure that this information is easily accessible by decision makers through their own computer terminals[94] or (where this is not possible) in thematically organised country information packets. It should also maintain an electronic bulletin board which is updated daily and draws the attention of decision makers to the latest happenings in refugee producing countries which are undergoing rapid political or social changes.

The Federal Court of Australia should continue to be able to review primary decisions on the ground that the decision maker has failed to take into account a relevant consideration and on the ground of unreasonableness. This will give decision makers a greater incentive to ensure that they seek out all DIEA-held information and other readily accessible information favourable to the claimant.

The caseloads of individual primary decision makers should be reduced to a level where it is feasible for them to take the time to seek out information favourable to the claimant even if it is not readily accessible.[95]

Primary state refugee status determinations should be made by independent and impartial decision makers.[96] Where decision makers are free from the control of persons with foreign policy

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94 As in the US: GA Beyer, 'Establishing the United States Asylum Officer Corps: A First Report' (1992) 4 *Int'l J Refugee L* 455 at 473.

95 A comment made by M Graves, 'From Definition to Exploration: Social Groups and Political Asylum Eligibility' 26 *San Diego L Rev* 739 at 829 (1989) was the starting point of this recommendation.

96 Detailed recommendations for ensuring independence and impartiality are beyond the scope of this article.

agendas and the like, the likelihood of deliberate disregard of information helpful to a claimant's case will be much reduced.

2 Information Obtained From the Claimant: are the claims credible?

(a) General comment

As previously mentioned, it is usually the refugee status claimant alone who is able to provide information about his or her personal circumstances, including specific past events in which he or she has been involved. Clearly, all refugee status claimants (both those who have valid claims and those who do not) will provide self-serving information but the UNHCR Handbook states that 'if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt'.[97]

The fact finding task of the decision maker is to form a judgment as to whether the *substance* of an applicant's claims are credible. It will be shown below that it is very difficult to make a correct assessment of the credibility of refugee status claimants. The important thing to remember is that, where the overriding aim is to attain a standard of reasonable efficacy in implementation of the non-refoulement obligation in article 33 of the Refugee Convention, the goal being pursued is correct identification and acceptance of valid claims not the correct identification and rejection of invalid claims. In other words, a State only risks breaching article 33 by making erroneous adverse credibility assessments. It does not risk breaching article 33 by making errors in the other direction. Accordingly, it is vital that a decision maker starts from the presumption that an applicant's account is truthful 'unless and until articulable reasons for a contrary belief develop'.[98]

(b) Australia's approach to credibility determinations at the primary stage of the refugee status determination process

Australia accepts, in theory, that if a refugee status claimant's account 'appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt'[99] in relation to unproved statements. However, this formal acceptance of the benefit of doubt

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97 UNHCR Handbook para 196.

98 HG Watkins, 'Credibility Findings in Deportation Proceedings: "Bear[ing] Witness Unto the Truth"' 2 *Georgetown Immigration LJ* 231 at 291 (1987), quoted in J Ruppel, op cit note 21, at 3 note 5. The comment was made in the context of describing the approach that US immigration judges should adopt in deportation proceedings.

99 UNHCR Handbook para 196.

principle is undercut if decision makers impose unreasonable expectations on refugee status claimants.

The following comments can be made about the approach of the DORS Operations Branch to credibility determinations. The credibility of refugee status claimants is considered suspect if they have provided at any stage false or misleading information to Australian government authorities.[100] The credibility of refugee status claimants is also impugned if they do not reveal all their claims at the very beginning of the refugee status determination process.[101] The reasoning is that information provided late is probably of recent invention and designed to bolster a refugee status application that the claimant has realised may not succeed. Internal inconsistencies or lack of detail in a refugee status claimant's narrative of events may also lead to an accusation of fabrication. Examination of demeanour, the classic tool of the trial judge in assessing the credibility of witnesses, appears rarely to be mentioned by DORS decision makers as a factor affecting their assessment of a claimant's credibility[102] but it would appear impossible for demeanour not to affect such an assessment at a subconscious, if not a conscious, level.[103]

As the discussion below will demonstrate, there are many explanations for the 'untrustworthy' demeanour of a claimant, for initial non-disclosure of information by the claimant or for vague,

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100 This was one of the grounds on which DIEA rejected the refugee status claim which was the subject of the *Premalal* case (1993) 41 FCR 117, and it was agreement with this ground of decision which led Einfeld J to dismiss the application for review of the decision.

101 For instance, the draft decision of one delegate impugned a refugee status claimant's credit on the basis that one of his claims 'developed over a period of time from an event which was only relevant to him as he was apparently living with his sister's family to an imputed political profile of him': quoted in *Lek Kim Sroun v The Minister for Immigration, Local Government and Ethnic Affairs*, Federal Court of Australia, unreported judgment of Wilcox J, 22 June 1993, at 18. Ms Blesing, head of DIEA's refugee law section, reviewed the draft and commented that DIEA 'should accept that claims will be expanded as applicants lose their fear of DILGEA interviewers' and 'should not place too much weight on incremental claims': loc cit. While accepting Ms Blesing's comments in principle, the delegate maintained that the incremental way in which the applicant's claims were made undermined his credibility: id at 19.

102 Interview with E Lester, 5 May 1993.

103 According to Ruppel, US studies have shown that speech errors, lack of fluency, foreign intonations, hesitation, visible nervousness, and 'unnatural smiles' are some of the many aspects of demeanour which cause listeners to perceive a witness as a liar: J Ruppel, op cit note 21, at 7.

inaccurate or inconsistent statements made by the claimant other than deliberate concoction of a story. Yet, DORS officers sometimes focus on any flaw in a claimant's account, no matter how peripheral to the central claims being made by him or her, and to infer from that flaw that the claimant lacks general credibility.[104]

The problem is one of attitude. Some DORS officers appear to begin with a 'rejection mentality'.[105] The High Court of Australia has made it more difficult for refugee status claims to be refused on the basis that the claimant does not have a 'well-founded' fear of being persecuted or that the harm the claimant fears is not 'persecution'.[106] This leaves an adverse credibility assessment as the only easy path to refusal of a refugee status claim.[107] Yet a too ready adverse credibility assessment makes the goal of accuracy in identifying valid claims more difficult to achieve.

(c) Alternate explanations for refugee status claimants presenting the appearance of persons of poor credibility.

(i) Mistrust of authority

A person who is a Refugee Convention refugee has often become a refugee by having a well-founded fear of being persecuted by the authorities in his or her country of origin. Such a person's whole experience is likely to have taught him or her that trusting strangers, especially strangers connected with public institutions, is dangerous.[108] Upon arrival in his or her chosen country of refuge, the

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104 Interview with E Lester, 20 January 1992.

105 'There's certainly an emphasis on this rejection mentality. The UNHCR Handbook, the United Nations High Commission for Refugee handbook, actually says that when there is insufficient evidence the benefit of the doubt should go to the applicant. Now, that clearly isn't happening in Australia; well, not in the majority of cases': M Phillips, Assistant Director, DORS, DIEA, interviewed on 'Dateline', television broadcast by SBS, Melbourne, 11 November 1992.

106 See *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412.

107 The Joint Standing Committee on Migration Regulations has expressed the opinion that the primary basis for the refusal of refugee status claims in Australia after the *Chan* case is likely to be credibility grounds: Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control* (August 1992) p 62.

108 See M Krygier, '"Civil Society": In and out of Communism' (unpublished paper, Law and Society Conference, Sydney, 11-12 December 1993) for an insightful analysis of the differing nature of trust in and out of 'civil society'.

conditioned response of such a person to any stranger, particularly a stranger in authority, is still likely to be one of initial mistrust. A refugee status claimant who is required to provide information relevant to his or her claim immediately upon coming into contact with the receiving State's authorities is being required to acquire in a moment the 'impersonal' trust[109] to which persons in liberal democracies have had a lifetime to become habituated. In other words, it is both unrealistic and unreasonable to expect asylum seekers to provide information before they have had an opportunity to satisfy themselves that the receiving State's authorities can be trusted.

Allegations have been made that some refugee status claimants in Australia have been subjected to compliance interviews in which intimidatory tactics have been used to obtain information.[110] Such treatment would reinforce any initial mistrust of Australian authorities.

Mistrust of authorities (or their interpreters) makes the aim of some claimants that of revealing the minimum necessary to secure recognition of refugee status.[111] They are reluctant to volunteer unsolicited information for fear that it will get back to the authorities in their country of origin and put them in further jeopardy should they be returned.[112]

Mistrust may also cause a refugee status claimant to appear nervous or hesitant in answering questions.

There is a danger that DORS officers may take insufficient account of mistrust of Australian authorities as an explanation for the behaviour of refugee status claimants.

(ii) Defects in perception and memory

Failures in a claimant's perception and memory can explain inconsistencies, inaccuracies and lack of detail in a narrative which is,

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109 Ibid.

110 Allegations cited in Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control* (August 1992) pp 168-9.

111 A Krohn speaking at RACS (Vic), Cambodian Asylum Seekers Workshop, held at 24 Victoria Street, Prahran, Victoria on 1 July 1992.

112 Ibid. The following example was given: the Jesuit Refugee Service ran a pilot project in which they interviewed eight unrepresented Cambodian asylum seekers, who had already been interviewed by DIEA. The pilot revealed that a lot of relevant information had not been drawn out at the initial interview. After the pilot, DIEA agreed to reinterview all the Cambodian asylum seekers.

in substance, true. It has been well-established by psychologists that stress or fear can cause a person to make fewer observations of his or her surroundings;[113] to overestimate the amount of time for which he or she was in danger;[114] to overestimate distances travelled while in danger;[115] and so on. Many refugees would, of course be bearing witness to events which caused them great stress and fear. Moreover, it is true of everyone that memory fades with the effluxion of time; that the retention in memory of a given detail will depend on the motivation to remember it;[116] and that the original memory of an event can be altered or replaced by subsequently acquired and possibly inaccurate information.[117]

(iii) The effects of post-traumatic stress disorder

A decision maker cannot make a reliable assessment of the credibility of a refugee status claimant's case if, unbeknown to the decision maker, the claimant is suffering from post-traumatic stress disorder.[118] Post-traumatic stress disorder may be triggered in a person if he or she 'has experienced an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone'.[119] If the triggering event is human conduct, the disorder may be of lengthier duration and greater severity than if triggered by some other event.[120] It would, of course, often be the case that a person falls within the Refugee Convention definition of refugee because past persecution has given him or her objective grounds for fearing persecution in the future. An incident of persecution can be characterised as human conduct 'that is outside the range of usual

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113 L Re, 'Eyewitness Identification: Why So Many Mistakes?' (1984) 58 *ALJ* 509 at 510.

114 Id at 511.

115 Ibid.

116 Ibid.

117 Ibid, citing C Bird, 'The Influence of the Press upon the Accuracy of the Report' 22 *J Abnormal and Social Psychology* 123 (1927).

118 This disorder has been variously described in the past as 'nervous shock' (by lawyers rather than doctors), 'traumatic neurosis', 'acute reaction to stress' and 'adjustment reaction': GC Smith, 'Post-traumatic stress disorder' (unpublished seminar paper, Law Faculty, Monash University, 10 August 1992) p 1. 'Post-traumatic stress disorder' is the description used in *Diagnostic and Statistical Manual of the American Psychiatric Association* (3rd ed revised); 'Post-traumatic stress reaction' will be the description used in the 10th revision of the *International Classification of Diseases*, which is widely used outside the United States.

119 Smith, loc cit note 118.

120 Ruppel, op cit note 21, at 20.

human experience and that would be markedly distressing to almost anyone'.

Amongst the diagnostic guidelines for post-traumatic stress disorder is the suggestion that a sufferer would have at least some of the following symptoms: an avoidance of thoughts, activities or situations which might cause him or her to recollect and re-experience the trauma; subconscious suppression of all memory of some aspects of the trauma (psychogenic amnesia); a loss of ability to relate to other people; a loss of interest in important activities; or a 'sense of foreshortened future'.[121] The symptoms of post-traumatic stress disorder above mentioned are such that a refugee status claimant who is a sufferer is likely to have a diminished ability to recall or recount his or her experiences[122] and may, in fact, avoid speaking of the very facts that would most strongly support his or her application. This may lead a decision maker unfairly to draw adverse inferences as to the credibility of the sufferer. For instance, a decision maker may conclude that a claimant who gives an unemotional and detached narrative of a horrific incident must be making it up, when in fact the claimant may be suffering from post-traumatic stress disorder in consequence of the incident and be manifesting a particular symptom of the disorder, which is the maintenance of emotional distance from the traumatic experience.[123]

DIEA does not have in place a procedure for systematically screening refugee status claimants for signs of post-traumatic stress disorder.[124] The training received by DORS officers[125] has made them aware of the existence and nature of the disorder but this in itself is not enough. DORS officers armed with a little knowledge about post-traumatic stress disorder may think that they would be able to recognise the disorder in a refugee status claimant. This is simply not true. Psychiatrists dealing with patients of their own cultural background, who speak their patients' language, would need to conduct interviews over a considerable period of time and would try

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121 Smith, op cit note 118, at 1. There are also other diagnostic criteria for post-traumatic stress disorder, including the presence of some or all of other groups of symptoms, but they are not relevant to the present discussion.

122 JC Hathaway, *The Law of Refugee Status* (1991) p 72, citing discussion of expert psychiatric evidence in *Mario Benito Fuentes Leiva*, Immigration Appeal Board Decision 79-9101, CLIC Notes 27.12, 13 November 1980, at 4-6

123 BA Ort, 'International and United States Obligations Toward Stowaway Asylum Seekers' 140 *U Penn L Rev* 285 at 314 (1991).

124 Interview with DIEA official A and DIEA official C, 24 February 1993.

125 DORS Interview Skills Training Course Module 8 (one and a half hour presentation on post-traumatic stress disorder).

to obtain considerable corroborating evidence before making a final judgment about whether or not any patient was suffering from post-traumatic stress disorder.[126] A fortiori, a lay interviewer dealing with a person of a different cultural background, who is speaking through an interpreter,[127] and with no access to corroborating data could not make an accurate judgment about whether or not that person was suffering from the disorder on the basis of a single face-to-face interview.[128]

In some cases, refugee status claimants become the clients of organisations such as the Victorian Foundation for the Survivors of Torture Inc before presenting themselves at a DORS interview. The organisation concerned, if it deems it to be necessary, may make a report to DIEA about the client on the client's behalf. The Victorian Foundation for the Survivors of Torture writes to DIEA in relation to clients whose claims may appear unconvincing unsupported by its specialised assessment but leaves clients with 'clear and convincing' claims to fend for themselves.[129] The staff of the Victorian Foundation themselves are the first to acknowledge that this approach (forced by lack of funding) is 'problematic' because of the possibility that clients who are left to fend for themselves may not be thought by DORS officers to have strong claims.[130] Since not all refugee status claimants are assessed by the Foundation and since the Foundation does not have the resources to report to DIEA on all the refugee status claimants it assesses, the involvement of the Foundation in the refugee status determination process cannot be considered an adequate safeguard against sufferers of post-traumatic stress disorder undeservedly receiving a negative credibility assessment.

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126 GC Smith, op cit note 118.

127 The inability to communicate directly makes diagnosis a very difficult matter even for psychiatrists. The possible problems include the concepts present in one language not being present in the other; the skills of the interpreter being inadequate and hence his or her translations being defective; or the interpreter introducing his or her prejudices into the translation process so that information is received by the psychiatrist in a distorted form: ibid.

128 Ibid.

129 Q Dignam, 'The Burden and the Proof: Torture and Testimony in the Determination of Refugee Status in Australia' (1993) 4 *Int'l J Refugee L* 343 at 361.

130 Ibid.

(iv) Problems of communication

Ambiguity in questions or answers

Persons who examine a refugee status claim will know what they mean by the words that they use in framing a question. Refugee status claimants will know what they mean by the words of their responses. They might not always understand each other.[131] For instance, a DORS officer made the following comment in relation to one application for refugee status:

> We, however, find an inconsistency with regard to the way the applicant was physically treated: in the statement she included in her husband's application for refugee status, the applicant has stated that she was not physically tortured while at the interview she stated that she was slapped on a number of occasions when she was interrogated.[132]

It is suggested that persons coming from a culture where violent interrogations are the norm would reserve the description of 'torture' for the most severe treatment that can be expected in such situations and is certainly unlikely to use that term in relation to the administration of slaps. In other words, there is no necessary inconsistency in the claimant's narrative. The real problem is likely to be miscommunication.

The use of translators and interpreters

Many refugee status claimants must conduct their oral and written communications with those making the decision on their claim with the assistance of translators and interpreters. The competence of the assistance received can have an enormous impact on the apparent credibility of their claims.[133] The interpreters used at DORS

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131 As all lawyers know, such is the limitation of language that even persons who are fluent in a common language and culture cannot be assured of perfect communication.

132 DIEA, Assessment of Application for Refugee Status, 10 May 1991 in relation to File 9. (This file number is the author's personal identifier. The consent of the client concerned to use the material herein presented was obtained on terms that the numbers allocated to the file by RACS and DIEA and other details which may identify the client would not be disclosed.)

133 D Anker, 'Determining Asylum Claims in the United States: An Empirical Case Study, Final Report' (April 1991) p 12 (forthcoming in 19 *New York University Review of Law and Social Change*), quoted in J Ruppel, op cit note 21, at 19 note 65.

interviews are provided by the DORS Operations Branch.[134] The DORS Operations Branch uses interpreters accredited at NAATI[135] level 3 wherever possible. Refugee status claimants are permitted to have their own interpreters present to monitor the DORS interpreter.[136] They are also given a tape recording of the interview to take away with them.[137] This enables the claimant to identify and explain misinterpretations even after the interview is over.[138] And misinterpretations do occur. For example, in one PRC case, a refugee status claim was rejected at the primary stage 'primarily on the basis that [the claimant's] home was not listed in the China Directory as the holder of the [Chinese Communist Party] position which he was understood to have claimed'.[138a] At the review stage, the claimant alleged that the interpreter at the primary stage had mistranslated the title of his position. The RRT investigated the allegation and found it to be substantiated. Holders of positions at the level of position actually claimed by the claimant did not, in fact, appear in the China Directory.[138b] The claimant was successful at the review stage.

It is not just the choice of an incompetent interpreter which can affect the outcome of the interview. If the interpreter is secretly hostile to the claimant or the claimant does not trust the interpreter, the interviewer may receive a distorted impression of the claimant and may be led to reject a valid claim. In Australia, interviewees are asked at the interview whether they accept the interpreter.[139] If an objection is made, the interview is rescheduled and a new interpreter is found.[140] The danger remains that interviewees may feel compelled to assent to the use of the interpreter presented to them, even though they are unhappy with the choice.[141] They may reveal those concerns only later.[142]

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134 In this respect, Australian practice is superior to US practice which is to require applicants to provide their own interpreters: DE Anker, *The Law of Asylum in the United States: A Guide to Administrative Practice and Law* (2nd ed, 1991) p 46 note 234.

135 National Accreditation Authority for Translators and Interpreters.

136 RACS, *Refugee Manual: A Guide for Advisers* (May 1993 update) 6.35

137 Id at 6.34

138 Id at 8.7

138a RRT Ref N93/00126 (R Mathlin, 16 December 1993) pp 5-6.

138b Id at p 6.

139 Interview with a member of the RSRC, 15 January 1992.

140 RACS, *Refugee Manual: A Guide for Advisers* (May 1993 update) 6.35

141 Interview with a member of the RSRC, 15 January 1992.

142 Ibid.

Cross-cultural communication

Refugee status claimants and the decision makers who interview them often have vastly different cultural backgrounds. An interviewer, who is unaware that a person from another culture may be conditioned by that culture to use eye contact or manifest emotion in a manner different from the manner of the interviewer's culture, may incorrectly infer from the interviewee's demeanour that he or she is lying.[143]

Initial non-disclosure of important information may also be explicable by reference to the claimant's cultural background. For instance, women from some cultures have a strong inhibition about speaking of matters relating to sex, especially to strangers of the opposite sex.[144] They may even have been brought up in a society where the victims of sexual assault are punished.[145] Yet a poorly trained interviewer may expect a woman from such a background voluntarily to reveal that she has been the victim of sexual assault simply because he or she knows that a female of his or her own culture would do so.

(d) Recommendations

The following procedures are recommended as procedures which will reduce the possibility that flaws in an claimant's account have 'innocent' explanations or that innocent explanations are overlooked in the making of a credibility assessment.

Procedures should be put in place to ensure that irregular arrivals who indicate a wish to remain in Australia are not subjected to immediate questioning. Such persons should be escorted courteously to a reception centre and given the opportunity to wash, eat and sleep. Once their bodily comforts have been tendered to, they should be provided with information (in their own language) about their domestic legal position and given the opportunity to contact a friend, relative or lawyer. Then and only then should they be asked about the circumstances of their arrival, their reasons for wishing to remain in Australia, and so on. Before making an adverse finding on credibility grounds a decision maker should be required to consider whether the time at which and the conditions under which the claimant provided information were such as were likely to minimise the possibility that mistrust on the part of the claimant could explain

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143 Ort, op cit note 123, at 310.

144 JR Castel, 'Rape, Sexual Assault and the Meaning of Persecution' (1992) 4 *Int'l J Refugee L* 39 at 55.

145 Ibid.

late disclosure of important information, vagueness as to details or 'untrustworthy' demeanour.

Before making an adverse finding on credibility grounds a decision maker should be required also to assure himself or herself that defects in perception and memory or the presence of post-traumatic stress disorder can be dismissed as a possible explanation for narratives which are inconsistent, inaccurate or vague. It is particularly unacceptable to have a situation in which the success of a meritorious application for refugee status is jeopardised because the decision maker is unaware that the applicant has post-traumatic stress disorder. All refugee status applicants should be screened by a qualified psychiatrist or psychologist before any DORS interview is conducted. If the psychiatrist/psychologist is of the opinion that a particular applicant is very unlikely to have the disorder, the DORS interview can proceed. If, however, the psychiatrist/psychologist is of the opinion that there is a not insignificant chance that the claimant may have the disorder, the DORS interview should be conducted in the presence of the psychiatrist/psychologist and the credibility assessment should be made by the decision maker in consultation with the psychiatrist/psychologist.[146]

A decision maker who doubts the credibility of a claimant on the basis of responses received to questions asked, should be required to ascertain in respect of each such question and answer that there has not been a misunderstanding on either side.[147]

All possible measures should be taken to ensure that interpreters and translators have a very high degree of competence. A refugee status claimant should be given an opportunity, in advance of his or her DORS interview, to select the person who will interpret at the interview. DORS should maintain a register of qualified interpreters from which the selection must be made, as it is clearly unsatisfactory to sacrifice interpreting standards to interviewee comfort. A decision maker who doubts the credibility of a claimant on the basis of responses received via an interpreter to questions asked via an interpreter, should be required to take whatever steps are necessary to assure himself or herself that any inconsistencies,

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146 No amount of training short of the training received by a psychologist would ensure that decision makers were themselves competent to recognise post-traumatic stress disorder. It may, nevertheless, be the case that the expense of the scheme which has been outlined (a continuing expense) would exceed the one-off cost of providing decision makers with the training to recognise post-traumatic stress disorder for themselves. If this is the case, the latter course should, of course, be pursued.

147 Ruppel, op cit note 21, at 13 note 45.

inaccuracies or vagueness present in the responses were not the consequence of the interpreter's mediation of the conversation or other communication.[148]

Finally, decision makers should be given more extensive training on the problems of cross-cultural communication and the means to overcome these problems. A decision maker should be required to direct his or her mind to the possibility that any negative impressions he or she has formed of a claimant's credibility can be explained by the lack of cross-cultural competence on both sides.

D Procedures for Overcoming Deficiencies in the Information Available to Refugee Status Claimants: the Need to Have Access to all Information Available to the Decision Maker

1 Principles and Policy

If some of the information on which a decision is based is kept secret from the claimant and his or her lawyers, the potential exists for decision makers to misinterpret information; to be unjustifiably selective in their use of available information; to use unreliable information;[149] and so on. Where adverse information is kept secret, the claimant is not given the opportunity to discredit it.[150] Where favourable information is kept secret, the claimant is unable to ensure that the information is given its proper weight. The claimant is, of course, the only person who can be counted upon to make every effort to ensure that favourable information is given proper weight. Finally, the non-disclosure of information leaves room for the assertion that the full basis of the decision cannot be revealed to be used as a cloak for the rejection of some claims on improper grounds.[151] All of this must lead to a lessening of the accuracy of decision making.

States often wish to withhold information from refugee status claimants because they fear that release of the information may damage their relations with another State (not necessarily the country of origin of the asylum seeker). A damaged relationship with another State might, of course, have significant ramifications. For instance, the country of origin of the refugee status claimant may be an important trading partner. If information released by the country determining

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148 Id at 25-6.

149 DA Martin, 'Due Process and Membership in the National Community: Political Asylum and Beyond' 44 *U Pittsburg Law Rev* 165 at 224 (1983).

150 Ibid.

151 Ibid.

the claim is offensive to the country of origin, it may retaliate by making difficulties over trade. To give another example, if the information released were provided in confidence by an ally (probably a country other than the country of origin of the refugee status claimant), that country might be reluctant to share information with the claim determining State in the future.

In many cases, information which a State seeks to withhold from a refugee status claimant is sensitive only because it would cause embarrassment to another State. In such cases, release of the information will only damage relations with the other State if it is widely disseminated. The needs of the refugee status claimant and the needs of the State determining the claim can both be met if the information is released to the claimant or his or her lawyer subject to an undertaking of confidentiality (backed by severe sanctions for breach). Even if such information does leak into the public sphere, the damage done is likely to be easily reparable in a world where greater injuries than loss of face are forgiven in the interests of 'real politik'. At the other end of the scale, the information may be information which cannot even be disclosed to the refugee status claimant or his or her lawyer without seriously jeopardising the defence arrangements of a friendly power. The damage which release of the information would do to the determining State's relationship with that power is likely to be enormous and the negative consequences would be proportionately great. There would, of course, be a whole lot of possibilities between these two extremes. The needs of refugee status claimants should be accommodated, if there is some means of doing so with little risk of *serious* negative consequences for the State determining the refugee status claim flowing from damaged relationships with other States.

A State may sometimes 'up the stakes' by arguing that its national security interests would be directly threatened by release of certain information to a refugee status claimant. Invoking national security interests is a convenient stratagem for justifying action which would otherwise be unjustifiable because 'national security' is a concept which is notoriously difficult to pin down.[152] The narrowest concept of national security interest is a State's interest in the physical protection of its territory and population.[153] The widest concept of national security interest encompasses also the interest which the Government of a State has in maintaining its political power and perpetuating its political ideology. In liberal democracies such as Australia, the only legitimate concept of national security interest is

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152 Eg JA Tapias-Valdes, 'A Typology of National Security Policies' 9 *Yale J World Public Order* 10 (1982); P Hanks, 'National Security - A Political Concept' (1988) 14 *Monash University Law Review* 114.

153 Hanks, op cit note 152, at 120.

the narrow one. This is because, as Hanks puts it, 'the essence of a liberal democracy is the open contention of competing values and ideologies'.[154] It is conceded that national security interests (in the narrow sense) are public interest considerations of such magnitude that, in a given case, these considerations may require information to be withheld from a refugee status claimant.

Whatever the public interest a government claims is served by the withholding of information, it is argued that it is inappropriate for the government to be the judge in its own cause. In other times and other contexts, governments have had this privilege and have abused it.[155]

2 Australian Practice Evaluated

(a) Present primary stage practice

In Australia, refugee status claimants do not have access to information equal to that of decision makers. For instance, refugee status claimants are not given direct access to the information collected by DIEA's Country Information Service.[156] Statements of reasons for negative assessments or decisions made in relation to refugee status applicants in Australia often refer to documents not made available to the claimants.[157] Some documents of DIEA and DFAT can be accessed by claimants through use of the *Freedom of Information Act* 1982 (Cth).[158] This availability is often more theoretical

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154 Id at 121.

155 For a long time the courts accepted the executive government's claim to public interest immunity (Crown privilege) in respect of information as conclusive and would not require disclosure of the information. However in *Sankey v Whitlam* (1978) 142 CLR 1 at 39 the High Court of Australia decided that it is 'in all cases the duty of the court and not the privilege of the executive government, to decide whether a document will be produced or may be withheld'. Since this change in judicial attitude, officers of Government Departments have ceased even to seek immunity in respect of many types of information which previously they routinely sought to protect from disclosure by this means: D Byrne and JD Heydon, *Cross on Evidence*, (4th ed, 1991) p 735.

156 Interview with A Rice, 23 February 1993.

157 A Krohn, op cit note 26.

158 Hereinafter 'FOI Act'. One of the objects of the FOI Act is to create 'a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interest and the private business affairs of persons in respect of whom information is collected and held by departments and public authorities': s 3(1)(b). In keeping with this object, s 11(1)

than real. It is necessary for the FOI applicant or the applicant's lawyer to have a good idea of the information he or she is after in order to frame FOI requests in terms sufficiently wide to elicit all relevant information[159] but sufficiently narrow to avoid an unmanageable deluge or an outright refusal of the request.[160] In other words, the persons most able to make successful FOI requests are the persons with least need to make them. Nevertheless, increasing use is being made of the FOI Act by refugee status claimants.[161]

The problem is that much of the material which would be useful to the refugee status claimant, and/or on which DORS officers base their assessments, is not even available to claimants through use of the FOI Act. Section 4(1) of the FOI Act states that '"document" ... does not include library material maintained for reference purposes'. Section 7(2A) of the FOI Act states that '[a]n agency is exempt from the operation of [the FOI] Act in relation to a document that has

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provides that, subject to the rest of the Act, 'every person has a legally enforceable right to obtain access in accordance with [the] Act to

(a) a document of an agency, other than an exempt document; or

(b) an official document of a Minister, other than an exempt document'.

Government departments such as DIEA and DFAT are 'agencies' within the meaning of the FOI Act: see the definitions contained in s 4. The Act is given teeth by the provision in Part VI for AAT review of agency decisions to refuse access.

159 Section 15 of the FOI Act provides that a request for access must, inter alia, 'provide such information concerning the document as would enable a responsible officer of the agency, or the Minister to identify it'. It is not necessary, however, that the applicant make the request in a form which identifies specific documents (for example, a letter written by X to Y dated such-and-such a date). It is sufficient if the documents are identified by reference to 'the nature of the information they contain': *Re Anderson and Australian Federal Police* (1986) 4 AAR 414 at 419.

160 Section 24 of the FOI Act provides that a request for access may be refused if the work involved in processing the request 'would substantially and unreasonably divert the resources of the agency from its other operations', having regard to the resources that would have to be used 'in identifying, locating or collating the documents within the filing system of the agency', 'in making a copy, or an edited copy, of the documents', etc. It is worth noting that an agency cannot refuse a request for access where it is only the task of considering whether documents requested are exempt documents which would 'substantially and unreasonably divert the resources of the agency from its other operations': *Re Timmins and National Media Liaison Service* (1986) 4 AAR 311 at 317-8.

161 DIEA, *Review 92*, p 79.

originated with, or has been received from', inter alia, the Office of National Assessments or the Defence Intelligence Organisation'. Part IV of the FOI Act[162] sets out the various categories of exempt documents. The more important of these categories, in the context of the refugee status determination process, are as follows:

- Where the disclosure of a document 'would, or could reasonably be expected to cause damage to' the security, defence or international relations of the Commonwealth, the document is exempt from the FOI Act.[163]
- Where the disclosure of a document would divulge information communicated in confidence by or on behalf of a foreign government, authority of a foreign government or international organisation to the Commonwealth Government or a Commonwealth public authority, the document is exempt from the FOI Act.[164]
- Where disclosure of a document would found an action for breach of confidence, the document is exempt from the FOI Act.[165]

As earlier stated much of the information used by DIEA in the refugee status determination process is DFAT sourced. DFAT's stated policy is to make as much information as it can available to the refugee status determination process and always to make it available in such a form that the material which is directly drawn upon by the decision maker is capable of being exposed to the claimant.[166] However, a claimant needs to have access not only to documents which DFAT has provided to the decision makers but also to the documents DFAT has drawn upon in preparing the documents relied upon by the decision maker. Many of the sources which DFAT draws upon in the preparation of material for use in the refugee status determination process are classified, often for reasons which have very little to do with national security or other vital State interests. For instance, DFAT missions are concerned to protect the identity of

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162 Sections 32-47A of the FOI Act.

163 Section 33(1)(a) of the FOI Act. For discussion of this exemption see *Re Maher and Attorney-General's Department* (1985) 3 AAR 396.

164 Section 33(1)(b) of the FOI Act. For discussion of this exemption see *Re Maher and Attorney-General's Department* (1985) 3 AAR 396; *Re Stolpe and Department of Foreign Affairs* (1985) 9 ALD 104; *Re O'Donovan and Attorney-General's Department* (1985) 4 AAR 151; *Re Anderson and Australian Federal Police* (1986) 4 AAR 414.

165 Section 45 of the FOI Act. See *Re Anderson and Australian Federal Police* (1986) 4 AAR 424; *Re Searle Australia Pty Ltd and Public Interest Advocacy Centre* (1992) 108 ALR 163.

166 Interview with DFAT official, 14 July 1992.

their informants in order to ensure that their supplies of information do not dry up.[167] The missions may also offer frank comments to Canberra, which are 'perhaps not things [DFAT] would want to say in public.'[168] Even in these cases, DFAT asserts that it is usually the case that the documents drawn upon, though classified, will be provided to the claimant in modified form.[169] In the typical case, a document has not been classified because of its substantive content but because of the appearance in it of the name of the source or some other such detail.[170] In such a case the document can be provided to the claimant, with the confidential information deleted but with nothing of substance withheld.[171]

At the end of the day, it appears that 'large slabs of information' are unavailable to refugee status claimants.[172] It is submitted that the present grounds on which information can be withheld from refugee status claimants are simply too wide. DIEA and DFAT are not forced to engage in a sophisticated balancing of the interests of the refugee status claimant and the public interest and do not do so.

Finally even where DIEA and DFAT have a legal obligation to make particular information available to a refugee status claimant, the inadequacy of their information storage and retrieval systems means that there can be long delays between request and production.[173]

(b) Future primary stage practice

From 1 September 1994, section 26Y of the *Migration Act* will apply in the period before a primary stage decision has been made. It provides that if the Minister has information specifically about an applicant or another person and obtained from a source other than the applicant, which would constitute a reason for refusing an application, the

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167 Ibid.

168 Ibid.

169 Ibid.

170 Ibid.

171 Ibid.

172 Dr E Arthur, Refugee briefing seminar, held at CAE Business Centre, 253 Flinders Lane, Melbourne, 17 August 1992.

173 See, for instance, the *Premalal* case in which Einfeld J noted that documents were produced by DIEA on 31 March 1992 in response to an FOI request made on 13 December 1991: (1993) 41 FCR 117 at 126. See also the *Lek* case in which Wilcox J recounts the difficulties that led to the process of discovery of documents extending some two months beyond the date initially fixed for the filing and service of all affidavits: Federal Court of Australia, 22 June 1993, unreported, per Wilcox J, at 7-8.

Minister must (unless the information is non-disclosable information) give the particulars of the information to the applicant and invite comment. The manner in which this is done is left to the Minister.[174]

Section 26Y of the *Migration Act* falls short of ensuring equal access to information. For a start, it only requires the Minister to disclose *adverse* information and allows the Minister to do so in whatever form he or she chooses. This means that refugee status claimants still have no access to favourable information and have no guarantee that the information which is provided is being provided undistorted. Moreover, s 26Y(1) only requires the Minister to provide information 'specifically about the applicant or another person'. It does not require that the applicant be given access to information about conditions in his or her country of origin. This means that refugee status claimants will still be forced to use FOI procedures to access country information.[175]

The disclosure requirement in s 26Y(1) is also subject to a long list of exceptions mostly necessitated by the fact that primary stage decision makers will still use classified information in making refugee status determinations.[176] The exceptions to the disclosure requirement are as follows:

- The Minister does not need to disclose any information 'whose disclosure would, *in the Minister's opinion*, be contrary to the national interest'[177] because it would prejudice Australia's security, defence or international relations; involve the disclosure of Cabinet deliberations or decisions; or involve the disclosure of matters which could be the subject of a Crown immunity claim.[178]
- The Minister does not have to disclose information that was 'given to the Minister or an officer in confidence'.[179]

Again the width of the exceptions is such that there is no guarantee that the interests of refugee status applicants in obtaining

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174 *Migration Act* 1992 (Cth) s 26Y(3).

175 Interview with DIEA official A, 24 February 1993.

176 About 75% of the material in the Country Information Service's country files is classified; about 99% of this classified material is material obtained from the Department of Foreign Affairs: interview with A Rice, 23 February 1993.

177 Emphasis added

178 Definition of 'non-disclosable information' in s 4(1) of *Migration Act* 1992 (Cth). This definition commences on 1 September 1994.

179 Ibid.

disclosure of information will only be sacrificed to the extent absolutely necessary to protect public interests of immense importance.

3 Recommendations

It is acknowledged that there is sometimes an overwhelming public interest in ensuring non-disclosure of information to a claimant. However, the exceptions to the disclosure requirement should be more limited than at present. Moreover, the Minister's position as the sole arbiter of the national interest is open to abuse. It is suggested that the Security Appeals Tribunal, which already exists,[180] should be entrusted with the task of determining whether national security interests (or other State interests of comparable magnitude) in fact require the suppression of the information in question. If adverse information must be withheld from the refugee status claimant in the public interest, the information should be withheld from the decision maker also. In some cases, withholding adverse information from a decision maker may mean that a person who is not in fact a Refugee Convention refugee is granted refugee status contrary to Australia's public interest. Where there are public interest objections both to the disclosure of adverse information to a refugee status applicant and to the grant of refugee status to that applicant, it is appropriate that the government make the refugee status determination outside the usual refugee status determination procedures.

E Conclusion

Section B of this article described the sorts of information required by persons examining refugee status claims and the problems faced by decision makers in obtaining the information required. Section C of this article was concerned with procedures for overcoming these informational deficiencies.

In relation to information obtained from sources other than the claimant, two arguments were presented. The first argument was that decision makers must have easy access to a central collection of up-to-date information from a diverse range of reliable sources in order correctly to identify valid claims. It was demonstrated that much of the information available to be used by the DORS Operations Branch is of uncertain reliability because much of it is obtained directly or indirectly from DFAT and because it is difficult for DORS officers to ensure that they have retrieved all information relevant to the case in hand. The second argument was that decision makers have a responsibility to seek out and give consideration to information

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180 The Security Appeals Tribunal is an independent tribunal established under section 41 of the *Australian Security Intelligence Organisation Act* 1979 (Cth).

favourable to a claimant's case as otherwise they are unlikely correctly to identify valid claims. It was concluded that Australian practices were such as may prevent Australia from attaining the goal of accuracy in identifying valid claims and hence from meeting the standard of reasonable efficacy in the implementation of article 33 of the Refugee Convention.

It was accordingly recommended that Australia should replace the Country Information Service of DIEA with an independent documentation centre which maintains up-to-date and easily accessible collections of information gathered from a diversity of reliable sources. It was recommended that primary stage refugee status determinations should be made by independent and impartial decision makers whose individual caseloads were small enough to facilitate thorough investigation of every case. It was recommended that the Federal Court of Australia should continue to have jurisdiction to review primary stage decisions on the ground that the decision maker has failed to take into account a relevant consideration and on the ground of unreasonableness.

In relation to information provided by a refugee status claimant, it was argued that the task of the decision maker is to form a judgment as to whether the substance of the claimant's claims are credible and, if so, to give the claimant the benefit of the doubt in relation to statements which were not susceptible of independent proof. It was pointed out that erroneous adverse credibility assessments placed Australia in danger of breaching article 33 of the Refugee Convention but not so errors in the other direction. It was argued that DORS decision makers should, therefore, presume that a refugee status claimant was truthful, unless they could fully articulate the reasons for finding otherwise.

It was suggested that the factors which may lead DORS decision makers to draw adverse inferences as to credibility (ie provision of false information, late disclosure of information, internally inconsistent narratives, vague narratives and 'untrustworthy' demeanour), can often also be explained in terms which do not impugn credit. Mistrust of authority, failures in perception and memory, the effects of post-traumatic stress disorder and communication problems are all possible 'innocent' explanations of the sorts of factors which could lead decision makers to draw adverse inferences as to the credibility of refugee status claimants.

The section ended with the recommendation of procedures which would reduce the possibility that flaws in the accounts of refugee status claimants had 'innocent' explanations or that innocent explanations were overlooked in the making of a credibility assessment.

Section D of this article was concerned with procedures for overcoming deficiencies in information available to refugee status claimants. A refugee determination system under which relevant information is withheld from the refugee status claimant is not unique to Australia.[181] However, it has been shown that there are reasons of principle for suggesting that all information considered by the decision maker should be made available to claimants or their lawyers. If there is an overwhelming public interest to be served by withholding information from the claimant, any *adverse* information so withheld should be withheld also from the decision maker.

181 See D Matas and I Simon, op cit note 21, at 239. A specific example is the German Federal Office for Refugees, which has regard to Foreign Ministry reports and other information which is not made available to the applicant: id at 244.