

Chapter 2

Mr Chen Yonglin's request for political asylum

2.1 This chapter examines the request by Mr Chen Yonglin on 26 May 2005 for political asylum and the initial responses and activities of the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) and the Department of Foreign Affairs and Trade (DFAT) on that day. The sequence of events are presented chronologically with events from 27 May 2005 onwards dealt with in chapter four. The committee heard two different accounts of events on 26 May 2005 which cannot be reconciled. Rather than determine which version is correct, the committee seeks to answer the broader questions of whether the response of the government to Mr Chen's requests for asylum and protection was fair and appropriate.

Background

2.2 Mr Chen Yonglin arrived in Australia in August 2001 and assumed the role of Consul for political affairs at the Chinese Consulate in Sydney. He was 'in charge of implementing the PRC Central Government policy in relation to the Five Poisonous Groups (Falun Gong, pro-democracy movement activists, pro-Taiwan independence force, pro-Tibet separation force and Eastern Turkistan force)'.¹ In particular, he noted he was required to persecute Falun Gong practitioners overseas. Mr Chen stated it distressed him to work for an authority which he deemed unjustifiably placed Falun Gong practitioners in labour camps, jails, forced re-education courses and put uncooperative practitioners to death.² He said he grew to hate his work because he supports democracy and the information he collected on these groups could be used against the individuals and their families.³

Initial contact with DIMIA

2.3 On 26 May 2005, Mr Chen Yonglin approached the Australian Government to seek political asylum. According to Mr Chen:

I approached DIMIA on the morning of 26 May to ask for an appointment with the state director of DIMIA. I stood in the public space outside the entrance to the department's inquiry office and I used my mobile phone to call the department. I said I wished to speak to Mr Nick Nicholls. A male official indicated that Mr Nicholls was no longer the director and that the new director was Mr O'Callaghan. The male official transferred the call to the state director's office, but the phone line to the state director's office was busy. A few minutes later I called the director's office directly. I introduced myself and identified myself. I said that I was the consul for political affairs

1 *Submission 7* (Refugee Advice and Casework Service), pp. 11-12.

2 *Submission 7* (RACS), pp. 11-12.

3 *The Weekend Australian*, 11 June 2005, p. 19.

in the Chinese consulate in Sydney and requested an urgent meeting. The female official asked whether I had made a prior appointment and I said 'no'. The female official then asked for the phone number of the Chinese consulate. I said, 'I would prefer not to give you the phone number but if you insist I can give it to you', and later I gave the phone number to the female official. I said: 'Please don't call them. It is an unusual meeting request. I have a very important matter to talk to the state director about and I can prove myself with my ID issued by DFAT and my passport'. The official later indicated that the state director was in a meeting and asked if it was an urgent matter. I said 'Yes'. She later talked to the director and asked me to leave my mobile phone number and said that she would call me back.

I waited and about 10 minutes later I called again. The first official responded that the director already knew of my request but that he was in a meeting. She asked if it was necessary to interrupt the meeting. I said 'yes'. She went to talk to the state director and I approached the reception desk and showed my ID to the security guard and the security guard called the state director's office to prove that I held the ID card issued by DFAT.

At that time I called the state director's office again. The phone was answered by another female secretary and she said that the first official was connecting to the Chinese consulate to check my ID. I said that would not be necessary, that I had shown my ID to the security guard, and said that I would be in danger – my life would be in danger – if they contacted the Chinese consulate and I feared that. The second female official said that the first one was connecting. I was very shocked to learn that. She said that the first one was transferring the call to my mobile, so that I was frightened and hurried to say, 'No, I have to go; I can't stay here any more'. I left two letters. One was addressed to the state director and I changed the name to Mr O'Callaghan. The other letter was addressed to Mr Illingworth. Then I left the immigration building. At that time, because I was frightened that the immigration office was too close to the Chinese consulate – it is about 10 minutes drive by car – I hurried to take a taxi and go to Chatswood railway station and go away to my hiding place.⁴

2.4 The submission from Mr Chen and his lawyer describes his concerns regarding contact with the Chinese embassy:

A DIMIA official informed the Chinese consulate that Mr Chen was present in the Department on 26 May despite Mr Chen's protestations that such action may endanger his life. This action, we submit, may reasonably be construed as an attempt to refole Mr Chen. We submit that the Department, by failing to keep Mr Chen's visit confidential, made it impossible for Mr Chen to re-avail himself of the protection of the PRC [People's Republic of China] government and in fact enhanced his chances of being persecuted. In this regard we submit that the mere act of seeking

4 *Committee Hansard*, 26 July 2005, pp. 45-46.

political asylum could be seen by the PRC as an act of treason or an act endangering state security.⁵

2.5 DFAT told the committee the consulate advised them that Mr Chen also left a letter in his apartment which stated he was not happy in his job and was not going back to China.⁶ The committee failed to question Mr Chen about the alleged letter as it had no knowledge of it at the time they spoke to Mr Chen.

DIMIA's version

2.6 According to Mr Jim O'Callaghan, the current State Director, New South Wales, Mr Chen's calls on 26 May 2005 did not come to him personally but were handled by executive assistants as he was in a meeting in another part of the building at the time of the calls. Mr Chen was told that Mr O'Callaghan was unavailable. Mr O'Callaghan stated 'at one point the executive assistants sought to confirm he (Mr Chen) was who he said he was. He provided some telephone numbers for us to confirm that with the Chinese consulate'.⁷ Mr O'Callaghan said that Mr Chen did not offer to wait when told he was unavailable but called back three or four times. When he could not meet the State Director or get past the security guards he left two identical letters addressed to two people with the security guards at the front desk.

2.7 Mr O'Callaghan indicated one of the executive assistants called the Chinese consulate mid morning. He said he did not ask for the call to be made but that it had occurred by the time he returned to his office. Mr O'Callaghan stated:

I recall coming back into the office and saying, 'There is someone from the Chinese consulate seeking to talk to me. Where is the number?' and so on, I had returned, I had undertaken to follow up, and at that stage I was advised that one of the executive assistants had made contact with the Chinese consulate. That was done on the basis that Mr Chen was advised by the executive assistant that we wanted to confirm his identity as part of the process of determining whether he should be having an appointment with the state director. Mr Chen was asked to provide some telephone numbers. He provided two telephone numbers at the Chinese consulate. At no time did Mr Chen indicate any difficulty about following up his identity with the Chinese consulate.⁸

2.8 Mr O'Callaghan emphasised that until he read Mr Chen's letter there had been 'no information about what Mr Chen's interest in calling the immigration office was'.⁹ He further stated, 'I asked what were the circumstances of the contact with the Chinese consulate and I was advised – and I did double check this on more than one occasion –

5 *Submission 7* (RACS), pp. 12-13.

6 *Committee Hansard*, 26 July 2005, p. 80.

7 *Committee Hansard*, 25 July 2001, p. 56.

8 *Committee Hansard*, 25 July 2005, p. 66.

9 *Committee Hansard*, 25 July 2005, p. 66.

that Mr Chen provided two numbers and consented to his identity being checked at the Chinese consulate'.¹⁰ Mr O'Callaghan told the committee that after he read Mr Chen's letter he asked the two executive assistants to prepare an account of what occurred that morning before he returned to the office.¹¹ This account was provided to the committee and is consistent with Mr O'Callaghan's evidence. It is attached at Appendix 4.

Identity check

2.9 During a phone call with Mr Chen, the executive assistant heard laughing in the background and became concerned that the call may not be genuine. She then asked for his number at the consulate to confirm his identity and Mr Chen said that he had no problem with them being contacted.¹²

2.10 Mr O'Callaghan further explained to the committee:

In this case Mr Chen provided numbers to the executive assistant and indicated no difficulty about that contact being made and that is why the contact was made. I think what that indicates is a responsiveness on behalf of this junior officer to Mr Chen's request to escalate his situation to see a senior officer. She was doing her job to test the appropriateness of him being able to see a senior officer.¹³

2.11 It would seem that Mr Chen and DIMIA had a different understanding of the reason for providing the number of the Chinese consulate. Mr Chen told the committee 'I just wanted to ensure that giving the consulate phone number should be enough'.¹⁴ Mr O'Callaghan, however, took the view that Mr Chen was clearly being asked to provide assistance to confirm his identity and gave no indication that he had any difficulty with his identity being checked at the consulate.¹⁵

2.12 Mr Hughes, First Assistant Secretary, Refugee, Humanitarian and International Division in DIMIA, reiterated that Mr Chen did not indicate a problem with his identity being confirmed with the consulate and indicated to the committee that Mr Chen was not known to be an applicant for political asylum or a protection visa at the time DIMIA spoke to the consulate and no information was provided to them.¹⁶

10 *Committee Hansard*, 25 July 2005, p. 67.

11 *Committee Hansard*, 25 July 2005, p. 68.

12 Statement of events on 26 May 2005 by the Executive Assistants to State Director, DIMIA, NSW Office.

13 *Committee Hansard*, 25 July 2005, p. 75.

14 *Committee Hansard*, 26 July 2005, p. 52.

15 *Committee Hansard*, 25 July 2005, p. 71.

16 *Committee Hansard*, 25 July 2005, p. 50.

2.13 DIMIA stated its position regarding contact with the consulate in a media release dated 8 June 2005. It emphasised that Mr Chen had not indicated any problem with his identity being confirmed with the consulate, DIMIA did not provide any information to the consulate and at the time of the call, DIMIA had no knowledge of the matter Mr Chen wanted to discuss.¹⁷

2.14 Mr Manne, Coordinator, Refugee and Immigration Legal Centre, told the committee that there were many other ways the official could have tested Mr Chen's identity if there were any doubts. He stated:

It seems incredible to us that it would be seen as necessary to contact Chinese officials to clarify the identity of a Chinese diplomat. It is clear that there are many ways available to the Australian government to check identity. Instead, what happened was that one of the cardinal sins in considering a request for asylum was committed. That was to contact the very authorities from whom he said he would face fundamental human rights abuse.¹⁸

Discrepancies between Mr Chen and DIMIA's accounts of 26 May

2.15 DIMIA's account of this period contradicts evidence provided by Mr Chen on the following points:

- Mr Chen claimed that he asked the executive assistant not to call the Chinese consulate. DIMIA officials stated to the committee and released a media release saying that Mr Chen did not indicate any difficulty with the Chinese consulate being contacted;
- Mr O'Callaghan's evidence and the media release indicate Mr Chen provided more than one telephone number for the Chinese consulate. According to Mr Chen, he provided only one;
- Mr O'Callaghan indicated that the phone call with the Chinese consulate was only to check identity. Mr Chen's evidence seems to indicate that they were trying to transfer the Chinese consulate to his mobile;
- importantly, DIMIA's version does not mention that Mr Chen expressed concerns for his safety. Mr Chen told the committee that he tried to persuade the executive assistant not to call as he feared for his life if the Chinese consulate was contacted;
- DIMIA asserted that the call to the consulate was made without further information being provided. Mr Chen's submission notes that a DIMIA official informed the Chinese consulate that Mr Chen was present in the department on 26 May 2005; and

17 8 June 2005 Department of Immigration and Multicultural and Indigenous Affairs Media Release titled Setting the Record Straight – Contact with the PRC Consulate accessed at http://www.immi.gov.au/media_releases/media05/d05018.htm on 5.7.05.

18 *Committee Hansard*, 26 July 2005, p. 29.

- there may also be an additional discrepancy as the DIMIA media release seems to suggest that Mr Chen offered the phone number of the Chinese consulate without being asked whereas Mr O'Callaghan told the committee that Mr Chen was asked to provide the number for the Chinese consulate.

2.16 The committee reminded Mr O'Callaghan that Mr Chen was on the public record saying he asked the consulate not to be called, that he had an unusual request and it was a serious matter. Mr O'Callaghan replied 'that is inconsistent with the advice my officers have given me'.¹⁹ He further stated 'all I can say is what I have been factually advised, and that is that Mr Chen provided phone numbers for the consulate to be contacted and gave no indication that he had any difficulty with his identity being checked at the consulate'.²⁰

2.17 When asked about DIMIA's account, Mr Chen reiterated and confirmed his account for the committee.

2.18 The committee is unable to determine which version of events regarding the contact with the Chinese embassy is correct. It is clear, however, that DIMIA did contact the Chinese consulate about Mr Chen. The committee now considers whether this action was necessary and appropriate.

Procedures for confirming identity

2.19 Mr Mark Green, Coordinator of the Refugee Advice and Casework Service (RACS) and Mr Chen's lawyer, questioned the appropriateness of the call to the Chinese consulate:

Contrary to the department's version of events as set out in the press release dated 8 June 2005, Mr Chen did indicate that he had a problem with his identity being confirmed via telephone call to the consulate...With respect, telephoning Mr Chen's Consulate was neither intelligent nor politically astute.²¹

2.20 The committee sought further explanation from DIMIA regarding why the phone call to the Chinese consulate was made. Mr Chen was offering his ID card and, according to Mr Chen, also his passport. Mr O'Callaghan stated several times that the call was made to confirm Mr Chen's identity and he indicated he had answered this question previously and had nothing to add.²²

2.21 The committee understands there were other options available to the executive assistant to confirm Mr Chen's identity such as his identity card (and possibly his passport), checking the department's database (as Mr Chen had a valid subclass 995

19 *Committee Hansard*, 25 July 2005, p. 70.

20 *Committee Hansard*, 25 July 2005, p. 71.

21 *Submission 7* (RACS), p. 13.

22 *Committee Hansard*, 25 July 2005, p. 67.

visa) or approaching DFAT.²³ The committee believes that later events would show DIMIA's contact with the Chinese consulate was unwise.

Safety concerns

2.22 The circumstances surrounding Mr Chen's visit to DIMIA were highly unusual and raised the question of whether DIMIA should have been more sensitive to his circumstances. Mr Green asserted that:

Mr Chen, who was then an accredited diplomatic representative of the People's Republic of China made a very serious attempt to communicate his fear of persecution and the reasons for that fear to the Australian government. In taking that step Mr Chen and indeed his family clearly indicated that they no longer wished to avail themselves of the protection of the People's Republic of China.²⁴

2.23 Mr Green told the committee that 'Mr Chen made several protestations on that day to department of immigration officials that, were they to take certain courses of action, his life would be in danger. These are not mere words; these are things which, when said, need to be taken very seriously'.²⁵ He further stated:

The department and the government of Australia throughout this case should have been aware, we would submit, that the mere act of seeking political asylum in Australia could always be seen by the government of the People's Republic of China as an act of treason and an act that endangered state security.²⁶

2.24 The letter from Mr Chen dated 25 May seeking political asylum clearly stated that he believed his life was at risk.²⁷ Mr Chen informed the committee that if he returned to China 'I definitely would have been persecuted. My life and my career would all be finished. Even my family would also be facing certain persecution. Freedom would be limited'.²⁸

2.25 Mr Chen was certain in retelling his account:

I said I would give the phone number, but please do not call the Chinese consulate. I just wanted to ensure that giving the consulate phone number should be enough. I persuaded her not to call the consulate, because, once she called, the consulate would definitely know that I was there to make some unusual, special meeting and that would definitely alert them.²⁹

23 *Submission 7* (RACS), p. 13.

24 *Committee Hansard*, 26 July 2005, p. 45.

25 *Committee Hansard*, 26 July 2005, p. 45.

26 *Committee Hansard*, 26 July 2005, p. 45.

27 Letter from Mr Chen to Mr O'Callaghan seeking political asylum dated 25 May 2005.

28 *Committee Hansard*, 26 July 2005, p. 57.

29 *Committee Hansard*, 26 July 2005, p. 52.

2.26 Evidence provided to the committee is consistent with Mr Chen's claims regarding likely persecution. The Federation for a Democratic China stated that as a senior diplomat, Chen Yonglin would certainly face persecution if he were sent back to China and further that the government's handling of his case has placed Mr Chen's life in danger.³⁰

2.27 The Falun Dafa Association of NSW were of the view that the contact with the Chinese officials would have been an obvious cause for consternation which could have resulted in serious harm for Mr Chen. The association further notes there was no provision of immediate physical protection for Mr Chen once his application for asylum and/or protection was made.³¹

2.28 DIMIA's account of the telephone call to the Chinese consulate does not mention that Mr Chen expressed fears for his safety.

2.29 The Committee has been presented with two conflicting accounts regarding whether Mr Chen made concerns for his safety known to DIMIA before it made contact with the Chinese consulate. Clearly, if Mr Chen expressed fear for his safety, this should have been of paramount importance to DIMIA.

2.30 The United Nations High Commissioner for Refugees notes that Australia is a State-Party to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, under which concomitant international obligations arise. They stated 'the primary consideration should be the physical safety and protection of asylum seekers and refugees as well as that of their family members or persons with whom they are associated'.³²

2.31 The contact with the Chinese consulate by a junior departmental official or others, albeit with innocent intentions, also raised concerns about the maintenance of confidentiality and protocols.

Recommendation 1

2.32 The committee recommends the department formulate a protocol requiring that people claiming to be diplomats, employees or officials of foreign governments or people who possess knowledge or understanding of the foreign government in question, be dealt with by senior officers.

Maintenance of confidentiality for applicants of territorial asylum and/or protection visas

2.33 The Federation for a Democratic China stated that the contact made with the Chinese consulate by a DIMIA official was done without regard for the regulations

30 *Submission 1* (Federation For a Democratic China), pp. 2 and 5.

31 *Submission 4* (Falun Dafa Association of NSW Inc), p .2.

32 *Submission 2* (UNHCR), p. 2.

and guidelines concerning the maintenance of confidentiality for consular officials or staff.³³ The Falun Dafa Association of NSW also noted their concerns that the contact with the Chinese consulate seemed to be a breach of confidentiality.³⁴

2.34 Questions regarding the maintenance of confidentiality have been raised in relation to human rights law, the *Migration Act 1958* and the *Privacy Act 1988*. The relevant areas are outlined below.

Human Rights Law

2.35 Without passing comment on this specific case, the United Nations High Commissioner for Refugees (UNHCR) noted the right to privacy of the individual outlined in human rights law:

International human rights law guarantees everyone the right to privacy and protects individuals from arbitrary or unlawful interference. It also requires that effective measures be taken to ensure that information concerning a person's private life does not reach the hands of third parties that might use such information for purposes incompatible with human rights law. The rights to privacy and confidentiality enshrined in these instruments clearly applies to asylum seekers and refugees. Respect for that right assists in creating the climate of trust and confidence that needs to exist between an asylum-seeker and the country of asylum.³⁵

2.36 UNHCR further advised that 'Australia has assumed responsibility to extend protection to asylum seekers and refugees through accession to the 1951 Convention and the 1967 Protocol relating to the Status of refugees (the Refugee Convention)'

2.37 Mr Manne, Coordinator, Refugee and Immigration Legal Centre, outlined his concerns regarding the maintenance of confidentiality for the committee:

Put simply, at the heart of a person being able to pursue what is a fundamental human right, as guaranteed under article 14 of the Universal Declaration of Human Rights – that is, that everyone has the right to seek and enjoy in other countries asylum from persecution – is protection from those they are seeking asylum from. In this area one of the cardinal sins, if I could say this, in relation to dealing with someone who is seeking asylum is to go to their authorities in any way or manner whatsoever. That that not occur is one of the fundamental safeguards afforded to anyone who wants to put a case for their need to be protected.³⁶

2.38 UNHCR has also advised the following principles should inform the application of the *Migration Act 1958*, its regulations and guidelines concerning the

33 *Submission 1*(Federation for a Democratic China), p. 5.

34 *Submission 4* (Falun Dafa Association of NSW), p. 2.

35 *Submission 2* (UNHCR), p. 2.

36 *Committee Hansard*, 26 July 2005, pp. 28-29.

maintenance of confidentiality, for any consular officials or staff who apply to DIMIA, DFAT, or their respective Ministers for territorial asylum and/or protection visas:

Confidentiality in the context of Refugee Status of Determination

The consent of the asylum seeker should be sought before individual case information about his or her claim for refugee status is shared with other parties. In addition, individual case information about asylum seekers should be kept strictly confidential because of the potential risk to the asylum seeker and others. Confidentiality in asylum procedures is particularly important because of the vulnerable situation in which refugees and asylum-seekers find themselves. As discussed during the Global Consultations in International Protection, 'the asylum procedure should at all stages respect the confidentiality of all aspects of an asylum claim, including the fact that the asylum-seeker has made such a request' and highlighted that 'no information on the asylum application should be shared with the country of origin'. State practice also shows that the principle of confidentiality is paramount in asylum procedures.

The decision-making authority in the country of asylum should not share any individual case information about an asylum seeker with the authorities of the country of origin...A decision-making authority should not confirm to the authorities or other entities in the country of origin whether or not a particular individual is or has been in contact with the decision-making authority, regardless of whether the person concerned is an asylum-seeker, a refugee, a resettled refugee, or whether she or he has been denied refugee status or excluded.

The decision-making authority in the country of asylum should not communicate with entities within the country of origin, whether they are governmental or non-governmental, in order to verify or authenticate declarations or documents provided by an asylum seeker.³⁷

The Migration Act 1958

2.39 DIMIA, DFAT and the Minister for Foreign Affairs were also criticised in the press with suggestions that the *Migration Act 1958* may have been breached by providing compromising information to the Chinese government about Mr Chen Yonglin's bid for political asylum.³⁸

2.40 Part 4A of the Migration Act (obligations Relating to Identifying Information) contains the following provisions regarding the prohibitions on the authorisation to disclose and the disclosure of identifying information to foreign countries which are central to determining whether a breach occurred.

2.41 Section 336 E, Disclosing identifying information, states that:

37 *Submission 2* (UNHCR), pp. 1-4.

38 *Sydney Morning Herald*, 11 June 2005, p. 6.

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- (1) A person commits an offence if:
 - (a) the person's conduct causes disclosure of identifying information; and
 - (b) the disclosure is not a permitted disclosure...

2.42 Section 336 F (3), Authorising disclosure of identifying information to foreign countries etc, states:

- (3) A disclosure is taken not to be authorised under this section if:
 - (a) the person to whom the identifying information relates is:
 - (i) an applicant for a protection visa; or
 - (ii) an offshore entry person who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; and
 - (b) the disclosure is to a foreign country in respect of which the application or claim is made, or a body of such a country.

2.43 Section 336 F also states:

However, if:

- (a) the person to whom the identifying information relates has requested or agreed to return to the foreign country in respect of which the application or claim is made; or
- (b) the person is an applicant for a protection visa, and the application has been refused and finally determined...

2.44 Regarding the sections of the Migration Act above, Mr Manne told the committee there is specific legislation which on its face precludes disclosure to a foreign country, including the home country of the applicant if they are an applicant for protection. 'It is only in circumstances where that matter has been finally determined – if you like, the claim for protection has been finally determined – that the nondisclosure requirement ceases to exist or does not apply.' He further stated '...the disclosure of identifying information in relation to the applicant Mr Chen, by any agency – whether by DFAT or whether by any particular public official, including in the department of immigration – could well have potentially constituted an offence under the acts, as referred to'.³⁹

2.45 The definition of personal identifiers in the *Migration Act 1958*, Section 5A, does not specifically include names but it does include 'any other identifier prescribed

39 *Committee Hansard*, 26 July 2005, p. 31.

in the regulations'.⁴⁰ In all of the circumstances of the facts before the committee, it is unable to conclude that there had been any breach of the Migration Act as at 26 May 2005 by either the DIMIA executive assistants in Sydney or any DIMIA or DFAT officers in Sydney or Canberra.

2.46 Even so, some members of the committee are concerned that a strict interpretation of this provision in the Act fails to take account of the circumstances of Mr Chen's case. A common sense approach dictates that disclosing the name of an individual seeking to remain anonymous because they fear that their life and that of their family may be in jeopardy is a serious breach of that individuals rights. Such rights should be protected under the law.

2.47 The committee recommends that the government review the provisions of the Migration Act to ensure that the rights of people in a situation similar to Mr Chen are afforded adequate protection. The law should, in such situations, prohibit the disclosure of names or any other information that would identify them.

Privacy Act 1988.

2.48 International obligations regarding an individual's right to privacy are implemented in domestic laws through the *Privacy Act 1988*. The protection of personal information is set out in the Information Privacy Principles (IPPs) which commonwealth departments must adhere to. Regarding the *Privacy Act 1988*, Ms Sheedy, Assistant Secretary, Information Law Branch, Attorney-General's Department, informed the committee that:

...the Privacy Act sets up a regime for protection of personal information. In relation to the public sector, there are a set of principles called the Information Privacy Principles, which agencies, such as DIMIA are bound by. Those IPPs set out a regime for the collection, storage, use and disclosure of personal information. The overarching principle is: only collect for a lawful purpose and only collect what is necessary for that purpose. In relation to disclosure: only disclosure for the purpose for which the information was collected. Then there are a series of exceptions to that disclosure rule, including where the individual has consented, where the information is necessarily disclosed to protect life and safety or for law enforcement purposes.⁴¹

40 According to the Migration Act 1958, 5A personal identifier means any of the following (including any of the following in digital form): (a) fingerprints or handprints of a person (including those taken using paper and ink or digital livescanning technologies); (b) a measurement of a person's height and weight; (c) a photograph or other image of a person's face and shoulders; (d) an audio or a video recording of a person (other than a video recording under section 261AJ); (e) an iris scan; (f) a person's signature; (g) any other identifier prescribed by the regulation, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*, accessed at <http://www.comlaw.gov.au> on 2.8.05.

41 *Committee Hansard*, 26 July 2005, p. 17.

2.49 Information Privacy Principles (IPP) 10 and 11 may be relevant in relation to the maintenance of confidentiality for any consular officials or staff who are applicants for territorial asylum and/or protection visas by DIMIA, DFAT and their respective ministers.⁴²

2.50 IPP 10 describes limits on the use of personal information. IPP 11 states that personal information cannot be disclosed to another agency except in certain circumstances, for example under law.

2.51 Ms Sheedy further explained to the committee that the provision in the *Migration Act 1958* (336E) is an offence provision but 'The IPP's under the Privacy Act give rise to a complaint mechanisms – you complain to the Privacy Commissioner about a breach of privacy'.⁴³

2.52 Mr Green told the committee that 'the more important issue is whether there has been a breach of the refugees convention, the Universal Declaration of Human Rights – instruments which clearly state that asylum seekers, people who are afraid of being persecuted, should not be refouled and should not be identified to the government of the country which they fear persecution from. That principle, ethically and morally and as a matter of fundamental human rights, is the principle at stake'.⁴⁴

2.53 In Mr Chen's case, if there had been a breach of the refugees convention by DIMIA, such a breach was clearly unintended. However, DIMIA's action in contacting the consulate was still unwise. This was a highly unusual set of circumstances, as DIMIA acknowledges, and the committee believes that DIMIA must take measures to ensure that in future, greater care will be taken in dealing with people claiming to be consular staff seeking, in unusual circumstances, to meet senior DIMIA officials.

Action taken on the morning of 26 May after Mr Chen delivered his request for political asylum

2.54 Once DIMIA became aware that Mr Chen was seeking political asylum, the government and Mr Chen became engaged in a formal process arising from the government's obligations under the *Migration Act 1958*.

2.55 Mr O'Callaghan clarified for the committee that he became aware of Mr Chen's approach somewhere between 10:30am and 11:00am on 26 May. He said that while in a meeting he received a message that someone was seeking to talk to him but he did not know about what saying 'I had no information about that because our officers had no information and Mr Chen provided no information'.⁴⁵ Mr O'Callaghan

42 *Submission 7* (RACS), pp. 16-17.

43 *Committee Hansard*, 26 July 2005, p. 19.

44 *Committee Hansard*, 26 July 2005, p. 61.

45 *Committee Hansard*, 25 July 2005, p. 61.

said the message he received indicated that the person wishing to speak with him claimed to be an official of the Chinese consulate. He said his response to the executive assistant providing the message to him in the meeting was that 'I would respond when I got back to my office'.⁴⁶

2.56 Mr O'Callaghan explained why he did not respond immediately to a matter which seemed to be of sufficient importance to his executive assistant that she chose to interrupt his meeting:

It was suggested that someone claiming to be an official of the Chinese consulate was seeking to speak to me. Many people seek to speak to the state director of the immigration department. We have between 1,000 and 1,500 people come into that office alone each day. We have 80,000 calls come into the contact centre in the office each month. We have many calls come through to the executives' numbers on a daily basis, where people are seeking to speak to the state director or the deputy state directors. As you know, Immigration is an agency dealing with people. There are a lot of people in New South Wales and beyond who seek to speak to me.⁴⁷

2.57 Mr O'Callaghan went on to explain that on occasions his executive assistant does interrupt meetings to bring him messages that people want to speak to him and on that occasion he expected to be back in the office in 30-40 minutes 'and there was no reason to think that it could not wait until then'.⁴⁸

2.58 Mr O'Callaghan told the committee that the letters left at the security desk by Mr Chen were taken by the security guards to the mail opening area where they were opened and brought to his office.⁴⁹ He clarified that he returned to his office about 11:20am and the letter was delivered around 11:30am.⁵⁰

2.59 These identical letters were Mr Chen's request for political asylum. One was addressed to the former state director and this had been crossed out and Mr O'Callaghan's name written in handwriting and the other was addressed to Mr Robert Illingworth, Assistant Secretary of the Onshore Protection Branch in the Refugee, Humanitarian and International Division, DIMIA.⁵¹

2.60 Mr O'Callaghan told the committee that upon reading the letter his first reaction was surprise and then he called the business manager of the onshore protection area, Ms Louise Lindsay, to his office and asked her to contact Mr Chen. He then put a phone call through to Canberra to speak to any of the senior executive

46 *Committee Hansard*, 25 July 2005, p. 62.

47 *Committee Hansard*, 25 July 2005, p. 62.

48 *Committee Hansard*, 25 July 2005, p. 63.

49 *Committee Hansard*, 25 July 2005, p. 59.

50 *Committee Hansard*, 25 July 2005, p. 63.

51 *Committee Hansard*, 25 July 2005, p. 59.

officers in the Refugee, Humanitarian and International Branch but all those officers were before a Senate estimates hearing and were unavailable. He then spoke to a director in that division, Ms Kathleen Dunham.⁵²

Contact with senior executives in Canberra and DFAT

2.61 Mr O'Callaghan told the committee that he understood that Ms Dunham sought to contact senior officers who were in Parliament House for Senate estimates hearings. She also spoke with some other senior officers in the Canberra office and contact was made with DFAT.⁵³ Mr Illingworth, DIMIA, clarified that Mr Chen's letter was faxed from the NSW office to Ms Dunham and she made a number of calls within the department and calls to contact him at Senate estimates hearings which she eventually did. According to Mr Illingworth, 'The upshot was that we received the letter around noon, DFAT was called, they were briefed on the content of the letter and the issue of territorial asylum visas orally over the phone and the letter was faxed to DFAT at 1.06pm'.⁵⁴ Mr Hughes, DIMIA, said that he was not aware of DIMIA contacting the office of the Minister for Foreign Affairs.⁵⁵

2.62 Mr Illingworth told the committee that DIMIA's response was to see this as a request for political asylum and to deliver it to the appropriate portfolio to be actioned. He added that at a practical level they continued to be in contact with the NSW office regarding the efforts to contact Mr Chen. Mr Illingworth said that there was communication during the afternoon between officers of the division in Canberra and DFAT but 'there was no response in terms of the outcome of the request put in the letter'.⁵⁶

2.63 DFAT officers told the committee that DFAT first became aware of this matter:

...when it received from DIMIA a copy of Mr Chen's letter addressed to DIMIA New South Wales office seeking political asylum. We received this letter by fax from DIMIA on the afternoon of Thursday 26 May. This letter was brought to the attention of Mr Downer's office later that evening...about 7pm.⁵⁷

2.64 Mr O'Callaghan said that Ms Louise Lindsay tried to contact Mr Chen around 11:30am on 26 May but his mobile phone was switched off. She was able to contact Mr Chen mid afternoon on 26 May and they had a discussion regarding setting up a meeting for 27 May.

52 *Committee Hansard*, 25 July 2005, p. 65.

53 *Committee Hansard*, 25 July 2005, p. 73.

54 *Committee Hansard*, 25 July 2005, p. 73.

55 *Committee Hansard*, 25 July 2005, p. 79.

56 *Committee Hansard*, 25 July 2005, p. 74.

57 *Committee Hansard*, 26 July 2005, p. 76.

2.65 Ms Lindsay explained:

I attempted to contact him at about 11:30am or 25 past 11 as I had been requested to by the state director. His mobile was turned off. I got the message about the phone being out of range or switched off. I rang back later that afternoon, just after 3pm. I spoke to him and invited him to come in to our office for a chat about his visa options. We had been conversing with Canberra, who in turn had been conversing with DFAT as they have explained. Following the claim for territorial asylum, we wanted to inform Mr Chen of the kinds of options that would be open to him if he did indeed want to remain in Australia.⁵⁸

2.66 Ms Lindsay told the committee that they organised for Mr Chen to come to the Parramatta office on 27 May and she arranged for one of the other business managers to attend as they had a lot more information and knowledge of the visa classes.⁵⁹

Conclusion

2.67 This chapter has examined the events which took place on 26 May 2005 from the time Mr Chen called to make an appointment to see the state director until the appointment was made for a face to face meeting on 27 May 2005.

2.68 The committee examined in detail all accounts regarding the telephone contact made by DIMIA with the Chinese consulate on 26 May to verify Mr Chen's identity. The committee is unable to reconcile the conflicting accounts regarding the phone call to the Chinese consulate but it is the committee's view that the situation could have been handled better.

2.69 From the evidence provided by Mr Chen, he was clearly anxious to see the state director, calling several times in a short timeframe. Although not providing a reason for wanting to speak to Mr O'Callaghan, he stated the matter was urgent, important and unusual. Mr Chen's request seemed sufficiently urgent to the executive assistant that she had Mr O'Callaghan's meeting interrupted to pass on Mr Chen's message.

2.70 With the benefit of hindsight, it may appear that Mr O'Callaghan's failure to respond to the urgent note was inappropriate – having been informed that a Chinese diplomat was in the foyer seeking urgent attention, Mr O'Callaghan should have assumed personal and immediate charge of the situation.

2.71 Mr Chen said he offered his ID card and passport as proof of his identity and showed his ID card to the security guards at the front desk. At some point DIMIA took the step of asking for a number for the Chinese consulate to confirm Mr Chen's identity with his employer. It appears Mr Chen and DIMIA had a different

58 *Committee Hansard*, 25 July 2005, p. 85.

59 *Committee Hansard*, 25 July 2005, p. 85.

understanding of how the number of the Chinese consulate would be used to confirm his identity.

2.72 The contact with the Chinese consulate, was, in the committee's view an error in judgement. Clearly, there were more appropriate avenues available to check Mr Chen's identity and these included his ID card, DIMIA's own database and contact with DFAT.

2.73 The committee is concerned that DIMIA's call to the Chinese consulate displayed a lack of awareness of the sensitivities required in dealing with a foreign diplomat seeking an urgent, private meeting with a senior DIMIA officer.

2.74 On the basis of evidence presented to it, the committee is not in a position to determine whether obligations regarding confidentiality were breached when DIMIA contacted the Chinese consulate to confirm Mr Chen's identity. It believes, however, that the incident is a timely reminder for DIMIA to ensure its officers are aware of their confidentiality obligations.

Recommendation 2

2.75 The committee recommends that DIMIA take immediate steps to ensure that all officers are made aware of their confidentiality obligations under relevant legislation and conventions. Furthermore, that they are made aware of the need to exercise care when dealing with a foreign diplomat and that such important matters are dealt with expeditiously by a senior officer.

