

# HOW ORGANISATIONAL CULTURE WITHIN AUSTRALIA'S DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION AFFECTS COMPLIANCE WITH THE REFUGEE CONVENTION - A METHODOLOGICAL CONTRIBUTION

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**Abstract:** Australia is a party to Refugee Convention (RC) and considers itself a good international citizen, that supports and protects asylum seekers and refugees and respects human rights. However, treatment to asylum seekers and refugees does not comply with obligations under the RC and other relevant treaties. This study critically evaluates the current asylum seeker and refugee decision-making process of the Australia's Department of Immigration and Border Protection (DIBP) paying attention to its organisational culture (OC), the researcher argues that if Australia claims it supports and protects asylum seekers and refugees and respects human rights, Australia should do so consistently with international human rights standards. He uses a qualitative approach for the research and the choices of methods include his own experience in the migration industry as a Migration Lawyer. Using this method, he expects to make a methodological contribution to the field.

**Key words:** Administrative Law, Human Rights Law, Migration Law, Organisational Culture.

**Introduction:** Australia by signing the Universal Declaration of Human Rights (UDHR) [1], voluntarily ratifying all key international human rights treaties including *Refugee Convention* (RC) and its *Protocol* [2] shows the world that Australia is a good international citizen that respects human rights and does not discriminate asylum seekers, refugees and other migrants on the basis of their ethnic origin, gender or colour [3]. However, recent Australian government policies have attempted to severely restrict asylum seeker and refugee rights [4], violating their basic human rights, despite the international and national criticisms [5]. This approach leads to a serious risk of refoulement, returning genuine refugees to face persecution and threats to their life and liberty [6]. Evidence have emerged that the recent Australian regimes have prioritized its domestic politics over Australia's international legal obligations to protect the rights of asylum seekers and refugees [7]. In the past, people have attempted to investigate this issue, however, based on their subjective judgements/political reasons without proper empirical evidence. The current study focuses attention on the impact of the Australia's Department of Immigration and Border Protection (DIBP)'s organisational culture (OC) and explores how it affects to procedural fairness (PF) in decision-making relating to asylum seeker and refugee applicants. In doing so, the researcher expects to make a methodological contribution in the field by adopting a qualitative ethnographic approach through his own migration legal experience, which has not been explored in a socio-legal study in the Australian migration industry. The focus of this paper is to highlight his methodology by being an 'insider' in the researching field.

**Selection of the Topic:** In the literature, we find that there are two broader viewpoints on Asylum seeker and refugee issue in Australia [8]. The first supports the Australian government view; asylum seekers should be restricted in entering into Australia [9] and the second takes a humanitarian approach opposing the government view [10]. However, there is a great deal of confusion and misinformation in the public debate and the issue is complicated [11]. Furthermore, Australian domestic laws in relation to migration matters are also highly complicated and ambiguous resulting in difficulties in interpretation by those who are involved in this sector; visa-officials, lawyers, judges, academics as well as journalists

[12]. However, based on opinion poll data, it can be noticed that asylum seeker arrivals have been an issue of concern to the Australian public [13]. Furthermore, opposition to these arrivals had increased steadily over the last decade [14]. In a situation like this, OC of the DIBP officials are significant. Do they represent the same opinion as the public opinion [15] and/ or are they just implementing the laws which have been enacted out of that opinion? Arguably, the DIBP' officials may act according to the cultural values they are surrounded with. If they represent the opposition view to asylum seeker arrivals, then their decisions may have an adverse effect in determining refugee and asylum seeker applications. This factor can be further illustrated by looking at relevant applicable laws in Australia.

**Applicable National and International Laws:** People arrive in Australia from all over the world, for a variety of reasons and using a variety of methods [16]. These arrivals are mainly governed and regulated by the *Migration Act 1958 (Cth)* ("*Migration Act*") and its amendments [17] through the DIBP [18]. Refugee and asylum seeker laws come under the purview of the *Migration Act* and the *Migration Regulations 1994 (Cth)* ("*The Regulations*") [19]. In deciding asylum claims, the DIBP officials are required to act in accordance with the criteria set out in Section 36 of the *Migration Act 1958* [20], Part 866 of Schedule 2 to the *Migration Regulation 1994* [21], and international human rights obligations [22] arise under the Article 1 of the RC [23]. Furthermore, under international protection obligations, Australia also required to employ appropriate legislative, administrative and judicial mechanisms to ensure a fair and effective asylum process [24]. As noted earlier and pointed-out by a number of international and national organizations such as: The United Nations High Commissioner for Refugees (UNHCR) [25], Australian Human Rights Commission(AHRC) [26], Amnesty International (AI) [27], the Australian DIBP's many past decisions are highly detrimental to asylum seekers and refugees [28]. These asylum procedures of Australia are arguably threatening the international laws in determining asylum claims [29], and the DIBP officials are more likely to unduly prefer immigration control over protection [30]. One of the main reasons seems to be the OC of the decision-making authorities [31]. This is a big question that needs to be deeply investigated through empirical evidence. Therefore, an investigation of DIBP culture has an important role to play in this context. It seems, it is important to look at how much DIBP cultures affect these decisions and how much of the structure of the legislation affects these decisions. At this point, it is also important to look at the degree of discretion of the DIBP officers. Are they independently using such discretion in deciding asylum and refugee cases is a question to be answered? In answering this question, to what extent are DIBP officers simply applying the legislation and to what extent are they using their discretion must be looked at deeply. Presumably, the more discretion they have, the more that culture can influence the outcome of the decisions. Looking at the past DIBP cultural pattern, it seems to be in favour of the government's view that asylum seekers are to be treated harshly rather than looking at the humanitarian angle; however, there is not much empirical evidence available on the DIBP culture that may be affecting the violation of the RC.

**Research Design and Methodology:** Selecting a suitable methodology which is defensible, logistically feasible and affordable on a topic like this is always a serious challenge. The researcher accepted the challenge and was trying to identify a suitable methodology for his study for some time and was wondering which methodology to be used for his study. The researcher wanted to understand the experiences of refugees and the decision-making process of the DIBP and he realized that qualitative research would allow him to make sense of, or interpret the phenomena. He then began the search for a qualitative method that would support his research topic.

In the following sections, the researcher discusses his research design and methodology for the study. He primarily argues that if Australia claims that it supports and protects asylum seekers and refugees and respects human rights, Australia should do so consistently with international human rights standards. However, it is pointed-out in the literature that the DIBP has issues within its OC and the researcher suggests that these may impact upon its PF and visa decision-making of the DIBP. The researcher therefore seeks to gain insight into the role of DIBP visa officials as front-line decision-makers and their perceptions, focusing attention to DIBP's OC in affording PF to asylum seeker and refugee applicants.

**Main Research Question:** How OC within Australia's DIBP affects compliance with the RC.

**Sub-Research Questions:**

1. What is the DIBP's OC pertaining to its decision-making process?
2. How does its OC influence its adherence to PF of DIBP migration decisions on asylum seekers?
3. How do DIBP decisions relate to, support and/or hinder the implementation of the RC?

**What is the Organizational Culture?**

OC is a powerful force within an organization, however, the term has many different meanings, and it varies from people to people, place to place and from time to time [32]. As such, there is no universally accepted meaning for the term; although, it is a central aspect for the governance of institutions and their decision-making processes [33]. However, it is commonly referred to as a system of shared assumptions, values, and beliefs that show employees what is appropriate and inappropriate behavior [34], the organisation's expectations, experiences, philosophy, interactions with the outside world and future expectations etc. [35] In that sense, organisations have their own personalities, known as organisational cultures [36].

Measuring OC is a difficult task [37], nonetheless, previous researchers have attempted to measure OC by using various methods. Schein (2004), suggests that culture can be observed on three different levels: tacit assumptions of the group (their widely held, ingrained subconscious views), espoused values (preferences for outcomes and means of achieving them), day-to-day behavior [38]. Martins and Terblanche (2003) suggest that culture can be observed in those aspects of an organisation which culture can influence: mission and vision, external environment, means to achieve objectives, image of the organization, management processes, employee needs and objectives, interpersonal relationships and leadership [39].

DIBP's OC can be measured by finding out what people within the DIBP say, do, think or feel. The researcher was aware that he has firsthand working experience with refugee/asylum seeker related matters; however, he was not sure whether he can use his own personal experience in the field on a deeper level of analysis for his study. After considerable readings, he realized that the appropriate way to understand the DIBP visa decision-making process of asylum seekers and refugees, is to revisit his own working experience on refugee matters through internal self-search, exploration, and discovery. Therefore, in measuring OC the researcher will utilize an ethnographic analysis that comes from his own experience for past 5 years in actively participating and handling refugee/asylum seeker related matters within the Australian federal jurisdiction and the Sri Lankan jurisdiction that allows him to focus and evaluate the organizational structure of the DIBP and the forms of power that exist in the organization which are the focal point of the research.

**How does PF relate to RC?**

The other element to be measured in this study is PF. Simply, the meaning of PF is to ensure that appropriate procedures are adopted in administrative decision making [40]. It is linked to the decision-making process in establishing whether Australia follows RC requirements for asylum seeker/refugee applicants. This component of the research design will be discussed in the following section. Australia's refugee related protection obligations arise under the 1951 *Refugee Convention* and the 1967 *Protocol* and define those to whom international protection is to be conferred and establish key principles such as non-penalisation of entry and non-refoulement [41]. It provides a basic definition of a refugee and spells out the legal status of refugees, including their rights and obligations.

**Non-Refoulement:** Article 33 is one of the key provisions of *the Convention* and it stipulates that a refugee should not be returned to a country where he or she fears persecution (non-refoulement) [42]. However, a refugee may not be entitled for this protection if there are reasonable grounds regarding danger to the security of the country where he or she has been convicted in a final judgment of a particularly serious crime which constitutes a danger to that country [43].

Protecting refugees is the primary responsibility of States and those countries who have signed the 1951 Convention are obliged to protect refugees on their territory and treat them according to internationally recognized standards [44].

To locate the research question, the researcher specifies the relevant international human rights norms he has drawn on. The principle of non-refoulement asserts that a refugee should not be returned to a country where they face serious threats to their life or freedom is now considered as a rule of customary international law [45]. These rights include:

- The right not to be forcibly returned, or refouled, to a country in which the refugee has reason to fear persecution (Article 33)
- The right not to be expelled, except under certain strictly defined conditions (Article 32)
- Exemption from penalties for illegal entry into the territory of a contracting State (Article 31)
- The right to work (Article 17)
- The right to housing (Article 21)
- The right to education (Article 22)
- The right to public relief and assistance (Article 23)
- The right to freedom of religion and free access to courts (Articles 4 and 16)
- Freedom of movement within the territory (Article 26)
- The right to be issued identity and travel documents (Articles 27 and 28)

However, it can be noticed that the *Migration Act 1958* (Cth) only partially implements these obligations and applies to the protection obligations determination (POD) process as the *Convention* and *Protocol* do not direct States on the decision-making process that they should establish [46]. As such, the United Nations High Commissioner for Refugees (UNHCR), in September 1979, issued a Handbook on the criteria for determining refugee status guiding States in implementing their obligations [47]. This document directs states how to provide fair and effective asylum procedures and focuses on decision-makers, who play a major role in deciding whether to grant protection or not. The UNHCR highlighted the following fundamental features of PF:

1. the right to be informed about the procedure
2. the right to a reasonable opportunity to prepare their case
3. the right to be heard
4. the right to know the case against the Asylum seeker, an opportunity to provide an answer, and the answer by the Asylum seeker to be considered before a decision is made
5. the right to an unbiased decision-maker
6. the right to have the decision made by a person who has heard the evidence.

Furthermore, the courts have also developed criteria to use as guidelines in determining the scope and content of procedural fairness which include;

- giving reasonable notice of a hearing and what is in issue
- giving parties adequate time to prepare
- deciding what form of hearing to give (oral and/or written)
- disclosing material obtained from another party or source
- and giving parties a reasonable opportunity to answer the case against them [48].

Generally, PF is about ensuring that the decision-making is fair and reasonable, and it has three rules to observe:

- the right to be heard (“the hearing rule”),
- no bias in our decision-making (“the bias rule”), and
- evidence to support our decision (“the no evidence rule”) [49].

**Constitutional Basis for Australia’s Migration Law:** The Australian Constitution grants Parliament the power to make laws under s 51 [50], however, that power is only restricted to the Commonwealth Parliament by s 52 of the Constitution. As immigration is not amongst those powers, there is a theoretical possibility for States to concurrently enact their own immigration legislations. However, any

State or Territory legislature that attempts to pass immigration laws that are inconsistent with the *Migration Act 1958* would likely be found invalid under s 109 of the *Constitution* [51], which provides that if 'a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. Therefore, immigration can be regarded as a solely federal area of law.

Section 51 of the *Constitution* provides three powers that give the Parliament power over matters relating to immigration. The section relevantly includes the powers as follows:

The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...

(xix) Naturalization and aliens ...

(xxvii) Immigration and emigration

(xxviii) The influx of criminals

Immigration laws passed by the Australian Parliament were based on s 51(xxvii) from 1901 to 1984, and s 51(xix) thereafter. Paragraph 51(xxviii) has been relied on very rarely, and more frequently in extradition matters than immigration cases.

**The High Court of Australia:** The High Court in the case of *M70/2011 and M106/2011 v Minister for Immigration and Citizenship* [52] at 135 stated that the *Migration Act* contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the *Refugees Convention* and the *Refugees Protocol*. At 136, the High Court stated that *The Migration Act* must therefore be understood as empowering and enabling the Minister and the Department to respond to Australia's protection obligations, including its non-refoulement obligation under the *Refugees Convention*.

The High Court said, "Australia's primary obligation under the *Refugees Convention* is not to *refoule* (return) a refugee, either directly or indirectly, to a country where they have a well-founded fear of persecution for a Convention ground." Australia's protection obligations extend to refugees who have entered Australia's territorial seas. Consideration of the exercise of the power must be procedurally fair to the persons in respect of whom that consideration is being given. And likewise, the consideration must proceed by reference to correct legal principles, correctly applied.

This construction of s 198A(3)(a) most closely accords with the fulfilment of Australia's Convention obligations [53].

### How the Researcher Measures PF?

The researcher has provided an overview and explanation of the international legal basis for refugee and asylum seeker protection in his review of literature. He also explained, how Australian Migrations law linked to this process. Now, he is setting the research design and methodology to explore the surrounding contexts for the establishment and implementation of these protection schemes in Australia. Researchers have measured PF in empirical studies [54]. Courts generally consider legislative prescription of procedure (what role) in determining PF [55]. The legislature can sometimes accept greater responsibility for ensuring that appropriate procedures are adopted, however, when conferring powers and/or imposing duties, decision-makers are given discretion [56]. These discretions can affect PF as indicated in the literature review. As his research analysis will be focused on how DIBP's OC influence on affording PF to asylum seekers and refugees in DIBP decision-making processes based on Australian obligations at international law, and the extent, he needs to uncover empirical evidence on those aspects. For that he will use the following methods in his research.

It is apparent that visa officials are the best people to question about OC and PF as they are the closest people at work on these aspects. Therefore, in addition to his main ethnographic research method, he will use other methods; interviews and documentary analysis. Also, he will use data via analysing few court cases to see how Australian courts looked at OC and PF in their decision. It can give a picture to uncover the relevant component of the research question.



**Methodological Contribution:** Using the method of the researcher's experience combined with other methods, he expects to make a methodological contribution to the field. The methodologies adopted in the existing organisational culture studies have been largely qualitative or quantitative with little understanding of the ways in which cultural processes are fully played out in organisational settings [57]. By adopting a qualitative ethnographic approach through the researcher's own migration experience, this study captures the complexities involved in OC's influence in migration decision-making and the links with PF and RC. These aspects have not been explored in a socio-legal study in the past in Australian Migration industry. The researcher in this study expects to explore and analyse the links between DIBP's OC, visa decision-making process, PF and compliance with RC requirements in-depth and to uncover their relationship. The researcher will reflect on the research process to explore the benefits and challenges derived by being an 'insider' in researching vulnerable groups.

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