

DAMNED WHORES AND THE BORDER POLICE:* SEX WORKERS AND REFUGEE STATUS IN AUSTRALIA

KRISTEN WALKER†

[This article addresses the question whether sex workers who face persecution because they are sex workers may be able to claim refugee status in Australia on the basis that they fear persecution as members of a particular social group. The author argues that they ought to be able to make such a claim. This is based either on the work in sex work, on the ground of the current Australian authorities on occupation as a form of particular social group under the Convention Relating to the Status of Refugees, or the sex in sex work, by analogy with lesbian and gay claims to refugee status. The author concludes, however, that such claims are unlikely to be successful until sex workers' rights are better recognised and protected under international and domestic law.]

CONTENTS

I	Introduction	938
II	Some Notes on Sex Work	940
	A A Definition of Sex Work	940
	B The Forced versus Chosen Dichotomy	941
III	A Case Study: Sex Work in the Dominican Republic	942
	A Legal Regulation of Prostitution	943
IV	Refugee Law in Australia: The Legal Framework	945
	A The Meaning of Particular Social Group in Australian Law	946
	B Occupation as the Basis for a Particular Social Group Claim	949
V	'Prostitutes Almost Anywhere': The Work in Sex Work	951
VI	The Sex in Sex Work	953
	A Gay Men and Lesbians as a 'Particular Social Group' under the <i>Refugees Convention</i>	953
	B Sex Work	956
VII	Persecution	957
VIII	Arrest and Prosecution under the Criminal Law	959
	A Arrest and Prosecution under a Law Not Specifically Directed at Prostitution	959
	B Arrest and Prosecution under Laws Criminalising Prostitution	961
	C Violence and Extortion by Police and Clients	964
	D Male Prostitutes	965
IX	How Might Sex Workers Achieve Recognition as Refugees?	965

Prostitutes are systematically robbed of liberty, security, fair administration of justice, respect for private and family life, freedom of expression and freedom of association. In addition, they suffer from inhuman and degrading treatment and punishment and from discrimination in employment and housing ... The *World Charter for Prostitutes' Rights* ... demands that prostitution be redefined

* Cf Anne Summers, *Damned Whores and God's Police: The Colonization of Women in Australia* (1975).

† BSc, LLB (Hons), LLM (Melb), LLM (Columbia); Associate Professor, Faculty of Law, The University of Melbourne.

as legitimate work and that prostitutes be redefined as legitimate citizens. Any other stance functions to deny human status to a class of women (and to men who sexually service other men).¹

I INTRODUCTION

In 1985 the International Committee for Prostitutes' Rights published the *World Charter for Prostitutes' Rights* ('Prostitutes' Charter').² The *Prostitutes' Charter's* primary focus is the decriminalisation of adult prostitution and the extension of workers' rights to sex workers. In addition, however, the *Prostitutes' Charter* also calls on states to: 'Grant asylum to anyone denied human rights on the basis of a "crime of status", be it prostitution or homosexuality.'³

The *Prostitutes' Charter's* call for states to grant asylum to those persecuted because of prostitution or homosexuality was made over 20 years ago, and since then refugee law in Australia and elsewhere has developed so as to recognise the legitimacy of refugee claims by lesbians and gay men, on the basis that lesbians and gay men may constitute a 'particular social group' under the *Convention Relating to the Status of Refugees* ('Refugees Convention').⁴ However, recognition of sex workers as refugees has not occurred. This article explores the question of whether such recognition might be possible under Australian refugee law.

Refugee claims based on, or connected with, prostitution arise in several different ways. In some cases, women claim refugee status because they have departed from expected standards of female behaviour in their home country and

¹ Draft Statements from the Second World Whores' Congress, 1986: International Committee for Prostitutes' Rights, 'World Charter and World Whores' Congress Statements' in Frederique Delacoste and Priscilla Alexander (eds), *Sex Work: Writings by Women in the Sex Industry* (2nd ed, 1998) 305, 316–17.

² International Committee for Prostitutes' Rights, *Prostitutes' Charter* (1985).

³ *Ibid.*

⁴ Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954). The fact that lesbians and gay men have been recognised as constituting a particular social group has been discussed extensively elsewhere and will not be fully explored here: see, eg, Kristen Walker, 'Sexuality and Refugee Status in Australia' (2000) 12 *International Journal of Refugee Law* 175; Kristen Walker, 'The Importance of Being Out: Sexuality and Refugee Status' (1996) 18 *Sydney Law Review* 568; Nicholas Bamforth, 'Protected Social Groups, the *Refugee Convention* and Judicial Review: The *Vraciu* Case' [1995] *Public Law* 382; Brian F Henes, 'The Origin and Consequences of Recognizing Homosexuals as a "Particular Social Group" for Refugee Purposes' (1994) 8 *Temple International and Comparative Law Journal* 377; Suzanne Goldberg, 'Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men' (1993) 26 *Cornell International Law Journal* 605; Stuart Grider, 'Sexual Orientation as Grounds for Asylum in the United States' (1994) 35 *Harvard International Law Journal* 213; Brian J McGoldrick, 'United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility?' (1994) 8 *Georgetown Immigration Law Journal* 201; Jenni Millbank, 'Fear of Persecution or Just a Queer Feeling?: Refugee Status and Sexual Orientation in Australia' (1995) 20 *Alternative Law Journal* 261; Jin S Park, 'Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians under US Immigration Policy' (1995) 42 *UCLA Law Review* 1115; Bill Shiller, 'Refugee Status for Homosexuals' in International Gay and Lesbian Association (ed), *Second Pink Book* (1988) 117; Ellen Vagelos, 'The Social Group That Dare Not Speak Its Name: Should Homosexuals Constitute a Particular Social Group for the Purposes of Obtaining Refugee Status? Comment on *Re Inaudi*' (1993) 17 *Fordham International Law Journal* 229; Erik D Ramanathan, 'Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence' (1996) 11 *Georgetown Immigration Law Journal* 1; Jenni Millbank 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia' (2002) 26 *Melbourne University Law Review* 144.

thus have been, or risk being, labelled as a prostitute, although they have never engaged in sex work.⁵ In other cases, women claim refugee status on the basis that they have been, or fear being, forced into sex work in their home country.⁶ Still other claims arise in the context of men who claim refugee status on the basis that they have engaged in sexual relations with a prostitute.⁷ I am not concerned with any of these kinds of claim. Rather, what I want to explore is the possibility that a woman who has worked as a sex worker without coercion⁸ might claim refugee status on the basis that she will be persecuted because she is a sex worker. Such claims are, to my knowledge, yet to be articulated in Australia; but perhaps they should be able to be.

In Part III, I briefly describe, as a case study, the sex industry in the Dominican Republic. This case study will then be used to illustrate the legal analysis later in the article. In Part IV, I set out the legal framework for refugee claims in Australia, with a particular focus on the concept of a 'particular social group' in the Australian jurisprudence. Part V of my analysis focuses on the work in sex work, considering whether persecution of a person because of his or her occupation can give rise to a valid claim for refugee status, and whether this reasoning might extend to sex workers, again on the basis of the 'particular social group' ground. Part VI focuses on the sex in sex work; that is, I consider whether the reasoning that permits lesbian and gay claims for refugee status might be extended to embrace refugee claims by sex workers. In Part VII, I move to the question of what might amount to persecution in the context of sex worker claims to refugee status, in particular addressing the question of whether criminalisation of sex work can amount to persecution within the terms of the *Refugees Convention*. Although I conclude that prostitutes should be able to claim refugee status if they are persecuted because they are sex workers, I recognise that such an argument may not succeed under the law as it presently stands.

II SOME NOTES ON SEX WORK⁹

A A Definition of Sex Work

It might be thought that the definition of sex work is clear: sex work is simply 'sex for money'. However, this definition is too broad. In fact there is a contin-

⁵ See, eg, *S1647 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FMCA 952 (Unreported, Barnes FM, 23 November 2004).

⁶ See, eg, *SZBPG v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1726 (Unreported, Stone J, 30 November 2005).

⁷ See, eg, *Z v Minister for Immigration, Multicultural and Indigenous Affairs* (1998) 90 FCR 51 ('Z Case'); *W384 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1808 (Unreported, Carr J, 11 December 2001).

⁸ I discuss below the distinction between 'forced' and 'chosen' sex work.

⁹ The term 'sex work' is used rather than 'prostitution' to emphasise that prostitution is an 'income-generating activity or form of labor for men and women': see Kamala Kempadoo, 'Introduction' in Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance and Redefinition* (2nd ed, 1998) 1, 3. However, I will also use the terms 'prostitution' and 'prostitute' from time to time. Although these terms are often seen as derogatory, some activists and scholars are seeking to reclaim words such as 'prostitute' and 'whore', and many sex workers organise using these terms.

uum of sexual economic exchange between women and men (and, to a lesser extent, between men and between women). As Gail Pheterson notes: ‘Financial or material compensation for sex may be differentiated as prostitution or may be integrated in relationships such as marriage or dating.’¹⁰

At some point on the continuum of sexual economic exchange we move from dating and long-term relationships (including marriage) to sex work — from the acceptable to the stigmatised. Sex work is usually differentiated from dating by the number of sexual partners¹¹ and, I would add, by our understanding of the sexual encounter as work, rather than leisure, for the sex worker. To try to capture the distinction between sex work and dating and long-term relationships, Jo Bindman proposes the following definition of sex work:

Negotiation and performance of sexual services for remuneration

- 1 with or without intervention by a third party
- 2 where those services are advertised or generally recognised as available from a specific location
- 3 where the price of the services reflects the pressures of supply and demand.¹²

B *The Forced versus Chosen Dichotomy*

Some people — largely women and girls — are coerced or deceived into engaging in sex for money (the money usually going to a third party, not to the woman herself).¹³ This is often called ‘forced’ prostitution, although I would argue that such a term is misleading and inappropriate, as what is in fact occurring when a woman is forced to have sex is rape or sexual assault, regardless of whether the ‘customer’ pays. Other people — again largely women and girls — choose, within the constraints of their social and economic circumstances, to engage in sex work. Some commentators have argued that this distinction between forced and chosen prostitution is problematic because prostitution is never freely chosen.¹⁴ Others have argued that the distinction is problematic

¹⁰ Gail Pheterson, *The Prostitution Prism* (1996) 27.

¹¹ Sometimes the idea that sex workers have ‘indiscriminate’ sex — that is, sex with anyone — is used to differentiate sex workers from those engaged in dating. However, sex workers are often not indiscriminate in their choice of clients. To be a sex worker does not mean to be sexually available to anyone who will pay.

¹² Jo Bindman, *Redefining Prostitution as Sex Work on the International Agenda* (1997) 11.

¹³ These women are often described as ‘trafficked women’. Trafficking is the movement of women and girls across international borders or within a country for the purpose of exploitation — on one view, trafficking involves only sexual exploitation; on another broader view, trafficking involves any form of exploitative labour conditions, including, for example, sweat shops and debt bondage. Trafficking, however, is not necessarily a feature of all forced prostitution. On trafficking: see generally Alison Murray, ‘Debt-Bondage and Trafficking: Don’t Believe the Hype’ in Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance and Redefinition* (2nd ed, 1998) 51; Marjan Wijers, ‘Women, Labor and Migration: The Position of Trafficked Women and Strategies for Support’ in Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance and Redefinition* (2nd ed, 1998) 69.

¹⁴ See, eg, Mary Sullivan, Coalition against Trafficking in Women, *What Happens when Prostitution Becomes Work? An Update on Legalisation of Prostitution in Australia* (2005). See generally the work of the Coalition against Trafficking in Women <<http://www.catwinternational.org/campaigns.php#prostitution>>.

because it is often used to designate one class of prostitutes (those forced to engage in sex for money) as ‘innocent victims’, worthy of protection and rights, and one (those who choose ‘the life’) as ‘whores’, who have ‘sacrificed [their] right to social protection through [their] degraded behavior’.¹⁵ In much work around prostitution, a moral judgement is indeed attached to the forced versus chosen dichotomy. However, for the purposes of my analysis it is necessary to draw this distinction, as the legal issues in the context of a refugee claim may be very different, depending on the kind of prostitution under discussion. I emphasise that in drawing this distinction I do not intend to engage in any moral judgement; indeed, the purpose of this article is to try to further prostitutes’ rights claims, not to negate those claims.

III A CASE STUDY: SEX WORK IN THE DOMINICAN REPUBLIC¹⁶

Like many parts of the Caribbean, the Dominican Republic has an extensive sex industry, much of which involves sex tourism. There are an estimated 50 000 sex workers in the Dominican Republic, ‘providing sexual services ... to both men and women, gay and heterosexual tourists’.¹⁷ Notwithstanding this, much of the response to sex work is gendered and most studies of sex workers in the Dominican Republic have focused on women.¹⁸ Because of this, my case study will focus on female sex workers in the Dominican Republic.

Prostitutes — *putas* or *cueras* in Spanish, each of which has a negative connotation, roughly equivalent to ‘whore’ — are stigmatised in Dominican society: ‘the connotations surrounding “puta” are the worst that a woman can be’.¹⁹ Sex workers are also known as *mujeres de la calle* (women of the street) and *mujeres libres* (free women). Sex workers themselves have started to use the term *trabajadora sexual* (female sex worker). The general category ‘sex worker’ may also be broken down into subcategories: bar and cabaret workers, sometimes called *analfabetas* (illiterates); street workers, known as *tigras*; independent sex workers who work on a freelance basis with foreign tourists; ‘sanky-pankies’, bisexual men who work exclusively with foreign tourists;²⁰ and casino escorts.

In her study of sex workers in the Dominican Republic, Amalia L Cabezas interviewed 35 women working in the sex trade in Sosua, the largest area of tourism development in the Dominican Republic. These women did other work as well as sex work and all of them were supporting and providing for their children and other relatives. They engaged in sex work for a variety of reasons,

¹⁵ Jo Doezema, ‘Forced to Choose: Beyond the Voluntary v Forced Prostitution Dichotomy’ in Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance and Redefinition* (2nd ed, 1998) 34; see also Bindman, above n 12.

¹⁶ The following account is taken from Amalia L Cabezas, ‘Women’s Work Is Never Done: Sex Tourism in Sosua, the Dominican Republic’ in Kamala Kempadoo (ed), *Sun, Sex and Gold: Tourism and Sex Work in the Caribbean* (1999) 93; Kamala Kempadoo, ‘COIN and MODEMU in the Dominican Republic’ in Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance and Redefinition* (2nd ed, 1998) 260.

¹⁷ Cabezas, above n 16, 93.

¹⁸ See, eg, *ibid*; Kempadoo, ‘COIN and MODEMU in the Dominican Republic’, above n 16.

¹⁹ Cabezas, above n 16, 110.

²⁰ Sanky-panky is both a social identity and a form of tourist-oriented prostitution.

but usually because of financial need, particularly in relation to their support of their children.²¹ A report by the AIDS education and health organisation *Centro de Orientación e Investigación Integral* ('COIN') found that 'sex work in the Dominican Republic is for basic survival, a means for a woman to provide [for] and feed her children and to resolve an immediate economic problem, and not for accumulating capital or saving money.'²² Cabezas reports the following response to the question of why a woman entered the sex trade: 'Well, necessity. My family is poor and I am the one who helps them. I have children. One is eight years old, the other is ten months old and the fathers do not help with anything.'²³

Cabezas noted that many women felt regret about being sex workers; in particular, they were concerned about what their families thought of them. They knew that sex work was considered socially unacceptable, but as the primary supporters of their families, they felt an obligation to provide for them. One woman explained:

I know, I am conscious that it is an antisocial job. The society does not accept women who walk the streets. But also, if I live off it, how is that evil? If I abandon my children to die, or if I give them away, or if I leave them to other people, society will also point the finger at me. ... I see all my children, and I say 'I am doing something, it is worthwhile'.²⁴

At the first COIN congress on sex work, one woman said: 'We are viewed negatively by society, in our neighborhoods, by our friends and even by our families. They accuse and persecute us without stopping to think about the reasons that took us into this life.'²⁵

A Legal Regulation of Prostitution

Women who work in bars and clubs in the Dominican Republic are regulated by national public health laws aimed at the sex industry.²⁶ Businesses that facilitate, tolerate or assist in prostitution operate within the public health laws as long as they do not employ minors or violate health and safety regulations. Women working for such businesses must be certified as free of venereal disease under the public health law.²⁷ No mention is made of male prostitutes in the public health regime, nor are a prostitute's clients regulated. This regime indicates a level of state acknowledgement of and tolerance for sex work. However, the regime is rarely enforced: women cannot afford the medical examinations, businesses will not pay for them, and the state does not have enough health inspectors to enforce the law.²⁸

²¹ Cabezas, above n 16, 106–8.

²² Quoted in Kempadoo, 'COIN and MODEMU in the Dominican Republic', above n 16, 262.

²³ Cabezas, above n 16, 107.

²⁴ *Ibid.* 109.

²⁵ Kempadoo, 'COIN and MODEMU in the Dominican Republic', above n 16, 264.

²⁶ Cabezas, above n 16, 116.

²⁷ *Ibid.*

²⁸ *Ibid.*

Notwithstanding such apparent legal tolerance of sex work, women are arrested by the police on a daily basis.²⁹ Notably, however, prostitution is not illegal in the Dominican Republic. There are no laws that prohibit a woman's sale of her sexual labour. There are, however, laws that criminalise those who 'aid and facilitate the practice of prostitution directly or as intermediaries and those who benefit from the earnings of a sex worker.'³⁰ Notwithstanding the absence of direct criminalisation of prostitution, sex workers in the Dominican Republic suffer harassment, exploitation, coercion, abuse, extortion and incarceration at the hands of the police.³¹ All but one of the women Cabezas interviewed had been arrested multiple times. Arrests take place outside discos, on beaches, on the streets and in restaurants — anywhere, in fact, that Dominican women gather in public. The police do not arrest the women's clients or, generally, the third parties involved in sex work, although it is third parties who are actually engaged in criminal activity.³²

Sex workers are generally arrested en masse and fined for 'bothering tourists'.³³ In addition, or if they cannot pay the fine, they may be jailed with the general criminal population. During these mass arrests, violations of civil laws and human rights are routine. Women are arrested to regulate the numbers of sex workers on the streets, to exact bribes and sexual favours from the women, and to control businesses that do not pay bribes to the police.³⁴ Many of these arrests are clearly unlawful — that is, women are arrested for no reason other than congregating in a particular area. After their arrest, women are often beaten and sometimes raped by the police. I also note that many women who are not sex workers are targeted by police if they are thought to be sex workers: 'The police are now bothering too much ... It's so bad that now there are many women, many housewives, who go out at night to eat a pizza and they are arrested. The police think they are "of the street".'³⁵

In addition to violence and harassment suffered at the hands of the police, sex workers find themselves without police protection from violence suffered at the hands of their clients, especially when those clients are tourists. 'Because of the social stigma and hatred that sex workers face in society and at the hands of police, they are seen as already guilty and not entitled to equal protection by the law.'³⁶

In response to the stigmatisation and violence they experience, sex workers in the Dominican Republic formed an organisation called *Movimiento de Mujeres Unidas* ('MODEMU'). MODEMU holds workshops to raise women's consciousness about issues of equality, wages, work conditions and health.³⁷

²⁹ Ibid.

³⁰ Ibid 115.

³¹ Ibid 115–19.

³² Ibid 115.

³³ Ibid 116–17.

³⁴ Ibid 117.

³⁵ Ibid.

³⁶ Ibid 119.

³⁷ Ibid 120–1; Kempadoo, 'COIN and MODEMU in the Dominican Republic', above n 16, 265–6.

IV REFUGEE LAW IN AUSTRALIA: THE LEGAL FRAMEWORK

Australia is a signatory to the *Refugees Convention*³⁸ and the Protocol thereto.³⁹ Section 36(2) of the *Migration Act 1958* (Cth) gives effect to Australia's obligations under the *Refugees Convention* and Protocol. That section provides for the grant of a protection visa to a person 'to whom Australia has protection obligations under the *Refugees Convention* as amended by the Refugees Protocol', allowing the person to enter and remain in Australia under the principle of non-refoulement.⁴⁰

Under the *Refugees Convention*, and hence under Australian law, a person is a refugee when that person:

owing to a well-founded fear of persecution 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, unwilling to avail himself of the protection of that country ...⁴¹

This raises four issues. First, is the person genuinely in fear? This is a subjective question of fact, not usually difficult to prove. Secondly, does the person fear persecution? This is a legal question about the kind of events the person fears — do these events amount as a matter of law to 'persecution'? Thirdly, is the fear well-founded? This is again a question of fact, but an objective one — is the person's fear reasonable, based on the circumstances of their home country? Finally (though this is often the starting point for any judicial or quasi-judicial enquiry), is the persecution feared because of a *Refugees Convention* reason? This is a question of fact and law — does the person fear persecution because of one of the grounds set out in art 1A(2) above, such as political opinion or membership of a particular social group, or do they fear persecution on some other ground, for example, random violence during civil strife?⁴²

³⁸ Australia became a signatory in Geneva on 28 July 1951, 189 UNTS 137.

³⁹ *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁴⁰ It should be noted that, strictly speaking, international refugee law does not confer a right of entry into a third country (the receiving state); it confers only a right to seek entry. However, the principle of non-refoulement, which is well-recognised in international refugee law, precludes a receiving state from returning a refugee to their home country where they would be in danger of persecution: see Guy S Goodwin-Gill, *The Refugee in International Law* (2nd ed, 1996) 202–4; Penelope Mathew, 'Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum Seekers in Australia' (1994) 15 *Australian Year Book of International Law* 35, 54–5.

⁴¹ Opened for signature 28 July 1951, 189 UNTS 150, art 1A(2) (entered into force 22 April 1954).

⁴² These distinctions are designed to limit the availability of a claim to refugee status, often in ways that may seem unfair. After all, surely torture, rape or other forms of persecution are horrible events from which a person should be protected, regardless of the reason they are inflicted. However, most states wish to limit immigration and although claims to refugee status are often given a special place in immigration systems, states are concerned to ensure that they do not offer an easy mechanism for bypassing general immigration rules. Refugee law is not intended to 'offer a haven to all suffering individuals': *Re GJ, Refugee Appeal No 1312/93* (Unreported, NZ Refugee Status Appeals Authority, Chairman Haines and UNHCR Member Wang Heed, 30 August 1995) [24]. Historically, also, refugee law emerged from the horrors of World War II and the ideological tensions of the Cold War, which led states to focus on some reasons for persecution as being more heinous than others: see generally Kristen Walker, 'Defending the 1951 Convention Definition of Refugee' (2003) 17 *Georgetown Immigration Law Journal* 583.

The focus of this article will be on two of these elements: first, can sex workers constitute a 'particular social group' under the *Refugees Convention*, and secondly, what treatment constitutes persecution in the context of sex worker claims to refugee status? Because the concept of a particular social group is central to my analysis, I will begin by describing the current approach to the understanding of that phrase in Australia.

A The Meaning of 'Particular Social Group' in Australian Law

The phrase 'particular social group' was the subject of extensive consideration by the High Court of Australia in *Applicant A v Minister for Immigration and Multicultural Affairs* ('*Applicant A*'),⁴³ which remains the leading case in the area. *Applicant A* concerned a claim for refugee status by a Chinese couple who feared forced sterilisation for violation of the People's Republic of China's 'one-child policy' if returned to the PRC.⁴⁴ The Court, by majority, held that they were not members of a particular social group within the meaning of the *Refugees Convention*, and therefore Australia did not owe them protection obligations under the Convention or the *Migration Act 1958* (Cth). The members of the majority adopted somewhat different approaches to the question of what constitutes a particular social group, although all agreed that fear of persecution could not be the defining element of such a group.

Dawson J observed that:⁴⁵

The adjoining of 'social' to 'group' suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word 'particular' in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.

I can see no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions may each be a particular social group. Nor is there anything which would suggest that the uniting particular must be voluntary ...

McHugh J stated that:⁴⁶

while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if

⁴³ (1997) 190 CLR 225.

⁴⁴ For a discussion of the cases concerning the Chinese one-child policy: see Penelope Mathew, 'Conformity or Persecution: China's One Child Policy and Refugee Status' (2000) 23(2) *University of New South Wales Law Journal* 103.

⁴⁵ *Applicant A* (1997) 190 CLR 225, 241.

⁴⁶ *Ibid* 264.

they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group ...

The fact that the actions of the persecutors can serve to identify or even create 'a particular social group' emphasises the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in the 'particular social group' category is the notion of 'membership' expressly mentioned. The use of that term in conjunction with 'particular social group' connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.

His Honour considered that, applying an ejusdem generis approach to art 1 of the *Refugees Convention*, the group in question had to be relatively large.⁴⁷

Gummow J said:⁴⁸

I respectfully agree with the emphasis placed in the United States authorities to which I have referred upon the qualification of the term 'group' by the words 'particular' and 'social', as indicating that para (2) of s A is not apt to encompass every broadly defined segment of those sharing a particular country of nationality ... numerous individuals with similar characteristics or aspirations in my view do not comprise a particular social group of which they are members. I agree with the statement in *Ram*:

There must be a common unifying element binding the members together before there is a social group of that kind. When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is 'for reasons of' his membership of that group.

In the minority, Brennan CJ stated:⁴⁹

There is nothing in the term 'a particular social group' which limits the criteria for selecting such a group nor anything in the travaux préparatoires which suggests that any limitation was intended. There is no reason to treat 'a particular social group' as necessarily exhibiting an inherent characteristic such as an ethnic or national identity or an ideological characteristic such as adherence to a particular religion or the holding of a particular political opinion. By the ordinary meaning of the words used, a 'particular group' is a group identifiable by any characteristic common to the members of the group and a 'social group' is a group the members of which possess some characteristic which distinguishes them from society at large. The characteristic may consist in any attribute, including attributes of non-criminal conduct or family life, which distinguish the members of the group from society at large. The persons possessing any such characteristic form a particular social group.

Kirby J took a different approach. His Honour considered that particular social groups could only be recognised on a case by case basis:⁵⁰

⁴⁷ Ibid 266.

⁴⁸ Ibid 284-5 (citations omitted).

⁴⁹ Ibid 234.

The discussion in *Applicant A* about the community perception that a particular group was a distinct group within society, particularly by McHugh J, was explained in *Applicant S v Minister for Immigration and Multicultural Affairs*, as follows: '[McHugh J] was expanding on the requirement that the existence of a particular social group requires that the group be distinguished or set apart from society at large. One way in which this may be determined is by examining whether the society in question perceives there to be such a group. Thus, perceptions held by the community may amount to evidence that a social group is a cognisable group within the community. The general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society.'

The High Court's approach to identifying a particular social group was elaborated on in later cases such as *Khawar v Minister for Immigration and Multicultural Affairs* ('*Khawar*')⁵¹ and *Chen v Minister for Immigration and Multicultural Affairs* ('*Chen*').⁵² It is unnecessary to explore those decisions in detail here, save to note that, in *Khawar*, women in Pakistan (or married women in Pakistan) were accepted as constituting a particular social group for the purposes of a refugee claim. It had been argued in *Khawar* that the particular social group in that case was impermissibly defined by the persecution feared. However, a majority of the Court held that it would be open to the Refugee Review Tribunal ('RRT') to find that the first respondent was a member of a particular social group. McHugh and Gummow JJ emphasised the operation of cultural, social, religious and legal factors, rather than any perceptions held by the community, as determining that married Pakistani women were a group that was distinguished or set apart from the rest of the community. Their Honours said:⁵³

The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group.

Gleeson CJ stated, perceptively, that:⁵⁴

It is power, not number, that creates the conditions in which persecution may occur. In some circumstances, the large size of a group might make implausible a suggestion that such a group is a target of persecution, and might suggest that a narrower definition is necessary. And cohesiveness may assist to define a group; but it is not an essential attribute of a group. Some particular social groups are notoriously lacking in cohesiveness.

Further, in *Applicant S v Minister for Immigration and Multicultural Affairs* ('*Applicant S*'),⁵⁵ Gleeson CJ, Gummow and Kirby JJ elaborated on McHugh J's

⁵⁰ Ibid 307 (citations omitted).

⁵¹ (2002) 210 CLR 1.

⁵² (2000) 201 CLR 293.

⁵³ *Khawar* (2002) 210 CLR 1, 28.

⁵⁴ Ibid 13–14.

⁵⁵ (2004) 217 CLR 387.

'left-handed men' example, acknowledging the role social and legal factors may have in the creation of a particular social group:⁵⁶

The example of left-handed men given by McHugh J in *Applicant A* indicates how it is possible that over time, due to the operation of social and legal factors prevailing in the community, persons with such a characteristic may be considered to hold a certain position in that community ... Left-handed men share a common attribute (ie, they are left-handed), but, ordinarily, there is nothing to separate or to distinguish them from the rest of the community. However, to expand on his Honour's example, if the community's ruling authority were to legislate in such a way that resulted in discrimination against left-handed men, over time the discriminatory treatment of this group might be absorbed into the social consciousness of the community. In these circumstances, it might be correct to conclude that the combination of legal and social factors (or norms) prevalent in the community indicate that left-handed men form a particular social group distinguishable from the rest of the community.

Of course, the left-handed men example is one associated with an immutable (or physiological) characteristic, and is to that extent different from a claim based on an activity such as sex work.

Their Honours went on to summarise the three factors necessary for determining that a group is a particular social group, as follows:⁵⁷

First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a 'social group' and not a 'particular social group'.

B Occupation as the Basis for a Particular Social Group Claim

The question of whether a person's occupation may provide the basis for a refugee claim based on membership of a particular social group has been considered in various cases. *Minister for Immigration and Multicultural Affairs v Zamora* ('*Zamora*')⁵⁸ raised this question directly. The test applied by the Full Court in *Zamora* must now be regarded as incorrect, given the decision in *Applicant S* (this was acknowledged by the Full Court in *NAPU v Minister for Immigration and Multicultural Affairs* ('*NAPU*')).⁵⁹ But the Court in *NAPU* also noted that the Court in *Zamora* had allowed for the possibility that an occupation group may be a particular social group:⁶⁰

There will no doubt be cases in which persons who have in common no more than a shared occupation do form a cognisable group in their society. This may

⁵⁶ Ibid 399.

⁵⁷ Ibid 400.

⁵⁸ (1998) 85 FCR 458.

⁵⁹ [2004] FCAFC 193 (Unreported, Moore, Branson and Emmett JJ, 5 August 2004) [39] (Moore J).

⁶⁰ See *ibid* [39] (Moore J), quoting *Zamora* (1998) 85 FCR 458, 465 (Black CJ, Branson and Finkelstein JJ).

well come about, as McHugh J recognised in *Applicant A's* case, when persons who follow a particular occupation are persecuted by reason of the occupation that they follow. The persecution for following a particular occupation may well create a public perception that those who follow the occupation are a particular social group. Human rights workers in certain nations subject to totalitarian rule come to mind as a possible example. Ordinarily however, persons who have in common no more than a shared occupation are not recognisable as a particular social group in their society. That is, they are not defined as individuals in any meaningful way by reason of their occupation. In the words of Gummow J in *Applicant A's* case, they are simply a 'broadly defined segment of those sharing a particular country of nationality.'

In *Nouredine v Minister for Immigration and Multicultural Affairs* ('*Nouredine*'),⁶¹ Burchett J held that beauty workers in Algeria were a particular social group as they were seen by religious extremists as immoral and a group that should be eliminated.⁶² His Honour observed that the Full Court in *Zamora* had not ruled out an occupational group constituting a particular social group but had simply urged caution. Burchett J went on to say:⁶³

In *Zamora*, the Full Court instanced human rights workers in some countries. It is easy to think of further illustrations, such as landlords after the revolutions in China and Vietnam, prostitutes almost anywhere, swineherds in some countries, and ballet dancers or other persons who followed occupations identified with Western culture in China during the Cultural Revolution. It seems to me there is no comparison between the tourist guides of Ecuador, who were simply a convenient target for criminal depredations really directed against the supposedly wealthy people they were guiding, and beauty workers seen by religious extremists as purveyors of immorality, and therefore as a group within society that should be eliminated.

The caution called for in *Zamora* was accepted by the Full Court in *NAPU*.⁶⁴ The particular claim in *Zamora* concerned 'professionally accredited tourist industry workers', and the Court doubted that 'such a group would be one recognisable in Ecuadorian society as one whose members share something which unites them'.⁶⁵ In addition, the RRT had found, and the Court accepted, that even had Ms Zamora been a member of a particular social group, she had not been singled out by the gangs for that reason. Rather, she had been singled out because she was in a position to assist them with their robbery plans.⁶⁶ This had nothing to do with her profession as the gangs would have targeted anyone who could assist them in their plans. Thus, *Zamora* had not been persecuted because of her membership of a particular social group.

While some claims for refugee status based on occupation as a particular social group will clearly fail, it remains possible for others to demonstrate that their

⁶¹ (1999) 91 FCR 138.

⁶² *Ibid* 143.

⁶³ *Ibid* 143–4.

⁶⁴ [2004] FCAFC 193 (Unreported, Moore, Branson and Emmett JJ, 5 August 2004) [39] (Moore J).

⁶⁵ *Zamora* (1998) 85 FCR 458, 464 (Black CJ, Branson and Finkelstein JJ).

⁶⁶ *Ibid* 467 (Black CJ, Branson and Finkelstein JJ).

occupation does constitute a particular social group and that they have been persecuted because of their membership of that group.

V 'PROSTITUTES ALMOST ANYWHERE':⁶⁷ THE WORK IN SEX WORK

Prostitutes' self-definition as prostitutes is generally centred on their work; that is, their sexual *labour*. This is apparent from the attempt by prostitutes in the Dominican Republic to introduce the term *trabajadora sexual* as an alternative to *cuero* or *puta*. If occupation may be sufficient to constitute a particular social group, then perhaps sex workers may be able to claim refugee status on this basis. Certainly this seemed to be acknowledged by Burchett J in *Nouredine*, albeit it simply in a passing remark.

Under the Federal Court's approach in *NAPU* and *Zamora*, one must be cautious in asserting any simple relationship between an occupation and a particular social group. It seems clear that something more is required to bring an occupational group within the ambit of the particular social group concept. Rather, one must ask whether the particular occupational group is distinguished or set apart from the society at large. One way that this might be shown is by demonstrating an external perception of persons who undertake a particular occupation as a distinct group within society, although this is not a necessary factor.

I argue that female sex workers in the Dominican Republic provide a paradigm example of when an occupational group may constitute a particular social group. Female sex workers in the Dominican Republic are clearly perceived as a cognisable group by society. This is evidenced in various ways. First, there are statements from sex workers themselves about how they are perceived. Secondly, language use indicates that sex workers are identifiable as a group within Dominican society: there are various Spanish words used to refer to sex workers, including subgroups of sex workers. Thirdly, sex workers in the Dominican Republic suffer stigmatisation because of their work — the derogatory nature of the terms *puta* and *cuero* illustrates this. Fourthly, female sex workers in the Dominican Republic have organised around sex work issues, including through the organisation MODEMU. Finally, sex workers suffer persecution — harassment, violence, extortion — because they are sex workers. Sex workers in the Dominican Republic are not simply a 'broadly defined segment' of the Dominican population. They are an identifiable group within that society and are persecuted as such.

As McHugh J stated in *Applicant A*,⁶⁸

once a reasonably large group of individuals is perceived in a society as linked or unified by some common characteristic, attribute, activity, belief, interest or goal which itself does not constitute persecution and which is known in but not shared by the society as a whole, there is no textual, historical or policy reason for denying these individuals the right to be classified as 'a particular social group' for Convention purposes.

⁶⁷ *Nouredine* (1999) 91 FCR 138, 143 (Burchett J).

⁶⁸ *Applicant A* (1997) 190 CLR 225, 266.

Female sex workers in the Dominican Republic constitute a reasonably large group (though the size of the group has been said more recently to be irrelevant);⁶⁹ they are linked by their shared activity, which does not itself constitute persecution; and their activity is known of but not shared by Dominican society as a whole. There is thus no reason for denying that they constitute a particular social group in the *Refugees Convention* sense. Dawson J's approach in *Applicant A* leads to a similar conclusion, as does the approach adopted in *Applicant S*.

Similarly, Brennan J's reasoning also permits the recognition of sex workers as a particular social group. His Honour defined a particular social group as 'a group the members of which possess some characteristic which distinguishes them from society at large.'⁷⁰ The characteristic in question could include 'any attribute, including attributes of non-criminal conduct or family life, which distinguish the members of the group from society at large'.⁷¹ Given that exchanging sex for money is not illegal in the Dominican Republic, nor in most Australian jurisdictions, Brennan J's qualification of 'non-criminal' should not prevent the recognition of Dominican sex workers as a particular social group.

On the other hand, Gummow J's approach in *Applicant A* offers one reason why a claim for refugee status by a sex worker might not succeed. Gummow J emphasised that to qualify for refugee status, a person must fear persecution 'not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors'.⁷² Thus it might be argued that sex workers are persecuted in the Dominican Republic not for what they are but for what they have done — namely, engage in sex for money. However, this argument cannot be used in any blanket way to deny claims based on occupational status. For as Dawson J observed in *Applicant A*: 'The distinction between what a person is and what a person does may sometimes be an unreal one. For example, pursuit of an occupation may equally be regarded as what one is and what one does.'⁷³

Dawson J seems to be implying here that an occupation may constitute a particular social group. In any event, I would argue that female sex workers in the Dominican Republic are stigmatised and persecuted as much for what they are — promiscuous women, whores — as for what they do. As Gail Pheterson has noted:⁷⁴

Any woman suspected of [prostitution] is likely to acquire the social status of prostitute. That status makes her vulnerable to legal controls and punishments and brands her as the prototype 'whore'. Prostitution for women is considered not merely a temporal activity (as it is for men who are clients and often for men who are sex workers), but rather a heavily stigmatized social status which in most societies remains fixed regardless of a change in behavior. Often women who themselves view sex work as temporary and part-time work are

⁶⁹ *Khawar* (2002) 210 CLR 1, 13 (Gleeson CJ).

⁷⁰ *Applicant A* (1997) 190 CLR 225, 234.

⁷¹ *Ibid* 234 (emphasis added).

⁷² *Ibid* 285 (emphasis added).

⁷³ *Ibid* 242–3.

⁷⁴ Pheterson, *The Prostitution Prism*, above n 10, 29.

forced by legal and social labeling to remain prostitutes and to bear the prostitute status in all aspects of their lives.

Evidence that female sex workers in the Dominican Republic are targeted for what they are, not what they have done, emerges in the accounts of police arresting and harassing women who are not in fact sex workers, simply because they are thought to be sex workers.⁷⁵ Such harassment cannot be for what these women have *done*; rather, it is for what they are perceived to *be*. Similarly, mass arrests of sex workers congregating in particular locations involves targeting women for what they are — sex workers — not for what they have done.

VI THE SEX IN SEX WORK

The *Prostitutes' Charter* explicitly equates persecution because of 'homosexuality' with persecution because of prostitution, seeing both as 'crimes of status'. In addition, of course, both concern sexual activity, in that sexual activity defines the status 'homosexual' and 'prostitute' (even if not all persons in these groups necessarily engage in the relevant sexual activity). Before considering whether there are sufficient similarities between prostitution and sexual preference to provide the foundation for an argument that sex workers fleeing persecution should be recognised as refugees, it is useful to examine the legal basis for the recognition of lesbians and gay men as a particular social group in Australia. For completeness, jurisprudence from the United States, Canada, New Zealand and the United Kingdom will also be briefly mentioned.

*A Gay Men and Lesbians as a Particular Social Group under the Refugees Convention*⁷⁶

The Australian courts have now accepted that lesbians and gay men can constitute a particular social group under the *Refugees Convention*. In the High Court, in *Applicant A*, McHugh J stated that: 'If the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status'.⁷⁷ Kirby J noted that in 1951 when the *Refugees Convention* was drafted, sexual orientation as a ground for claiming refugee status would not have been in the minds of the drafters (nor the signatories), as same-sex sexual activity would at that time have been illegal in 'many, if not most, countries', but

nowadays, a different content and application of the phrase ['particular social group'] affords the protection of the Convention deriving from a larger understanding of the 'persecution' and the identity of the 'particular social group' in question.⁷⁸

⁷⁵ See above n 35 and accompanying text.

⁷⁶ See above n 4 and accompanying text.

⁷⁷ (1997) 190 CLR 225, 265.

⁷⁸ *Ibid* 294.

His Honour also observed that:⁷⁹

the following categories have been upheld as particular social groups, the membership of which gave rise to a well-founded fear of persecution: ... homosexual and bisexual men and women in countries where their sexual conduct, even with adults and in private, is illegal.

The High Court even more clearly accepted that ‘homosexuals’ may constitute a particular social group in *Applicant S395/2002 v Minister for Immigration and Multicultural Affairs* (‘*Applicant S395*’).⁸⁰ McHugh and Kirby JJ stated that, not only was the RRT’s finding that ‘homosexual men in Bangladesh’ constituted a particular social group open to it, had it failed to so find ‘its decision would arguably have been perverse’.⁸¹ Gummow and Hayne JJ, accepting that ‘homosexuals in Bangladesh’ constituted a particular social group, stated:⁸²

It is important to recognise the breadth of the assertion that is made when, as in the present case, those seeking protection allege fear of persecution for reasons of membership of a social group identified in terms of sexual identity (here, homosexual men in Bangladesh). Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity.

Courts in Canada⁸³ and the UK,⁸⁴ and administrative bodies in New Zealand⁸⁵ and the US,⁸⁶ have also accepted that gay men and lesbians may constitute a particular social group for the purposes of the *Refugees Convention*.

⁷⁹ Ibid 303–4.

⁸⁰ (2003) 216 CLR 473. There have also been various cases where the Federal Court has recognised — sometimes implicitly, sometimes explicitly — that gay men and lesbians may constitute a particular social group for the purposes of the *Refugees Convention*: see *Minister for Immigration and Multicultural Affairs v Guo Ping Gui* [1999] FCA 1496 (Unreported, Heerey, Carr and Tamberlin JJ, 29 October 1999) (explicit); *MMM v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 324 (‘*MMM*’) (implicit); *Bhattachan v Minister for Immigration and Multicultural Affairs* [1999] FCA 547 (Unreported, Hill J, 27 April 1999) (‘*Bhattachan*’) (implicit); *F v Minister for Immigration and Multicultural Affairs* [1999] FCA 947 (Unreported, Burchett J, 9 July 1999) (explicit); *Hossain v Minister for Immigration and Multicultural Affairs* [1999] FCA 957 (Unreported, Lehane J, 14 July 1999) (‘*Hossain*’) (implicit).

⁸¹ *Applicant S395* (2003) 216 CLR 473, 494.

⁸² Ibid 500–1. Gleeson CJ, in dissent, did not deal with the question whether ‘homosexuals in Bangladesh’ may constitute a particular social group. Callinan and Heydon JJ, in contrast, indicated some doubt on this question, stating: ‘It is not necessarily beyond argument that sexual inclination or practice necessarily defines a social class, a matter which was not raised here but seems to have been assumed’: at 512 (citations omitted).

⁸³ See, eg, *Ward v A-G (Canada)* [1993] 2 SCR 689, 739 (La Forest J) (‘*Ward*’); *Rojas v Minister of Citizenship and Immigration* (1999) 162 FTR 157; *Gomez v Minister of Citizenship and Immigration* (1998) 150 FTR 156; *Muzychka v Minister of Citizenship and Immigration* (1997) 141 FTR 233.

⁸⁴ *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 All ER 545.

⁸⁵ *Re GJ, Refugee Appeal No 1312/93* (Unreported, NZ Refugee Status Appeals Authority, Chairman Haines and UNHCR Member Wang Heed, 30 August 1995).

⁸⁶ *Re Toboso-Alfonso*, No A23 220 644 (BIA, 12 March 1990). In 1994, this decision was elevated to the status of precedent by Attorney-General Janet Reno: Memorandum from US Attorney-General Janet Reno to Mary Maguire Dunne, Acting Chair, Board of Immigration Appeals, 16 June 1994.

The basis for accepting that lesbians and gay men may constitute a particular social group has not always been spelled out by the courts. Most Australian cases concerning lesbians and gay men as refugees have simply assumed that these categories constitute a particular social group.⁸⁷ There have, however, been two cases where judges have offered some further comment. These cases indicate that the courts have considered both internal identification as homosexual, and external perceptions of homosexuals, as a particular social group. For example, in *F v Minister for Immigration and Multicultural Affairs*, Burchett J noted that:⁸⁸

it is in accordance with settled authority to see as a member of a social group a person who identifies himself by some means with an ascertainable set of associated persons *linked by shared homosexual activities*. So, too, in the case of a person who is identified as such by others, though perhaps against his will. However the mere possession of some homosexual feelings might not necessarily be enough.

In *Applicant A*, McHugh J referred to a *perception* that the homosexual members of a particular society have characteristics or attributes that unite them as a group and distinguish them from society as a whole.⁸⁹

In other jurisdictions the most common explanation given for accepting lesbians and gay men as a particular social group is that 'homosexuality' is immutable.⁹⁰ In some cases the reason has been broader: homosexuality is seen as *either* innate or unchangeable, *or* as 'a characteristic so fundamental to identity or human dignity that it ought not be required to be changed'.⁹¹ The Australian courts have never expressly articulated this kind of approach to lesbian and gay claims, nor indeed to the question of what constitutes a particular social group more generally. The simple assumption by some judges that lesbians and gay men constitute a particular social group may be thought to rest upon an assumption that homosexuality is innate, comparable to sex or race. As Penelope Mathew has observed, 'we are well-used to the categories of homosexuality and heterosexuality and we think of these categories as particular groups within (or excluded from) society'.⁹² That is, in the West we have become accustomed to thinking of lesbians and gay men as particular types of people: homosexual is something that a person *is*.

Some early judicial statements seem to recognise that gay and lesbian identity is intimately connected with sexual activity. For example, Burchett J, in *F v Minister for Immigration and Ethnic Affairs*, spoke of individuals linked by

⁸⁷ See, eg, *Guo Ping Gui v Minister for Immigration and Multicultural Affairs* [1998] FCA 1592 (Unreported, Hely J, 11 December 1998); *MMM* (1998) 90 FCR 324; *Bhattachan* [1999] FCA 547 (Unreported, Hill J, 27 April 1999); *Hossain* [1999] FCA 957 (Unreported, Lehane J, 14 July 1999).

⁸⁸ [1999] FCA 947 (Unreported, Burchett J, 9 July 1999) [11] (emphasis added).

⁸⁹ *Applicant A* (1997) 190 CLR 225, 265.

⁹⁰ *Ward* (1993) 2 SCR 689; *Re Toboso-Alfonso*, No A23 220 644 (BIA, 12 March 1990).

⁹¹ *Re GJ, Refugee Appeal No 1312/93* (Unreported, NZ Refugee Status Appeals Authority, Chairman Haines and UNHCR Member Wang Heed, 30 August 1995).

⁹² Mathew, 'Conformity or Persecution', above n 44, 126.

their ‘homosexual activity’,⁹³ and Kirby J, in *Applicant A*, referred to lesbians and gay men in societies where ‘their sexual conduct is illegal’.⁹⁴ That is, although homosexuals are still seen as a particular kind of person, sexual activity is a fundamental part of what it means to be that kind of person. Indeed, Burchett J’s judgment suggests that merely having homosexual desire (or orientation) may not be enough; some action based on that desire may be required.⁹⁵ However, the remarks of Gummow and Hayne JJ in *Applicant S395*⁹⁶ suggest that such an approach is incorrect and may place too much emphasis on sexual activity (though such activity is obviously relevant to the definition of the particular social group).

B *Sex Work*

Are female sex workers in the Dominican Republic a particular social group by analogy with lesbians and gay men? As a starting point, sex workers are defined as a group by their sexual activity: by the fact that they engage in sexual activity for money. Lesbians and gay men, too, are defined by their sexual activity: by the sex of the partner with whom they engage in sexual activity. In addition, both sex workers, and lesbians and gay men, are generally identifiable as a distinct group within society whether or not their sexual activity is criminalised, although the criminal law (including the past criminal law) clearly plays a role in constituting both groups.⁹⁷ As Mathew has noted:

Perhaps laws that ban sodomy are not merely reactions to the activities of a pre-existing social group ... but one part of the process by which the excluded group ‘homosexuals’ and the barriers between it and the rest of society are brought into existence.⁹⁸

We might make the same argument concerning sex workers — the historical criminalisation of sex work helped to create a stigmatised class of persons known as whores. Thus it would seem that McHugh J’s requirement in *Applicant A* that the group be identifiable as a social unit is satisfied.

Is it enough that sex workers are identifiable as a cognisable group within society for them to thus constitute a particular social group? In Australia, the answer may well be ‘yes’. As discussed above, a majority of the High Court in *Applicant A* considered a particular social group to be a group of persons united

⁹³ [1999] FCA 947 (Unreported, Burchett J, 9 July 1999) [12].

⁹⁴ (1997) 190 CLR 225, 303–4.

⁹⁵ This is no doubt based on a concern about potentially false claims for refugee status on the ground of homosexuality.

⁹⁶ See above n 82 and accompanying text.

⁹⁷ I note that Dawson J observed in *Applicant A* (1997) 190 CLR 225 that ‘where a persecutory law applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms’: at 243. So, for example, those who committed contempt of court or traffic offences would not constitute a particular social group. This is probably correct, but in relation to prostitutes (and to lesbians and gay men), the criminal law is not the only factor participating in the creation of the particular social group — such groups are identifiable because of their sexual practices, not simply because those sexual practices are (or were once) against the law.

⁹⁸ Mathew, ‘Conformity or Persecution’, above n 44, 116.

‘by reason of some characteristic, attribute, activity, belief, interest or goal’.⁹⁹ This is clearly the case with respect to female sex workers in the Dominican Republic, who are united by a common activity, namely sexual activity for money. In addition, the fact that the group is perceived in the relevant country as a particular social group will strongly favour a finding that the group indeed constitutes a social group for *Refugees Convention* purposes. As I argued above, female sex workers in the Dominican Republic are perceived as constituting an identifiable group within Dominican society.¹⁰⁰

The High Court did not, in *Applicant A* or in *Applicant S395*, discuss the requirement in other jurisdictions, such as Canada¹⁰¹ and New Zealand,¹⁰² that the defining element of a particular social group be something either immutable or so fundamental to a person’s identity that they should not be required to change it. In these jurisdictions, lesbians and gay men have been accepted as a particular social group because sexual orientation is seen as something immutable or so fundamental that a person should not be required to change it. That is, lesbians and gay men as a group are arguably defined not by their sexual activity, but by their *orientation towards* such activity — for what they are, not what they do. If this approach is accepted, sex workers may have more difficulty demonstrating that they constitute a particular social group. Sex work is clearly not an immutable characteristic,¹⁰³ and it would no doubt be difficult to persuade a court that it is something that a person should not be required to change.

However, the motivations of female sex workers in the Dominican Republic for engaging in sex work may provide some basis for an argument that they should not be required to give up sex work. As discussed in Part III above, the vast majority of female sex workers in the Dominican Republic enter the sex trade because of economic necessity — and, in particular, because of their need to support their children. In economies where there are few opportunities for jobs that pay enough money to adequately support a family, perhaps economic necessity ought to be considered as a reason why a sex worker should not be required to change her profession in order to escape persecution.

VII PERSECUTION

Sex workers in many countries suffer a variety of human rights abuses as a result of their status as sex workers. These rights abuses include police extortion and violence,¹⁰⁴ private violence and theft, arbitrary detention, slavery-like

⁹⁹ (1996) 190 CLR 225, 264 (McHugh J).

¹⁰⁰ See above Part III.

¹⁰¹ See, eg, *Ward* [1993] 2 SCR 689.

¹⁰² *Re GJ, Refugee Appeal No 1312/93* (Unreported, NZ Refugee Status Appeals Authority, Chairman Haines and UNHCR Member Wang Heed, 30 August 1995).

¹⁰³ Unless the group is defined as former sex workers, because a person cannot alter their personal history and their status is thus immutable. This may be of assistance to some individuals in circumstances where former sex workers are subject to persecution; however, that particular social group is not the focus of my article.

¹⁰⁴ ‘[R]epression by the Carabineros [police] is frequent. It doesn’t matter if we have the proper documentation, they often arrest us or force us to have sexual relations with them to avoid fines or jail’: Chilean activist, quoted in Bindman, above n 12, 36. See also Department of Labor, United States, *Forced Labor: The Prostitution of Children* (1996) 74.

practices,¹⁰⁵ legal regimes regulating movement and marriage,¹⁰⁶ state removal of children, and general discrimination. As one activist notes: ‘Even in so-called democratic countries the list of mundane abuses against prostitutes carried out by the authorities will include raids, rapes, beatings, extortion, “confiscation” of property and compulsory medical intervention.’¹⁰⁷

The Global Alliance against Trafficking in Women (‘GAATW’) reports the following events in India:¹⁰⁸

In Bombay ... the police arrested 447 sex workers in raids on brothels. They were taken from the brothels without their belongings and, in some cases, without their children. Though prostitution itself is not illegal in India, the women were kept in detention. They were tested for HIV without their consent, but were not given any medical treatment. Those who wanted to go back to work were not released: ‘If these women were in different occupations, there would have been considerable public outrage against this abuse and violation of rights’.

These abuses involved violation of various rights protected under international law, including:

- the right to liberty and security of the person;¹⁰⁹
- the right to be free from arbitrary detention;¹¹⁰
- the right to a fair trial;¹¹¹
- the right to be free from slavery and servitude;¹¹²
- the right to equality;¹¹³
- the right to work;¹¹⁴
- the right to freedom of assembly and association;¹¹⁵

¹⁰⁵ See Bindman, above n 12, 52:

Lea worked as a prostitute in Manila. A recruiter approached her and offered her a job in a club in Japan. In Japan she was sold to the Yakusa [organised crime] and forced to work without pay. When ... she refused to have sex with her employer, he locked her up for two months and denied her enough food. During her detainment she was gang-raped.

¹⁰⁶ In Turkey, ‘registered women are forbidden to live or work outside a genelev [brothel] and must inform the police if they change premises’: *ibid* 40. Immigration laws also often target prostitutes, barring entry to sex workers.

¹⁰⁷ See *ibid* 37, citing Cheryl Overs, ‘Unfair Cop’ (1994) 252 *New Internationalist* 26.

¹⁰⁸ See *ibid* 37, citing GAATW, *Report of Fact-Finding Tour on Trafficking in Nepal, India, Bangladesh, Hong Kong, Taiwan and Japan* (1996) 22.

¹⁰⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9(1) (entered into force 23 March 1976) (‘*ICCPR*’).

¹¹⁰ *Ibid*.

¹¹¹ *Ibid* art 14.

¹¹² *Ibid* art 8.

¹¹³ *Ibid* arts 2, 26.

¹¹⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 6(1) (entered into force 3 January 1976) (‘*ICESCR*’).

¹¹⁵ *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171, arts 21–2 (entered into force 23 March 1976). See also Gail Pheterson, *A Vindication of the Rights of Whores* (1992) 7, who notes that:

Numerous attempts [by prostitutes] to organise have been blocked by violence or social control. In Ireland, for example, a prostitute who tried to organise her colleagues was killed ... In Thailand a few women tried to organise a kind of union called ‘Thai Night Guard’, but they

- the right to freedom of movement;¹¹⁶
- the right to marry;¹¹⁷
- the right to respect for family life;¹¹⁸
- the right to social security;¹¹⁹ and
- violations of various labour rights.¹²⁰

VIII ARREST AND PROSECUTION UNDER THE CRIMINAL LAW

Arrest and prosecution under the criminal law are key concerns for sex workers everywhere, even though many countries no longer criminalise prostitution *per se*. The Dominican Republic provides a good example: the sale of sexual labour is not prohibited by law, yet sex workers are the subject of mass arrests and detention without trial. I argue that this constitutes persecution on account of membership of a particular social group.

A Arrest and Prosecution under a Law Not Specifically Directed at Prostitution

Generally speaking, prosecution under a generally-applicable criminal law will not amount to persecution. However, this is not an absolute rule, as courts and commentators have recognised. For example, prosecution of lesbians and gay men under ‘hooliganism’ laws in the PRC has been held to amount to persecution on account of membership of a particular social group.¹²¹ Guy S Goodwin-Gill observes that, ‘[n]otwithstanding the presumption of legitimacy in the legislative field, discriminatory application of law or the use of the law to promote discrimination may tend to persecution’.¹²² The United Nations High Commissioner for Refugees also recognises that prosecution under a generally applicable criminal law may amount to persecution where such prosecution is selective or the punishment of particular groups is excessive — that is, where the law is applied in a discriminatory manner.¹²³

In the Australian context, McHugh J stated in *Applicant A* that:¹²⁴

failed because of family pressure, police harassment and threats from their managers. In Ecuador, brothel managers purposely rotate prostitutes each week to prevent them from grouping together and expressing their grievances.

¹¹⁶ *JCCPR*, opened for signature 16 December 1966, 999 UNTS 171, art 12 (entered into force 23 March 1976).

¹¹⁷ *Ibid* art 23.

¹¹⁸ *Ibid* art 17.

¹¹⁹ *IESCR*, opened for signature 16 December 1966, 993 UNTS 3, art 9 (entered into force 3 January 1976).

¹²⁰ *Ibid* art 7. There are also numerous International Labour Organization Conventions dealing with working conditions.

¹²¹ See, eg, *Minister for Immigration and Multicultural Affairs v Guan* [2000] FCA 1033 (Unreported, Moore J, 2 August 2000).

¹²² Goodwin-Gill, above n 40, 52.

¹²³ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, [56]–[60], UN Doc HCR/IP/4/Eng/REV.1 (1992).

¹²⁴ (1997) 190 CLR 225, 258.

The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group.

In cases concerned with political opinion and the membership of particular social groups, the issue of persecution may often be difficult to resolve when the sanctions arise from the proper application of enacted laws.

In *Khawar*, McHugh and Gummow JJ observed that:¹²⁵

Applicant A establishes that disagreement with a law of general application and fear of the consequences of the failure to abide by that law does not, on that account, constitute the persons in question a social group within the meaning of the Convention definition.

In *Minister for Immigration and Multicultural Affairs v Israelian* ('*Israelian*'), a majority of the Court appeared to support the view that application of a law of general application would not constitute persecution.¹²⁶ However, in *Applicant S*, Gleeson CJ, Kirby and Gummow JJ observed:¹²⁷

What was said in *Israelian* does not establish a rule that the implementation of laws of general application can never amount to persecution. It could scarcely be so given the history of the Nuremberg Laws against the Jews enacted by Nazi Germany which preceded, and help to explain, the purposes of the *Refugees Convention*. Rather, the Court majority determined that, on the facts of that case, it had been open to the Tribunal to conclude that the implementation by Armenia of its laws of general application was not capable of resulting in discriminatory treatment. A law of general application is capable of being implemented or enforced in a discriminatory manner.

They went on to say that

the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is 'appropriate and adapted to achieving some legitimate object of the country [concerned]'.¹²⁸

As McHugh J had observed in *Applicant A*, a legitimate object 'will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the State and its citizens'.¹²⁹ The joint judgment in *Applicant S* further explained this by reference to the comment in *Chen* that:

whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the

¹²⁵ (2002) 210 CLR 1, 28.

¹²⁶ (2001) 206 CLR 323.

¹²⁷ (2004) 217 CLR 387, 402.

¹²⁸ *Ibid.*

¹²⁹ (1997) 190 CLR 225, 258; approved in *Applicant S* (2004) 217 CLR 387, 402 (Gleeson CJ, Gummow and Kirby JJ).

different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity.¹³⁰

This latter comment might be thought to invoke internationally accepted human rights norms.

Certainly the courts are faced with a difficult predicament when dealing with enforcement of a generally applicable criminal law. However, where the law is used on a pretextual basis for harassing a particular group of persons, it ought to be seen as persecution. Mass arrests of female sex workers in the Dominican Republic who congregate in public places, under the charge of ‘bothering tourists’, amounts to a pretextual application of the law. Such arrests and subsequent detentions or fines also violate basic human rights, such as the right to be free from arbitrary detention, the right to a fair trial, the right to freedom of association and the right to freedom of assembly. Such mass arrests thus in my view constitute persecution — systemic harassment because of membership of a particular social group. We might contrast these mass arrests, fines and detention with an arrest under the same law of an individual prostitute, on complaint from a tourist, followed by presentation before a magistrate and due process of law. Such an application of the law would (probably) not be pretextual, would (probably) not violate basic human rights and would (probably) not amount to persecution.

B Arrest and Prosecution under Laws Criminalising Prostitution

In addition to the use of general laws to target prostitutes, some countries do still criminalise sex work directly. This raises the question of whether prosecution under such laws can amount to persecution within the meaning of the *Refugees Convention*. Again the parallel with laws criminalising same-sex sexual activity is useful. Enforcement of such laws is considered to constitute persecution of gay men (and lesbians, if they apply to lesbians). Even though such laws are often neutral on their face, in that they apply to everyone in the community, the courts have held that such a law impermissibly targets lesbians and gay men. Thus in *MMM*, Madgwick J noted that the High Court’s comments about the application of generally applicable laws left open the possibility that in some circumstances the enforcement of such laws could constitute persecution:¹³¹

It does not appear to me that [the High Court] intended to place outside the scope of Convention related persecution the operation of *any* law, however vile, provided that it was generally expressed, unless actually selective enforcement

¹³⁰ *Applicant S* (2004) 217 CLR 387, 403 (Gleeson CJ, Gummow and Kirby JJ).

¹³¹ (1998) 90 FCR 324, 330. Notably, Madgwick J’s approach is inconsistent with the approach adopted in an earlier case, *Z Case* (1998) 90 FCR 51, concerning adultery. There, Katz J took the view that, in order to constitute persecution, prosecution under a generally applicable law must involve ‘either selective prosecutions ..., the criterion of selection of persons for prosecution being [a *Refugees Convention* reason] ... or the imposition of punishments on persons convicted ..., such punishments being greater than they would otherwise have been [because of a *Refugees Convention* reason]’: at 7. The argument that the RRT was required to assess the legitimacy of the law in question and assess whether it violated basic human rights, so that even a non-discriminatory application of the law would constitute persecution, was rejected by his Honour: at 8–9.

of it could be shown. In some circumstances, the existence of the law, provided it seems likely to be enforced, even though the actual enforcement may not be selective, may indicate that the legislature as well as the executive of the country in question, was intending serious harm to a particular social group.

Given later comments in *Applicant S*, Madgwick J was undoubtedly correct in this regard.

Picking up on McHugh J's observation in *Applicant A* that state conduct involving a 'legitimate object' does not constitute persecution,¹³² Madgwick J concluded that:¹³³

there is no identifiable and pressing social problem to which attempted suppression by the criminal law of homosexual acts is 'appropriate and adapted'. If serious official harm is offered or threatened to homosexuals because they wish privately to give expression to their sexuality, there is in my view no legal reason why, in particular circumstances, this might not amount to persecution.

More recently, in *Applicant S395*, McHugh and Kirby JJ stated:¹³⁴

If a person claims refugee status on the ground that the law of the country of his or her nationality penalises homosexual conduct, two questions always arise. First, is there a real chance that the applicant will be prosecuted if returned to the country of nationality? Second, are the prosecution and the potential penalty appropriate and adapted to achieving a legitimate object of the country of nationality? In determining whether the prosecution and penalty can be classified as a legitimate object of that country, international human rights standards as well as the laws and culture of the country are relevant matters. If the first of these questions is answered: Yes, and the second: No, the claim of refugee status must be upheld even if the applicant has conducted him or herself in a way that is likely to attract prosecution. ...

In *WABR*, the appellant, an Iranian, alleged that he was a homosexual and claimed that he feared persecution because homosexual conduct was illegal in Iran and that penalties ranged from death to flogging to imprisonment. Thus, the issues were whether there was a real chance of the appellant being prosecuted for homosexuality and, if so, whether the prosecution and any potential penalty were so inappropriately adapted to achieving a legitimate object of Iranian society as to amount to persecution.

From this analysis of the criminalisation of homosexual activity, one might argue that the existence (and enforcement) of criminal laws against prostitution may constitute persecution. Such an argument is unlikely to succeed, however, as the courts would probably accept that prostitution is an 'identifiable and pressing social problem' to which laws criminalising sex work are appropriate and adapted. Indeed, this line of reasoning was expressly articulated in *Mah-*

¹³² (1997) 190 CLR 225, 258.

¹³³ *MMM* (1998) 90 FCR 324, 331.

¹³⁴ (2003) 216 CLR 473, 491–2.

moodi v Minister for Immigration and Multicultural Affairs ('Mahmoodi').¹³⁵ Tamberlin J stated:¹³⁶

A further matter relied on by the applicant before the RRT was that he was at risk of punishment by the Taliban for having sexual relations with a prostitute. Again, it seems to me that the policy, objective or code of morality of the Taliban which prescribes punishment for engaging in such conduct, could be considered to be a general principle of morality, or an objective which those controlling the country might, according to prevalent values in its community, consider to be appropriate in promoting the general welfare of the State and its citizens. Due allowance must be made for different values and standards in different countries as to the consequences, if any, which ought to properly follow from perceived moral transgressions. In the case of Afghanistan, punishment for having sexual relations with prostitutes might legitimately be considered to be a matter of general, social or moral regulation which relates to the welfare of the state and its citizens. In any event, it would apply on a non-selective basis for Convention purposes so that the element of selective harassment is lacking.

In this respect, prostitution is distinguishable from private same-sex sexual activity. It is now reasonably well-accepted in international human rights law that the criminalisation of private, consensual same-sex sexual activity is an arbitrary interference with privacy that cannot be justified on the basis of protection of morals or public health.¹³⁷ That is, although lesbians and gay men have not achieved full human rights protection at international law, it is accepted that individuals have a right to engage in private, consensual, same-sex sexual activity. The same cannot be said, however, for sex workers.

First, it is difficult to argue that the criminalisation of prostitution arbitrarily interferes with privacy. Because prostitution involves the exchange of money for sex, it is generally viewed as commercial, that is, non-private. Furthermore, the exchange of sex for money is viewed by many societies as a profoundly immoral act, and it thus seems likely that criminalisation of prostitution would be held not to be arbitrary on the basis that it involves the permissible protection of morals, as articulated in *Mahmoodi*. In addition, criminalisation of sex work may be argued to be non-arbitrary because it furthers the permissible aim of protection of public health.¹³⁸

¹³⁵ [2001] FCA 1090 (Unreported, Tamberlin J, 6 August 2001).

¹³⁶ *Ibid* [11]. In a similar vein, Callinan and Heydon JJ observed in *Applicant S395* (2003) 216 CLR 473, 512:

in all societies, there are greatly varying views, and indeed laws, about what is or is not acceptable, conventional, or proper sexual conduct or practice, both heterosexual and homosexual. And the same may readily be said about other expressions of identity, not merely sexual. These may well be matters of cultural and national interest in respect of which there may be great divergence of opinion and, in consequence, laws, from nation to nation. For example, in Ireland the *Offences against the Person Act 1861*, s 58, makes abortion a felony punishable by imprisonment for life and other legislation has restricted access to contraceptive devices and also access to information about abortion.

¹³⁷ See, eg, *Toonen v Australia*, United Nations Human Rights Commission, UN Doc CCPR/C/50/D/488/1992 (1994).

¹³⁸ Although in the age of HIV, and when it has been acknowledged that criminalisation of populations at risk, such as gay men, in fact impedes public health measures against HIV, it may be argued that criminalisation of prostitutes similarly impedes public health measures against HIV, thus negating the public health argument.

More generally, even though many countries no longer criminalise prostitution per se, preferring instead to criminalise the acts of third parties associated with prostitution,¹³⁹ decriminalisation is not associated with any recognition that individuals have a right to engage in sex for money. Rather, it has stemmed from a view of (female) prostitutes as victims who should not be criminalised but who need to be protected from the (male) individuals who exploit them.¹⁴⁰ That is, prostitution is seen as a violation of women's rights,¹⁴¹ not as something women have a right to do.¹⁴² Thus it seems unlikely that refugee receiving countries such as Australia will view criminal laws against sex work as persecution, even though Australia itself does not criminalise sex work.

C Violence and Extortion by Police and Clients

In addition to enforcement of the criminal law and selective enforcement of a general law, sex workers often face extortion and violence at the hands of the police. In some cases it has been held or suggested that violence and extortion by police is simply a 'private' act by the individual police officer, unrelated to the woman's membership of a particular social group. In *Ram v Minister for Immigration and Multicultural Affairs* this was the view of the Full Federal Court in relation to extortion, which was seen to be motivated by the perception that a person could pay, rather than by their social group.¹⁴³ And in some early US cases this was the view in relation to rape and sexual assault, which were seen as motivated by the male perpetrator's sexual desire or sexual drive, rather than by the woman's membership in a particular social group.¹⁴⁴

Both these approaches, however, fail to consider the question of the state's failure to protect the women in question from harm. As the High Court held in *Khawar*, if state inaction in the face of persecution is a result of a person's membership of a particular social group, then a refugee claim may be made out, regardless of the motivation of the individual who inflicted the harm. In the case of police violence, it may well be possible to prove that a sex worker is unable to seek state protection from such violence precisely because of her status as a sex

¹³⁹ Examples include most Australian states, New Zealand and Sweden. See, eg, Dejo Olowu, 'The Promise of the *Prostitution Reform Act*' (2006) 31 *Alternative Law Journal* 93; Kate Gleeson, "'Having Sunk as Law as a Man Can Sink": The Pimp in Law' (2004) 21 *Australian Feminist Law Journal* 101.

¹⁴⁰ See Priscilla Alexander, 'Prostitution: Still a Difficult Issue' in Frederique Delacoste and Priscilla Alexander (eds), *Sex Work: Writings by Women in the Sex Industry* (2nd ed, 1998) 184, 201; Pheterson, *A Vindication of the Rights of Whores*, above n 115, 105. This approach to prostitution is generally described as 'abolitionist'.

¹⁴¹ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, opened for signature 21 March 1950, 96 UNTS 271, preamble (entered into force 25 July 1951): 'prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.'

¹⁴² Notably, such arguments ignore the existence of male prostitutes.

¹⁴³ (1995) 57 FCR 565, 569 (Burchett J).

¹⁴⁴ This approach to a claim of rape as persecution was later rejected by the US Court of Appeals for the Ninth Circuit: see *Garcia-Martinez v Ashcroft*, 371 F 3d 1066, 1072 (Rawlinson J) (9th Cir, 2004).

worker. Thus her claim of persecution for a *Refugees Convention* reason will be made out. As McHugh and Kirby JJ observed in *Applicant S395*:¹⁴⁵

Even where a law [against homosexual activity] is not enforced, however, there may be a real chance that a homosexual person will suffer serious harm — bashings or blackmail, for example — that the government of the country will not or cannot adequately suppress. That appears to be the position in Bangladesh. If the harm is inflicted for a Convention reason and is serious enough to constitute persecution, the homosexual person is entitled to protection under the Convention. It is immaterial that the conduct of the applicant for refugee status disclosed his or her identity as a homosexual and attracted the attention of the persecutors.

A similar argument may be made in relation to the state's failure to respond to the rape of prostitutes or theft from them by private actors (including clients). If such failure is because of the woman's status as a sex worker, her claim of persecution on the ground of membership of a particular social group may be made out.

D *Male Prostitutes*

The major focus of this article has been on female sex workers. This is in part because most sex workers are women and thus there are gender issues involved in an analysis of the sex trade. It is also because most of the data available about sex workers in various countries — including the Dominican Republic, the country of my case study — is about women. However, there are of course male sex workers, who cater to male and/or female clients. So much is clear in the Dominican Republic, where there is a particular term for male sex workers — *sanky-pankies*. It is for this reason that I have chosen not to argue, as some have, that persecution of sex workers constitutes persecution on the basis of sex or gender.¹⁴⁶ While I consider that such an argument can be made in some circumstances, I argue that the analysis I undertake in this article could apply equally to male sex workers. I note, however, that the issues surrounding male sex workers are different from those relating to female sex workers at least where the male sex worker caters to male clients and is thus perceived as homosexual; such sex workers will often be able to link their claim more clearly to sexuality, rather than sex work.¹⁴⁷

IX HOW MIGHT SEX WORKERS ACHIEVE RECOGNITION AS REFUGEES?

Although I consider that prostitutes should be able to claim refugee status, either by analogy with lesbians and gay men or via a claim based on occupation, I recognise that it is unlikely that Australian courts — or those of other refu-

¹⁴⁵ *Applicant S395* (2003) 216 CLR 473, 491.

¹⁴⁶ See, eg, Pheterson, *The Prostitution Prism*, above n 10, 100.

¹⁴⁷ This seemed to be the view of the RRT in its decision that was the subject of review in *Minister for Immigration and Multicultural and Indigenous Affairs v SZFDJ* [2006] FCAFC 53 (Unreported, Ryan, Tamberlin and Mansfield JJ, 28 April 2006).

gee-receiving countries — will accept such an argument at present. This raises the question of how sex workers might achieve recognition as refugees. The trajectory of lesbians and gay rights claims under international law, including refugee law, is illustrative in this regard. Persecution of lesbians and gay men had been occurring for many years before the first claims based on refugee status were recognised. Early refugee claims based on sexual preference were rejected by decision-makers and courts, and indeed in some European countries such claims are still rejected, notwithstanding the European Court of Human Rights' progressive approach to lesbian and gay rights issues.¹⁴⁸ Ultimately, however, it was the increasing recognition of lesbian and gay rights by Western refugee-receiving states that enabled the success of refugee claims based on sexual preference. That is, it was not until lesbian and gay rights had achieved some legitimacy, both in international law and in the domestic law of refugee receiving states, that refugee claims by lesbians and gay men began to succeed. In particular, the recognition that the criminalisation of same-sex sexual activity violated the right to privacy was central in the recognition that such criminalisation amounted to persecution.¹⁴⁹

Thus in the area of prostitutes' claims for refugee status, we are unlikely to see success in such claims until there is a broader acceptance of prostitutes' rights, at least in the Western, refugee-receiving states and also in international human rights law. Such recognition shows little sign of emerging at present, notwithstanding the increasing activism by sex workers at both the international and domestic levels. In particular, so long as the abolitionist approach to prostitution remains influential amongst feminists and governments, sex workers are unlikely to be recognised as refugees except, perhaps, where they seek to avoid 'forced prostitution'. That is, refugee law will not lead the way in this area: prostitutes need to succeed in their claims to be rights bearers before they can succeed in refugee claims.

¹⁴⁸ No lesbian or gay refugee case has ever reached the European Court of Human Rights. However, given the Court's increasingly positive attitude towards lesbians and gay rights claims, one might expect that such a case would be decided favourably to the claimant if it ever emerged: see, eg, *Salguero Da Silva Mouta v Portugal* (2001) 31 EHRR 47; *Horsham v United Kingdom* (1999) 27 EHRR 163.

¹⁴⁹ The US approach provides the exception that proves the rule — gay and lesbian refugee claims were accepted in the US at a time when the right to privacy under the *United States Constitution* was not applied to protect lesbian and gay sexuality. That is, prior to the US Supreme Court's decision in *Lawrence v Texas*, 539 US 558 (2003), overturning *Bowers v Hardwick*, 478 US 186 (1986).