

WOMEN ASYLUM SEEKERS IN AUSTRALIA: DISCRIMINATION AND THE *MIGRATION LEGISLATION AMENDMENT ACT [NO 6] 2001 (CTH)*

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[The Australian government recently implemented various pieces of legislation to amend and expand the country's strict border control strategy. The Migration Legislation Amendment Act [No 6] 2001 (Cth) was one such piece of legislation that directly impacted on the procedural and substantive elements of the refugee status determination process in Australia. One of the most vulnerable groups affected by the changes in Australia's migration legislation has been women asylum seekers. This article assesses the situation of women asylum seekers under the Migration Legislation Amendment Act [No 6] 2001 (Cth) using a paradigm of non-discrimination, which forms the cornerstone of both international human rights and refugee law. It is noted that whilst issues of discrimination are frequently the focal point of the substantive analysis of a claim to asylum, far less attention is paid to the discrimination potentially faced by asylum seekers on arrival in the territory of the state from which they are requesting protection. The examination of various procedural and substantive provisions of the Migration Legislation Amendment Act [No 6] 2001 (Cth) and their impact on women asylum seekers reveals that discriminatory practices infuse Australian domestic migration law. These practices negatively impact on the development and implementation of human rights and refugee law within Australia. It is proposed that a human rights-based approach to the assessment of women's claims for refugee status could provide the foundation for an alternative to the current legislation. This would allow for more consistent decision-making that accords with Australia's international obligations and commitments to the development and respect for women's rights and freedoms.]

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I INTRODUCTION

Discrimination involves one person's rejection of another person as a full human being who is equal in dignity and rights to all other human beings. That is what makes discrimination a great evil.¹

In recent years, the Australian government has implemented legislation and policies aimed at deterring asylum seekers from arriving at its shores.² Its main method of deterrence has been the temporary protection regime, introduced in October 1999. This regime prevents asylum seekers who arrive in Australia without valid travel and visa documentation from applying for permanent asylum in Australia. Instead, they may only apply for a three-year Temporary Protection Visa ('TPV') that denies the holder the right to family reunification, to return if they leave Australia, and to access various settlement services and welfare benefits.³

Since the introduction of the temporary protection scheme, the government has continued to take legislative steps, under the banner of border protection and national security, to limit the legal rights accorded to these onshore asylum seekers who are allowed into Australia.⁴ As a result, very few of these onshore asylum seekers are now able to obtain Permanent Protection Visas ('PPVs') when their TPV expires.⁵ Of those refugees granted TPVs, the vast majority are men who, for various reasons, have been separated from their families. Under the TPV regime, they face a minimum wait of three years before becoming eligible to apply for permanent protection and the ability to be reunited with their families. However, even then most are either denied a further protection visa or are granted successive TPVs, making reuniting with their family in Australia impossible.

Despite the introduction of the temporary protection regime, asylum seekers have continued to attempt to reach Australian shores by any means possible. Recently, however, there has been a marked increase in the number of women

¹ Chris Sidoti, Human Rights Council of Australia, 'Without Prejudice: Discrimination and Refugees' (Paper presented at the New South Wales State Conference of the Local Government Community Services Association, Sydney, Australia, 14 November 2002) [4] <<http://www.hrca.org.au/discrim%20and%20refugees.htm>> at 1 October 2003.

² See, eg, Department of Immigration and Multicultural and Indigenous Affairs (Australia), *Fact Sheet 64: Temporary Protection Visas* (2003) <<http://www.dimia.gov.au/facts/64protection.htm>> at 1 October 2003.

³ *Ibid.*

⁴ Seven acts impacting on Australia's migration laws were enacted on 27 September 2001: *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); *Migration Legislation Amendment Act [No 1] 2001* (Cth); *Migration Legislation Amendment Act [No 5] 2001* (Cth); *Migration Legislation Amendment Act [No 6] 2001* (Cth); *Migration (Judicial Review) Act 2001* (Cth).

⁵ During the fiscal year 2001–02, nearly 4000 refugees were granted protection visas, of which 750 were PPVs and 3100 were TPVs: US Committee for Refugees, *World Refugee Survey* (2003) 107 <<http://www.refugees.org/WRS2003.cfm.htm>> at 1 October 2003. Note also that many of the 8400 persons granted TPVs in previous years are coming up for reassessment in 2003 and it is likely under the new legislation that few will be eligible for PPVs.

and children, desperate to escape their home countries and be reunited with their husbands and fathers.⁶

This changing demographic has coincided with the implementation of further legislation, declared by the government to be aimed at restoring the application of the *Convention Relating to the Status of Refugees*⁷ to its 'proper interpretation', and addressing the issues of misuse and abuse of the Australian refugee determination process.⁸ This legislation, the *Migration Legislation Amendment Act [No 6] 2001* (Cth) ('MLAA'), has restricted the *Refugee Convention* definition of a refugee⁹ and implemented various procedural requirements for the lodging of a refugee claim.

The *MLAA* was implemented as part of a raft of legislation concerned primarily with the idea that Australia was becoming a 'soft touch'.¹⁰ As a result, little attention was given to the impact the *MLAA* would have on the rights and freedoms of those individuals it would affect. Further, despite a notable increase in the number of women seeking asylum on Australia's shores, no recognition has been given to the fact that women asylum seekers are a particularly vulnerable group with special needs.¹¹ Women asylum seekers thus not only require equal access and equal treatment in refugee determination procedures and the granting of asylum,¹² but also have special needs for protection that reflect their gender as victims of, for example, persecution through sexual violence or other gender-related persecution.¹³

This article examines the position of women asylum seekers under the *MLAA* in light of Australia's international non-discrimination obligations. In particular, the *Convention on the Elimination of All Forms of Discrimination against Women*¹⁴ recalls that 'discrimination against women violates the principles of equality of rights and respect for human dignity',¹⁵ and requires state parties to agree to 'pursue by all appropriate means and without delay a policy of

⁶ Refugee Council of Australia, *RCOA Position on the 'Children Overboard' Incident and the Pacific 'Solution'* (2002) [14] <http://www.refugeecouncil.org.au/html/position_papers/CHILDREN%20OVERBOARD.html> at 1 October 2003; Anne Barker, *Australia: Waiting for Loved Ones* (2002) <http://www.abc.net.au/asiapacific/specials/journeys/case_australia2.htm> at 1 October 2003.

⁷ Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugees Convention*'). The *Refugees Convention* was amended by the *Protocol Relating to the Status of Refugees*, opened for signature 16 December 1966, 606 UNTS 267 (entered into force 4 October 1967).

⁸ Explanatory Memorandum, Migration Legislation Amendment Bill [No 6] 2001 (Cth) [1], [3].

⁹ *Refugees Convention*, above n 7, art 1(A).

¹⁰ See, eg, Louise Dodson, Simon Mann and Kerry Taylor, 'Boat People Stranded at Sea', *The Age* (Melbourne, Australia), 28 August 2001, 1.

¹¹ Executive Committee of the High Commissioner's Program, UN High Commissioner for Refugees ('UNHCR'), *Agenda for Protection*, UN Doc A/AC.96/965/Add.1 (2002), [6].

¹² *Beijing Declaration and Platform for Action* (adopted at the Fourth World Conference on Women, Beijing, China, 15 September 1995) [147(h)] <<http://www.un.org/womenwatch/daw/beijing/platform/armed.htm#object5>> at 1 October 2003.

¹³ *Ibid.* See, eg, A Widney Brown and Laura Grenfell, 'The International Crime of Gender-Based Persecution and the Taliban' (2003) 4 *Melbourne Journal of International Law* 347.

¹⁴ Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*').

¹⁵ *Ibid* preamble.

eliminating discrimination against women'.¹⁶ Little attention has been paid to the discrimination faced by asylum seekers on arrival in the territory of the very state from which they are requesting protection. This article aims to examine various provisions of the *MLAA* and assess their impact on women asylum seekers. The first section will examine several procedural aspects of the *MLAA* and the extent to which they accommodate women within the asylum seeking process. The second section will then address more substantive issues relating to the determination of women asylum seekers' claims.

This article demonstrates that Australian domestic migration law is infused with discriminatory practices that are negatively impacting on the development and implementation of Australia's obligations under international human rights and refugee law. The article concludes that Australian domestic refugee law and international human rights law need to become more integrated, so that the protection of women refugees is more clearly viewed as being essential to the protection of women's human rights. It is proposed that a human rights-based approach to the assessment of women's refugee claims can provide the foundation for an alternative to the current legislation. This approach would allow Australia's decision-making process to achieve consistency with the *Refugees Convention* and the current international emphasis on the development and respect for women's rights and freedoms.¹⁷

II DISCRIMINATION AND THE AUSTRALIAN ASYLUM-SEEKING PROCESS

As an active member of the international community and signatory to numerous international treaties,¹⁸ Australia is obliged to prevent and eliminate all forms of discrimination and to ensure the promotion and protection of all human rights.¹⁹ Australia has been a party to *CEDAW* since 1983 and has committed itself to

take in all fields ... all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.²⁰

The United Nations *Declaration on the Elimination of Violence against Women*, although not binding on states, also upholds the important principle that

¹⁶ *CEDAW*, above n 14, art 2.

¹⁷ See, eg, Executive Committee of the High Commissioner's Program, above n 11, 22, which states that an approach that proceeds from a rights-based framework is necessary to protect refugee women and children.

¹⁸ See, eg, *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A(III) (1948) ('*UDHR*'); *International Covenant on Civil and Political Rights*, opened for signature 26 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*'); *CEDAW*, above n 14; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*').

¹⁹ See, eg, *ICCPR*, above n 18, art 2; *ICESCR*, above, n 18, art 2(2); *CEDAW*, above n 14, art 2.

²⁰ *CEDAW*, above n 14, art 3.

all states should ensure that the re-victimisation of women does not occur because of laws that are insensitive to gender considerations.²¹

During the mid-1990s, Australia attempted to take some steps towards recognising the issues faced by women in general, and by those claiming refugee status. A 1994 Australian Law Reform Commission report recommended the development of a Commonwealth ‘*Equality Act*’, which would require the assessment of whether a law, policy, program, practice or decision made by the government, or in performance of public functions, powers or duties, was inconsistent with equality in the law.²² However, this recommendation has never been implemented.

In 1996, the Australian Department of Immigration and Multicultural Affairs (‘DIMA’), produced the *Guidelines on Gender Issues for Decision-Makers*,²³ which were developed to assist decision-makers in assessing gender-based refugee claims. Unfortunately, these *Gender Guidelines* have had limited influence on decision-making.²⁴

By the late 1990s, there had been a marked shift in the prevailing attitudes towards asylum seekers in Australia and the world over. Indeed, as the UN High Commissioner for Refugees (‘UNHCR’) noted:

Overall, UNHCR detected a distinct trend in an increasing number of States to move gradually away from a law or rights-based approach to refugee protection, towards more discretionary and ad hoc arrangements that give greater primacy to domestic concerns rather than to their international responsibilities ...

Major problems in protecting refugees have arisen through ... unduly narrow application of the existing refugee treaties. Contrary to the aims of the *1951 Convention* regime, current policies and practices in some regions are designed to restrict access to safety rather than to facilitate such access. The essential need today is for the uniform, liberal and positive application of existing refugee instruments.²⁵

In Australia, as noted above,²⁶ the government implemented a strict border control strategy, including the mandatory detention of unlawful arrivals, claiming that its actions were in Australia’s national interest. Asylum seekers were portrayed as ‘wealthy queue jumpers’ and even worse, terrorists and criminals, who threw their children into the sea and sewed their lips together in

²¹ *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN GAOR, 85th plen mtg, Supp No 49, UN Doc A/RES/48/104 (1993) 217.

²² Australian Law Reform Commission, *Equality before the Law: Women’s Equality*, Report No 69 (Pt II) (1994) 54–76. ‘Equality in the law’ is given a particular definition in recommendation 4.3, as including ‘equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal enjoyment of human rights and fundamental freedoms’.

²³ DIMA (Australia), *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision-Makers* (1996) (‘*Gender Guidelines*’).

²⁴ A search of all Refugee Review Tribunal (‘RRT’) decisions since 1996 on the Australasian Legal Information Institute database found no references to the *Gender Guidelines*: <<http://www.austlii.edu.au>> at 1 October 2003. Whilst they are not binding on the RRT, their failure to even be mentioned when quoting sections of first-instance decisions reveals the lack of influence that they have on RRT decision-making.

²⁵ Executive Committee of the High Commissioner’s Program, UNHCR, *Note on International Protection*, UN Doc A/AC.96/914 (1999) [10], [14].

²⁶ See above n 2 and accompanying text.

barbaric acts of self-mutilation.²⁷ The government also claimed to be acting in accordance with humanitarian concerns, aiming to deter prospective ‘boat people’ from the sometimes fatal dangers of their perilous journey to Australia.²⁸

This new border protection strategy required various amendments to the *Migration Act 1958* (Cth) (*Migration Act*), the legislation implementing the *Refugees Convention* in Australian domestic law. One such amendment was the *MLAA*. The government believed that legislation was needed to clarify the content of Australia’s international obligations, achieve greater certainty in domestic executive decision-making and maintain the integrity of Australia’s refugee program. This clarity required a narrow reading of the *Refugees Convention* in order to ensure Australia’s right to regulate who enters its territory.²⁹ As will be seen below, in regressing from the broader humanitarian purpose of the *Refugees Convention*, the Australian government now unnecessarily risks breaching its international obligations by failing to protect the fundamental rights and freedoms of women asylum seekers.

III PROCEDURAL ISSUES

A Family Unit Applications

The *MLAA* amendments to s 48 of the *Migration Act* prevent members of a family unit that are declined refugee status from making any further visa applications either individually or as a group.³⁰ This restriction aims to prevent the misuse of the asylum process by family groups that wish to prolong their stay in Australia by serially lodging protection applications, with ‘each member taking turns to advance claims for protection while the others apply as family members.’³¹ Of concern here is that this legislation discriminates against women and children who, for the reasons discussed below, may not have their initial

²⁷ Edmund Rice Centre for Justice and Community Education (NSW), ‘Debunking the Myths about Asylum Seekers’, *Just Comment (Special Edition)* (Sydney, Australia), September 2001, 1; Edmund Rice Centre for Justice and Community Education (NSW), ‘Debunking More Myths about Asylum Seekers’, *Just Comment (Special Edition No 2)* (Sydney, Australia), October 2001, 1.

²⁸ See generally BBC News, *Sharks Used to Deter Immigrants* (2000) <<http://news.bbc.co.uk/2/hi/asia-pacific/792477.stm>> at 1 October 2003; Migration Dialogue, ‘Australia, New Zealand’ (2000) 7(7) *Migration News* <http://migration.ucdavis.edu/mn/more.php?id=2150_0_5_0> at 1 October 2003.

²⁹ See Department of Immigration and Multicultural and Indigenous Affairs (Australia), *Interpreting the Refugee Convention: An Australian Contribution* (2002) 3–4.

³⁰ *Migration Act* s 48A(2)(aa)–(ab).

³¹ Explanatory Memorandum, above n 8, [15].

claims adequately addressed. As a consequence, Australia could breach its internationally-binding obligation of *non-refoulement*.³²

A family who arrives in Australia lawfully and seeks asylum must lodge an application form for a permanent protection visa.³³ Each family member is recorded as a dependant on the form of the principal applicant, who is usually the male head of the family. Each dependant can also make his or her own claim under the family unit application by completing a further section of the application form, although many women asylum seekers who arrive in Australia with a male relative tend to lodge only a dependant application.³⁴

Once a claim is lodged, the *Gender Guidelines* aim to give officers of the Department of Immigration and Multicultural and Indigenous Affairs ('DIMIA')³⁵ a greater level of understanding of the particular needs of women asylum seekers.³⁶ The *Gender Guidelines* recognise that for women asylum seekers there may be 'social and cultural barriers to lodging applications and/or pursuing claims related to their own experiences'.³⁷ For example, where a male head of the household seeks asylum, claims relating to female members of the family unit may not be mentioned due to shame, fear or lack of knowledge.³⁸ They may even be ignored or given little, if any weight by the male applicant, the decision-maker or even the female asylum seeker herself.³⁹ Gender-based persecution can be extremely subtle, and therefore even if the experience is acknowledged, insufficient recognition may be given to how this could amount to a claim in its own right.

Despite recognition of these problems, the *Gender Guidelines* are silent on the issue of whether a woman should submit a claim as an individual or as a dependant.⁴⁰ Further, whilst DIMIA purports to be sensitive to differences in

³² *Refugees Convention*, above n 7, art 33 states that no member state is to return any asylum seeker to a country where his or her life or freedom is threatened on account of one of the five *Refugees Convention* reasons. This obligation is considered customary international law, that is, binding on all states whether party to the *Refugees Convention* or not: Ministerial Meeting of States Parties 12–13 December 2001, *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/MMSP/2001/09 (2002) [4]; UNHCR Global Consultations on International Protection, Cambridge Roundtable, 9–10 July 2001, *The Principle of Non-Refoulement* (2001) <http://www.unhcr.org/global_consult/principe_non_refoulement_en.pdf> at 1 October 2003; International Institute of Humanitarian Law, *San Remo Declaration on the Principle of Non-Refoulement* (San Remo, Italy, 6–8 September 2001) <<http://www.iihl.org/San%20Remo%20Declaration%20on%20the%20Principle%20of%20Non-Refoulement.doc>> at 1 October 2003.

³³ Note that onshore asylum seekers who arrive in Australia without valid travel documents and seek asylum can only apply for a TPV. For a discussion of Australia's visa regime, see Andreas Schloenhardt, 'To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia' (2002) 14(2/3) *International Journal of Refugee Law* 302.

³⁴ Caroline Lambert, *Six Acts that Change Australia's Refugee Regime* (2001).

³⁵ DIMIA is the successor department to DIMA. This change was effected by Commonwealth (Australia), *Administrative Arrangements Order*, 26 November 2001 <<http://www.dpmc.gov.au/pdfs/ao.pdf>> at 1 October 2003.

³⁶ DIMA (Australia), *Gender Guidelines*, above n 23, [1.5].

³⁷ *Ibid* [2.11].

³⁸ UNHCR, *Guidelines on the Protection of Refugee Women*, UN Doc EC/SCP/67 (22 July 1991) [57].

³⁹ DIMA (Australia), *Gender Guidelines*, above n 23, [2.11].

⁴⁰ Cf Global Consultations on International Protection, *Asylum Processes (Fair and Efficient Asylum Procedures)*, UN Doc EC/GC/01/12 (2001) [45].

experience within a family unit application and its officers can suggest that a dependant may wish to submit an individual claim,⁴¹ this can only be done if some indication has arisen as to the potential grounds for the woman's claim in the first place. In the absence of such an indication, a woman's claim may never be heard and never formally assessed.

The *Gender Guidelines* do, however, state that a 'woman who is included in the application as a member of a family unit should be given the opportunity of a separate interview so that she is able, with appropriate assurances of confidentiality, to outline her experiences.'⁴² Yet this is contrary to current DIMIA practice where a woman who has submitted a claim as a dependant tends not to be interviewed, except perhaps to test the credibility of the principal applicant.⁴³ This practice is of concern because women asylum seekers often have strong claims to protection based on grounds quite separate to those of the male head of the family unit. Such a practice can also be extremely disempowering for women claimants.⁴⁴

In the author's opinion, the structure of the DIMIA application form and its interviewing policy implicitly uphold the assumption that asylum seekers are politically active males who are persecuted by the state for their activities, and that women should be regarded as dependants. The effect of this non-interventionist stance is to silence and discount women's experiences, thus perpetuating the discrimination and gender imbalances within society and the home. Despite appearing to be a gender-neutral piece of legislation, the amendments to s 48 of the *Migration Act* in fact indirectly discriminate against women asylum seekers. The effect of the amendments is that female claimants are required to carry a heavier burden than male claimants in articulating their claims. Not only is this piece of legislation inconsistent with equality in the law,⁴⁵ but it is also a clear example of the state refusing to interfere in the 'private' sphere to the detriment of women's rights to non-discrimination.

Internationally, there is strong recognition of the specific needs of women asylum seekers. The UN Fourth World Conference on Women, held in 1995, recognised the need for states to develop criteria and guidelines for responding to persecution specific to women.⁴⁶ The General Assembly and the UNHCR have also frequently called upon states to ensure that both women and men have equal access to refugee status determination procedures.⁴⁷ The UNHCR has assisted several countries in implementing legislation specifically addressing the needs

⁴¹ DIMA (Australia), *Gender Guidelines*, above n 23, [2.11].

⁴² *Ibid* [3.10].

⁴³ Email from DIMIA Training Coordinator to Leanne McKay, 24 October 2002.

⁴⁴ See *Dranichnikov v DIMA* [2002] FMCA 23 (Unreported, Baumann FM, 18 February 2002), where despite initially applying as a member of a family unit, the applicant subsequently wished to lodge an individual application and was prevented from doing so. See also *V120/00A v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 116 FCR 576, where the principal applicant died prior to the RRT hearing leaving his wife and children who were dependents on the deceased's application unable to pursue claims in their own right.

⁴⁵ *ICCPR*, above n 18, art 26.

⁴⁶ *Beijing Declaration and Platform for Action*, above n 12, [147(i)].

⁴⁷ See Executive Committee of the High Commissioner's Program, UNHCR, *Refugee Protection and Sexual Violence* (No 73) (1993).

and rights of women asylum seekers.⁴⁸ It recommends that each family member should have the chance to submit a separate claim, and that this option must remain available where the head of the family's claim has been rejected in order to ensure that the protection needs of the family unit are properly addressed.⁴⁹

Australia's treatment of women's claims under the *MLAA* is clearly contrary to international requirements. The *MLAA* effectively ensures that if a woman asylum seeker is not interviewed prior to the principal applicant's claim being declined, it is unlikely that her claim will be heard at a later date. The only remedy in this situation is to apply to have the bar on further applications lifted by the Minister for Immigration. This will be done when the Minister considers it to be in the public interest to do so.⁵⁰ The decision is at the Minister's discretion, and he must submit a statement to each house of Parliament stating the reasons for any determination.⁵¹ In light of the current trend in Australian policy to attempt to limit the number of asylum seekers travelling to Australia,⁵² and in consideration of the prior lack of assessment regarding the impact of this legislation on women asylum seekers, it appears doubtful whether the considerations discussed above would be at the forefront of any Ministerial decision-making process.

Furthermore, Australia also risks breaching its *non-refoulement* obligations if a woman asylum seeker is prevented from having her claim properly assessed and is then returned to her home country. Penelope Mathew has stated that '[i]n so far as this amendment leads to the exclusion of genuine refugees, it is simply inconsistent with art 33 of the *Refugee Convention*.'⁵³

In light of the risks of breaching anti-discriminatory and *non-refoulement* obligations, it would seem prudent to explore alternatives that would not breach these obligations, but which would still address the alleged problem of family claims that abuse the asylum-seeking process. Internationally, states have also been encouraged to bring their national immigration regulations into conformity with the relevant international instruments, focusing on the principle of *non-refoulement*.⁵⁴

An examination of other jurisdictions is useful. In both Canada and New Zealand, all family members claiming asylum are formally required to complete an individual application form stating why they are unable or unwilling to return to their country of origin.⁵⁵ In New Zealand, for example, all family members are then interviewed and women are interviewed individually and with a female

⁴⁸ This has occurred in, for example, Belarus, Bulgaria, Mexico, Russia and Slovenia: Executive Committee of the High Commissioner's Program, UNHCR, *Refugee Women and a Gender Perspective Approach* (3 September 1999) [14].

⁴⁹ Executive Committee of the High Commissioner's Program, UNHCR, *Family Protection Issues*, UN Doc EC/49/SC/CRP.14 (1999) [10].

⁵⁰ *Migration Act* s 48B(1). This section existed prior to the enactment of the *MLAA*.

⁵¹ *Migration Act* s 48B(3)(b).

⁵² See DIMIA (Australia), *Fact Sheet 71: New Measures to Strengthen Border Control* (2002) <<http://www.dimia.gov.au/facts/71border.htm>> at 1 October 2003.

⁵³ Evidence to Senate Legal and Constitutional References Committee, *Reference: Migration Legislation Amendment Bill [No 6] 2001*, Parliament of Australia, Canberra, 21 September 2001, L&C 40 (Penelope Mathew).

⁵⁴ *Beijing Declaration and Platform for Action*, above n 12, [147(h)].

⁵⁵ See, eg, *Immigration Act 1987* (NZ) s 129G.

interviewer and interpreter if they wish.⁵⁶ This approach prevents family members from lodging continuous family applications for asylum and ensures that all women are interviewed and are given the opportunity to have their experiences heard. All family members are also able to appeal a declined decision to the Refugee Status Appeals Authority ('RSAA').

The *Migration Act* could be amended to require that all women claimants be given the opportunity to be interviewed regarding their refugee claim. This would be consistent with art 4(1) of *CEDAW*, which permits the adoption of special temporary measures 'aimed at accelerating de facto equality between men and women'. *CEDAW* also requires that such measures should be 'discontinued when the objectives of equality of opportunity and treatment have been achieved.'⁵⁷ To achieve this objective would obviously require further amendments to be made to the *MLAA*, as will be discussed below.

In conclusion, the amendments to s 48 of the *Migration Act* in their current form operate contrary to the Australian *Gender Guidelines*, the international requirements of the UN and the UNHCR, and to Australia's international obligations more generally.⁵⁸ Women asylum seekers are indirectly discriminated against, and may be penalised for their reluctance or inability to immediately raise issues that may constitute a valid claim. An approach such as that adopted in New Zealand would more accurately address the issues of family claims which abuse the asylum-seeking process, whilst also reducing the risk of *refoulement* of women asylum seekers by according them an equal opportunity to have their claims heard.

B Oaths and Documentation

Section 91V of the *Migration Act* states that an asylum seeker who applies for a protection visa may be required to make an oath or affirmation to the effect that the information they have provided in their application is true. The Minister may draw adverse inferences as to the veracity of such evidence should an applicant, when required, refuse or fail to provide such an oath or affirmation or complies with the request but in an insincere manner. Under s 91W, the Minister may, in the absence of acceptable identifying documentation and without reasonable explanation for this absence, draw adverse inferences as to the veracity of the applicant's claimed identity and/or nationality.

This legislation was implemented to address 'increasing concerns that some applicants are engaging in sophisticated identity, nationality and claims fraud in order to bolster their chances of gaining protection in Australia.'⁵⁹ According to the government, in some cases individuals have withdrawn false testimony 'when presented with the prospect of affirming by way of oath or affirmation the truthfulness of the information they had originally given.'⁶⁰ Section 91W was regarded as necessary to increase the incentive of claimants to provide travel and identity documentation to DIMIA on arrival in Australia, since many claimants

⁵⁶ Very young children are generally merely sighted by the interviewing refugee status officer.

⁵⁷ *CEDAW*, above n 14, art 4(1).

⁵⁸ International obligations include anti-discrimination and *non-refoulement* obligations: see, eg, *Refugees Convention*, above n 7, arts 3, 33.

⁵⁹ Explanatory Memorandum, above n 8, [44].

⁶⁰ *Ibid.*

are believed to destroy their legitimate documentation shortly before their arrival.⁶¹

The requirements of the above provisions raise several concerns with regard to women asylum seekers. Firstly, and more generally, to require a person to exhibit the appropriate demeanour when making an oath or affirmation raises important cross-cultural issues. For example, failing to look a person of authority in the eye can be a sign of respect or nervousness, or an indicator of guilt, deceit or untruthfulness.⁶² Thus, as Justice Thomas Bingham has noted, '[t]o rely on demeanour is in most cases to attach importance to deviations from a norm when in truth there is no norm.'⁶³

Secondly, some women asylum seekers may be poorly educated or illiterate. They may also come from cultures that dictate dependence on husbands or other male relatives for pragmatic reasons. Therefore, these women may never have had possession of their travel documentation, let alone played any role in their acquisition or loss. It is then at the decision-maker's discretion as to whether or not to accept their subsequent lack of knowledge testimony as a 'reasonable explanation.'⁶⁴

Finally, the Australian government believes that unlawful arrival in Australia is inappropriate for a 'bona fide asylum seeker.'⁶⁵ Such pre-emptory statements stigmatise and disadvantage unlawful arrivals before they have even lodged their claims. They are inconsistent with the *Refugees Convention*, which states that asylum seekers who enter a country illegally should not be penalised for doing so.⁶⁶ The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* also confirms that whether an asylum seeker holds a valid passport or not should not affect his or her claim to refugee status.⁶⁷

The realities of today's world often require the asylum seeker to take various lawful and unlawful measures to ensure their successful flight from persecution. States are increasingly striving to prevent the arrival of asylum seekers. Therefore, 'the combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without

⁶¹ Ibid [57].

⁶² Phyllis Coven, Office of International Affairs, Immigration and Naturalization Service (US), *Memorandum to Immigration and Naturalization Service Asylum Officers: Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (1995) 7.

⁶³ Justice Thomas Bingham, 'The Judge as Juror: The Judicial Determination of Factual Issues' (1985) 38 *Current Legal Problems* 1, 11.

⁶⁴ DIMA (Australia), Submission No 12, *Submissions to the Senate Legal and Constitutional References Committee: Migration Legislation Amendment Bill [No 6] 2001* (2001) 13.

⁶⁵ Evidence to Senate Legal and Constitutional References Committee, *Reference: Migration Legislation Amendment Bill [No 6] 2001*, Parliament of Australia, Canberra, 21 September 2001, L&C 36 (Jennifer Bedlington, First Assistant Secretary, Refugee and Humanitarian Division, DIMA).

⁶⁶ *Refugees Convention*, above n 7, art 31.

⁶⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1992) [47]–[48] ('UNHCR Handbook').

false documents.⁶⁸ The UNHCR has also noted that

claims from asylum-seekers arriving without documentation or with false documentation have often been treated as abusive, in disregard of the fact that persons facing persecution are frequently compelled to travel without documents or to use forged documents to reach a potential country of asylum ... this by itself does not automatically render a claim abusive or fraudulent.⁶⁹

Even the World Bank has recognised that global migration pressures, a growing population and the lack of state-sanctioned outlets will continue to lead to tensions and provide further fuel for the lucrative, illegal people smuggling market.⁷⁰

DIMA has stated that guidelines would be developed to ensure that ss 91V and 91W would be implemented with regard to cultural and religious sensitivities and as to what may constitute a reasonable explanation.⁷¹ Accordingly, the amendments are not intended to be inflexible or determinative and do not oblige the decision-maker to draw an adverse inference from the lack of documentation — a reasonable explanation for failing to produce the relevant documentation will be taken into account.

Yet if the amendments are intended to be flexible, it would seem that in light of the above concerns, implementing them entirely as guidelines rather than as black letter law would be a much more effective way of dealing with asylum claims. Issues such as these have always played an informal role in the assessment of each claimant's credibility. To place them in legislation risks privileging process over substance by allowing decision-makers greater powers to draw adverse inferences that can be justified by reference to legislative authority.

To focus on procedural requirements over the substantive claims for refugee status suggests that the Australian refugee determination process is becoming an administrative rather than a protective concern. Legitimate refugees risk being declined refugee status because they do not fit the legislative process in the manner the Australian government would like them to. Thus, with an increasingly complex and inflexible determination process, the government's goal of limiting the number of successful claims for refugee status is likely to be fulfilled, albeit whilst simultaneously breaching Australia's obligations of *non-refoulement*.

For women asylum seekers, the vagueness surrounding what will be interpreted as 'reasonable explanations' does little to ensure that their individual situations are appropriately considered. The assurance that guidelines will be prepared to assist decision-makers is of little comfort in light of the limited weight that appears to be given to the *Gender Guidelines*.

⁶⁸ *R v Uxbridge Magistrates Court; Ex parte Adimi* [1999] 4 All ER 520, 524 (Simon Brown LJ).

⁶⁹ Executive Committee of the High Commissioner's Program, above n 25, [23].

⁷⁰ World Bank, *World Development Report 2003: Sustainable Development in a Dynamic World* (2002) 192 <http://econ.worldbank.org/files/17960_WDR_2003_chp_9_web.pdf> at 1 October 2003.

⁷¹ DIMA (Australia), *Submission to the Senate Legal and Constitutional References Committee*, above n 64, 12.

Mathew has pointed out there are other methods of confirming a person's identity including linguistic analysis, a procedure that is used by various states including Australia.⁷² In light of the concerns relating to procedure and *refoulement* raised above, and in order to limit the risk that Australia will *refouler* legitimate refugees under the *MLAA*, it would seem preferable to develop these and other methods to assess credibility.⁷³

C Conclusion

An examination of two of the procedural sections of the *MLAA* and their possible impact on women asylum seekers clearly shows that this legislation does little to promote or protect the rights of women asylum seekers. Given the inherently gendered approach of Australia's refugee determination process, women are at a greater risk of not having their claims heard or assessed, and there are insufficient safeguards or remedies available to prevent this from occurring. There is a clear stigmatisation of asylum seekers arriving in Australia unlawfully and, for women arriving as dependents, this attitude becomes even more difficult to rebut in light of the implicitly gendered approach taken to the determination process.

Given this impact on women asylum seekers, alternative approaches to dealing with procedural abuse should be fully investigated and corresponding amendments made to the *MLAA* and DIMIA guidelines and procedures. This would be in keeping with Australia's international obligations and would also, given the life and death decisions being made regarding a person's refugee status, be more humane.

IV SUBSTANTIVE ISSUES

A Definition of Persecution

The new s 91R of the *Migration Act* defines the term 'persecution', which is a key element of the definition of a refugee.⁷⁴ Neither the *Refugees Convention* nor the *UNHCR Handbook* defines what type of conduct amounts to persecution as 'it is generally acknowledged that the drafters of the *Convention* intentionally left the meaning of "persecution" undefined'.⁷⁵ Although the *travaux préparatoires* provide some guidance, ascertaining whether a claimant's fear of harm amounts to a fear of persecution can often be a difficult task.

Persecution is generally linked with the on-going development of international human rights law. According to the UNHCR, persecution 'comprises human rights abuses or other serious harm, often but not always with

⁷² Evidence to Senate Legal and Constitutional References Committee, *Reference: Migration Legislation Amendment Bill [No 6] 2001*, Parliament of Australia, Canberra, 21 September 2001, L&C 42 (Penelope Mathew).

⁷³ The development of working relationships with governmental and non-governmental organisations from countries of origin can be a key to ensuring a cooperative approach to issues of unlawful migration, people smuggling, and the resolution of these concerns: see, eg, Executive Committee of the High Commissioner's Program, above n 11.

⁷⁴ *Refugees Convention*, above n 7, art 1(A).

⁷⁵ James Hathaway, *The Law of Refugee Status* (1991) 102.

a systemic or repetitive element.⁷⁶ Jurisdictions such as the UK, Canada and New Zealand have explicitly adopted the definition of ‘the sustained or systematic violation of basic human rights demonstrative of a failure of state protection.’⁷⁷

In *Chan v Minister of Immigration and Ethnic Affairs*,⁷⁸ the leading Australian case regarding the definition of ‘refugee’, McHugh J (with whom the majority concurred) defined persecution as involving selective harassment or systematic conduct directed at an individual or a group, although he noted that a ‘single act of oppression’ may also amount to persecution.⁷⁹ He and the other justices related the meaning of persecution to basic human rights, including the right to life and freedom from deprivation of liberty.⁸⁰

Since *Chan*, various tribunals and the Federal Court have interpreted McHugh J’s definition in ways that have at times been conflicting and inflexible. Thus, in *Minister for Immigration v Ibrahim*,⁸¹ the High Court warned against detracting from the meaning of the refugee definition in the *Refugees Convention*. For example, McHugh J noted in this later case that the expression ‘systematic conduct’ had been misunderstood by tribunals and recommended that it should not be used in the context of the *Refugees Convention*. Further, if it was used, it should not be regarded as requiring a person to show a series of coordinated acts directed at him or her but rather should refer to non-random acts.⁸² Kirby J commented that McHugh J had thereby qualified his earlier statement in *Chan* about the necessity for ‘systematic conduct’.⁸³

Essentially, the lack of a strict definition provides the *Refugees Convention* with the flexibility to accommodate future types of persecution that could not be envisaged when it was first drafted. However, this flexibility concerned the Australian government, which felt that the High Court was beginning to define persecution too broadly.⁸⁴ In the Explanatory Memorandum to the *MLAA*, it was explained that:

Claims of persecution have been determined by Australian courts to fall within the scope of the *Refugee Convention* even though the harm feared fell short of the level of harm accepted by the parties to the *Convention* to constitute persecution ... these trends in Australian domestic law have widened the application of the *Refugee Convention* beyond the bounds intended.⁸⁵

⁷⁶ UNHCR, *UNHCR Handbook*, above n 67, [51]–[53]. See also UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/GIP/02/01 (2002).

⁷⁷ Hathaway, *The Law of Refugee Status*, above n 75, 104–5.

⁷⁸ (1989) 169 CLR 379 (‘*Chan*’).

⁷⁹ *Ibid* 430 (McHugh J).

⁸⁰ *Ibid* 388 (Mason CJ), 400 (Dawson J), 416 (Gaudron J), 430 (McHugh J).

⁸¹ (2000) 204 CLR 1.

⁸² *Ibid* 32 (McHugh J).

⁸³ *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, 67 (Kirby J).

⁸⁴ See especially *Kord v Minister of Immigration and Multicultural Affairs* [2001] FCA 1163 (Unreported, Hely J, 24 August 2001), in which a case of ‘minimal discrimination’ was remitted back to the RRT for reassessment.

⁸⁵ Explanatory Memorandum, above n 8, [19].

In order to create greater consistency in decision-making, a new s 91R was introduced into the *Migration Act* by the *MLAA*. It states that a *Refugees Convention* ground must be the ‘essential and significant reason’ for the persecution, and that the persecution must involve serious harm to the person⁸⁶ and ‘systematic and discriminatory conduct’.⁸⁷ Section 91R(2) then lists six examples of what could constitute serious harm.⁸⁸

According to the UNHCR, setting such a definition in legislation, as opposed to flexible guidelines, risks giving persecution a restrictive meaning and is inconsistent with the intention of the founders of the *Refugees Convention*.⁸⁹ This restrictive approach also impacts directly upon women asylum seekers.

In the past decade there has been increasing recognition that many experiences of women are clear violations of their human rights. As human rights norms have evolved and feminist theory has assisted in exposing the artificiality of the public–private dichotomy, there has been an acceptance that human rights abuses against women by state and non-state actors may amount to persecution.

Despite the government’s claims that it recognises and endorses these developments,⁹⁰ there are at least three areas in which women asylum seekers will potentially be adversely affected by s 91R of the *MLAA*. Firstly, the definition of persecution limits possible claims of sexual violence. Secondly, the definition makes it difficult for women to raise claims of serious discrimination amounting to persecution. Thirdly, the nexus requirement and lack of recognition of the element of state protection could exclude gender-based claims of persecution.

1 *Sexual Violence*

Sexual violence can cause psychological as well as physical harm. Any recognition of psychological harm as amounting to serious harm is, however, omitted from s 91R(2). The reason for this omission is unclear, particularly in light of the Explanatory Memorandum which states that ‘[t]he serious harm test does not exclude serious mental harm. Such harm could be caused, for example, by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection.’⁹¹

⁸⁶ *Migration Act* s 91R(1)(b).

⁸⁷ *Migration Act* s 91R(1)(c).

⁸⁸ These six examples mirror Professor Hathaway’s ‘hierarchy of rights’: Hathaway, *The Law of Refugee Status*, above n 75, 109–11.

⁸⁹ Evidence to Senate Legal and Constitutional References Committee, *Reference: Migration Legislation Amendment Bill [No 6] 2001*, Parliament of Australia, Canberra, 21 September 2001, L&C 19 (Tham Meechubot, UNHCR).

⁹⁰ The Australian government has claimed that:

Australia accords a high priority to the promotion and protection of women’s human rights. In the area of refugee status determination, Australia recognises that women may experience persecution differently from men and endorses the need to ensure that decision-makers and asylum processes incorporate gender perspectives.

Refugee and Humanitarian Division, DIMIA (Australia), ‘Gender-Related Persecution (Article 1A(2)): An Australian Perspective’ in DIMIA (Australia), *Interpreting the Refugee Convention: An Australian Contribution* (2002) 88.

⁹¹ Explanatory Memorandum, above n 8, [23].

In both the omission and the statement in the Explanatory Memorandum there is a failure to explicitly recognise women's particular vulnerability to serious mental harm. Women asylum seekers are disproportionately affected by physical and sexual violence and abuse and can experience serious psychological trauma from even the most minimal of physical injuries.⁹² Even the threat of sexual violence is an extremely degrading attack on the moral integrity of a woman which can amount to persecution.⁹³

The lack of explicit recognition of sexual violence as amounting to serious harm is also unfortunate due to its clear links with psychological harm. Sexual violence can be used as a tool of psychological torture aiming to break down and shatter a woman's psychological defence mechanisms. It can destroy a woman's personal and political identity and may lead to ostracism from the community and/or family. For example, in armed conflicts, sexual attacks on women can be planned as part of a terror campaign. In nationalist struggles, where women are frequently viewed as the 'mothers of the nation' and as symbols of family honour and sexual purity embodying the national ideal, opponents may target women to destroy nationalist morale and 'contaminate' bloodlines.⁹⁴

The failure to recognise sexual violence and related psychological harm as serious harm is indicative of the male-oriented approach to law. The assumptions of the public-private dichotomy sustained by this approach mean that women's experiences of sexual violence, which often occur within the home or family environment, are frequently tolerated as 'private' issues that are not the appropriate subject of legal intervention.⁹⁵

A lack of awareness that sexual violence is a serious violation of an individual's personal security and integrity, as well as a breach of several human rights,⁹⁶ has led some decision-makers to the view that, for example, the rape of women during wartime is merely a common (and implicitly acceptable) fate.⁹⁷

The *Gender Guidelines* recognise that sexual violence can inflict both mental and physical harm and can be used as a tool of persecution, amounting to torture breaching fundamental human rights.⁹⁸ Unfortunately, this recognition has not found a place in s 91R(2). This section fails to explicitly recognise the role of international human rights law in determining situations of persecution and does not direct attention towards the *ICCPR* or *ICESCR*, let alone *CEDAW*. Instead, s 91R(2) provides a fairly mechanical list that emphasises the state of the male, rational, unemotional and politically active refugee, as opposed to the emotions and distress often, though not exclusively, experienced by women.

In its recent submissions to the UNHCR, Australia recognised that the issue of sexual violence is particularly contentious due to the 'expectations that may be

⁹² See Heaven Crawley, *Refugees and Gender: Law and Process* (2001) 43; UNHCR, *Guidelines on International Protection*, above n 76, [9].

⁹³ Crawley, above n 92, 92.

⁹⁴ DIMA (Australia), *Gender Guidelines*, above n 23, [4.7]. See also Peter Landesman, 'The Minister for Rape', *Good Weekend* (Melbourne, Australia), 30 November 2002, 26, regarding the genocide in Rwanda in 1993.

⁹⁵ *Beijing Declaration and Platform for Action*, above n 12, [117].

⁹⁶ Instances of rape may violate the *UDHR*, above n 18, arts 3, 5 and the *ICCPR*, above n 18, art 7.

⁹⁷ Crawley, above n 92, 89.

⁹⁸ DIMA (Australia), *Gender Guidelines*, above n 23, [2.6].

placed on State authorities ... in responding to matters traditionally perceived as involving private harm, and how these expectations should in turn be reflected in interpretations of [the] *Convention*.⁹⁹ The submissions further note that where domestic violence, female genital mutilation, or other gender-related asylum claims arise and are found not to engage protection obligations under the *Refugees Convention*, the opportunity exists under s 417 of the *Migration Act* for the Minister to intervene in the public interest and provide an alternative means to stay in Australia. The implication of this statement, in light of the concerns expressed above and the implementation of legislation restricting the definition of persecution, is that cases involving sexual violence are not intended to succeed under the *MLAA*.

2 *Discrimination as Serious Harm*

States are obliged to eliminate all forms of discrimination.¹⁰⁰ Under international refugee law, discrimination that leads to consequences of a substantially prejudicial nature for the person concerned, for example serious restrictions on the right to employment, freedom of religion, or access to education, may amount to persecution.¹⁰¹

To be persecutory under the *MLAA*, however, discrimination must consist of economic hardship threatening subsistence or the denial of access to basic services affecting a person's capacity to subsist. These requirements raise several issues for women asylum seekers who are often affected by discriminatory conduct in quite different ways to men.¹⁰²

The types of rights that women are frequently denied or of which violation might be seen to constitute discrimination are often social and economic rights, which are traditionally given less weight than breaches of civil and political rights.¹⁰³ This gender-related discrimination is often more subtle than other forms of discrimination and frequently occurs in the private sphere. Yet, as the New Zealand RSAA has noted,

[t]he impact of ... discrimination within the family is by no means of lesser importance than overt discrimination in society. Rather, there is a causal connection between discrimination in the private sphere and the existence of a formalized discrimination in public life.¹⁰⁴

Covert discrimination against women can occur when state-enforced laws and policies restrict the way a woman behaves or acts, or when the imposition of cultural and religious norms restrict her opportunities and rights.¹⁰⁵ In some cases this will clearly amount to serious harm if, for example, the punishment for

⁹⁹ Refugee and Humanitarian Division, 'Gender-Related Persecution', above n 90, 95.

¹⁰⁰ See, eg, *UDHR*, above n 18, art 2; *ICCPR*, above n 18, art 2; *CEDAW*, above n 14.

¹⁰¹ UNHCR, *UNHCR Handbook*, above n 67, [54]–[55].

¹⁰² *Refugee Appeal No 71427/99* (Unreported, RSAA (New Zealand), Chairperson Haines QC and Member Tremewan, 16 August 2000) [11].

¹⁰³ See, eg, *Vienna Declaration and Programme of Action* (adopted by the World Conference on Human Rights, Vienna, Austria, 25 June 1993) UN Doc A/CONF.157/23, 20.

¹⁰⁴ *Refugee Appeal No 2039/9; Re MN* (Unreported, RSAA (New Zealand), Chairperson Haines and Member Gutnick, 12 February 1996) [78] ('*Re MN*'), quoting Liesbeth Lijnzaad, *Reservations to UN-Related Human Rights Treaties: Ratify and Ruin?* (1995) 324.

¹⁰⁵ DIMA (Australia), *Gender Guidelines*, above n 23, [4.9].

transgressing social norms is disproportionately severe or the law itself violates international human rights standards.¹⁰⁶ If a state condones, tolerates or is unable to prevent practices such as female genital mutilation, this may also amount to persecution.¹⁰⁷

A more difficult case arises when a law proposes to be of general application yet in fact has a discriminatory impact on a specific group in society. For example, it is widely accepted that family planning constitutes an appropriate response to population pressures. However, implementation of policies of forced abortions and sterilisation can breach the fundamental human rights of women.¹⁰⁸

The *MLAA* requires that discriminatory conduct must be ‘systematic’, which has been interpreted to mean either repetitive or deliberate. Moreover, on one reading, if a piece of legislation such as the family planning example does not have as its *main purpose* to discriminate or persecute an individual or group, it may not amount to persecution under the *MLAA*.

Indeed, McHugh J noted in *Applicant A v Minister for Immigration and Ethnic Affairs* that the enforcement of a generally applicable criminal law does not ordinarily constitute persecuting conduct if it is appropriate and adapted to achieving some legitimate object of the country.¹⁰⁹ A legitimate object will ordinarily be an object the pursuit of which is required to protect the welfare of the state.

The Explanatory Memorandum does not discuss the meaning of ‘systematic’ within the *MLAA*, although DIMA submitted that persecution must be ‘deliberate and discriminatory rather than random, generalized or indiscriminate’.¹¹⁰ Where the UNHCR interprets systematic to mean repetitive,¹¹¹ DIMA representatives noted that ‘the primary definition in most dictionaries is actually something that is purposeful or methodical ... actions that were “designed for”, “methodically planned for” ... not that it was a repetitive or habitual sort of action’.¹¹² Thus by interpreting systematic to mean ‘deliberate’, the government imputes a need for motive on the part of the persecutor.

This interpretation is in direct conflict with the High Court decision handed down only a few months prior to the implementation of the *MLAA*, *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*.¹¹³ Although

¹⁰⁶ See UNHCR, *Guidelines on International Protection*, above n 76, 111.

¹⁰⁷ See *Canada (A-G) v Ward* [1993] 2 SCR 689 (‘Ward’); *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574 (‘Khawar’).

¹⁰⁸ See *ICCPR*, above n 18, art 17, which states that ‘[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation’. See also art 23(2), which recognises the ‘right of men and women of marriageable age to marry and to found a family’.

¹⁰⁹ (1997) 190 CLR 225 (‘Applicant A’).

¹¹⁰ DIMA, *Submission to the Senate Legal and Constitutional References Committee*, above n 64, 6–7. See also *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1, [99]–[100] (McHugh J).

¹¹¹ Evidence to Senate Legal and Constitutional References Committee, *Reference: Migration Legislation Amendment Bill [No 6] 2001*, Parliament of Australia, Canberra, 21 September 2001, L&C 19 (Tham Meechubot, UNHCR).

¹¹² *Ibid* 12.

¹¹³ (2000) 201 CLR 293 (‘Chen Shi Hai’).

approving of McHugh J's earlier comments in *Applicant A*,¹¹⁴ their Honours noted that:

In that context, his Honour [McHugh J] also pointed out that 'enforcement of a generally applicable criminal law does not ordinarily constitute persecution.' That is because the enforcement of a law of that kind does not ordinarily constitute discrimination.

To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination.¹¹⁵

Kirby J noted in particular the importance of this finding for women asylum seekers' claims, since

[d]iscrimination may in particular circumstances fall most heavily on ... women subjected to sexual abuse ... It may be reinforced by laws or practices of apparently general application. The mere fact that the law is a criminal law or one of general application in a particular society does not withdraw from those who have a well-founded fear of being persecuted, the protection of the *Convention* definition ... Laws of general application in such a State can sometimes be the instruments that reinforce and give effect to the antecedent persecution and help to define the persecuted and to occasion their urgent search for foreign refuge.¹¹⁶

The High Court therefore held that the RRT had erred in holding that there was no persecution for a *Refugees Convention* ground because there was no 'malignity, enmity or other adverse intention towards him [the claimant] on the part of the [Chinese] authorities'.¹¹⁷ Rather, it held that whilst the existence of enmity and malignity may be an indicator of persecution, their absence did not rule out the possibility that conduct could amount to persecution for a *Refugees Convention* reason. What was necessary was that the reason for the persecution be found in one or more of the five attributes listed in the *Refugees Convention*.¹¹⁸ This approach was in line with that taken by the House of Lords in *R v Immigration Appeals Tribunal; Ex parte Shah*.¹¹⁹

Indeed, contrary to the Australian government's view,¹²⁰ the *Refugees Convention* makes no mention of a motive requirement. Rather, the focus of the *Refugees Convention* is on the individual circumstances that the asylum seeker is fleeing. The criteria for the granting of asylum is whether there is a serious possibility of persecution if the applicant returns to his or her home country, not whether there is proof of intent to harm on the part of the persecutor. Therefore, it is submitted, to require motive on the part of the persecutor is incorrect.

¹¹⁴ (1997) 190 CLR 225, 258 (McHugh J).

¹¹⁵ *Chen Shi Hai* (2000) 201 CLR 293, [20]–[21] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹¹⁶ *Ibid* [72] (Kirby J).

¹¹⁷ *Ibid* [7] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹¹⁸ *Ibid* [33].

¹¹⁹ [1999] 2 AC 629, 651 (Lord Hoffman) ('*Shah*').

¹²⁰ DIMA (Australia), Submission No 12, above n 64, 6.

A more favourable approach would be that which was followed in *Shah*, as discussed above, and the New Zealand case of *Re MN*. The latter case locates discrimination within the human rights framework, thus allowing for more consistent decision-making. In doing so, decision-makers must consider the *UDHR*, *CEDAW*, *ICESCR* and *CERD*. Thus, the compulsion to wear a veil, for example, could be found to breach any or all of the rights to freedom of religion,¹²¹ freedom of thought and conscience,¹²² and privacy.¹²³ The advantage of this approach is that it overcomes any cultural relativist arguments by applying rights that the international community has recognised as international standards of acceptable behaviour.¹²⁴ Therefore, the basis of such an approach is that if the law discriminates by selectively abrogating fundamental human rights of women, or other groups, then the law itself is taken to be persecutory.¹²⁵ The intention of the state is irrelevant, as is the fact that an individual could avoid harm by obeying the law, if in doing so he or she forsakes his or her protected freedoms.¹²⁶

As James Hathaway states:

Intention to harm on the part of the state is irrelevant: whether as the result of commission, omission, or incapacity, it remains that people are denied access to basic guarantees of human dignity, and therefore merit protection through refugee law.¹²⁷

The *MLAA* is a clear retreat from such a human rights-based approach, and thus fails to recognise the extent to which women can experience serious discrimination that amounts to violations of their fundamental rights and freedoms.

3 *The Nexus Requirement and Failure of State Protection*

The *MLAA* requires that the persecution experienced by an asylum seeker must be for a *Refugees Convention* reason and that this reason must be the ‘essential and significant reason’ for the persecution.¹²⁸ It thus establishes a nexus requirement between the persecution and the *Refugees Convention*.

This requirement was implemented in the belief that some claimants obtained refugee status even though the dominant reason for their persecution was arguably not a *Refugees Convention* reason.¹²⁹ The Australian government held that s 91R ‘is consistent with the wording of the *Convention* which does not acknowledge the possibility of more than one ground for persecution.’¹³⁰

¹²¹ *ICCPR*, above n 18, art 18.

¹²² *Ibid.*

¹²³ *Ibid.*, art 17.

¹²⁴ *Re MN* (Unreported, RSAA (New Zealand), Chairperson Haines and Member Gutnick, 12 February 1996) [60]–[71].

¹²⁵ *Ibid.* See also Crawley, above n 92, 46.

¹²⁶ *Re MN* (Unreported, RSAA (New Zealand), Chairperson Haines and Member Gutnick, 12 February 1996) [123]. See also *Khawar* (2002) 187 ALR 574, 610 (Callinan J).

¹²⁷ Hathaway, *The Law of Refugee Status*, above n 75, 128.

¹²⁸ *Migration Act* s 91R(1)(a).

¹²⁹ DIMA (Australia), Submission No 12, above n 64, 4–5.

¹³⁰ *Ibid.* 6.

In fact, the *Refugees Convention* is silent on the issue of whether a person can experience persecution for one or more *Refugees Convention* grounds. According to the *UNHCR Handbook*,

[i]t is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyse his case to such an extent as to identify the reasons in detail.¹³¹

Similarly, an eminent group of refugee lawyers recently determined that

the *Convention* ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. If, however, the *Convention* ground is remote to the point of irrelevance, refugee status need not be recognized.¹³²

It is recognised that women may have difficulty articulating their claims for asylum in terms that are assessable by decision-makers due to shame or fear,¹³³ or because they genuinely do not know why they have suffered harm. Therefore, due to the restrictive terminology of s 91R of the *MCAA*, there is now a risk that certain *Refugees Convention* reasons may not be identified or adequately addressed, resulting in legitimate claims going unrecognised. The UNHCR has recommended that:

in 91R(1)(a) the phrase ‘relevant contributing factor’ be used instead of ‘essential and significant reasons’ as it provides more flexibility in the formulation of the proposed legislation and avoids a lesser and unduly restrictive interpretation. This is in line with UNHCR guidelines ‘Interpreting Article 1 of the *1951 Convention*.’¹³⁴

Section 91R was implemented in response to court decisions such as *Khawar*.¹³⁵ In this case the successful applicant, a Pakistani woman, suffered severe physical and mental harm inflicted by her husband and his family, who disapproved of their marriage. The applicant sought protection from the Pakistani authorities but was not granted any assistance because of her gender.

The case turned on the issue of the failure of state protection.¹³⁶ Under refugee law, persecution for a *Refugees Convention* reason can be perpetrated by a non-state actor.¹³⁷ The state will then share responsibility for the persecution where ‘it has failed or is unable to protect the person in question’ from such

¹³¹ UNHCR, *UNHCR Handbook*, above n 67, [66].

¹³² James Hathaway, ‘The Causal Nexus in International Refugee Law’ (2002) 23 *Michigan Journal of International Law* 207, 217, citing *Michigan Guidelines on Nexus to a Convention Ground* (2001) [13] (emphasis added). See also UNHCR, *Guidelines on the Protection of Refugee Women*, above n 38, [20].

¹³³ See, eg, DIMA (Australia), *Gender Guidelines*, above n 23, [3.13].

¹³⁴ Evidence to Senate Legal and Constitutional References Committee, *Reference: Migration Legislation Amendment Bill [No 6] 2001*, Parliament of Australia, Canberra, 21 September 2001, L&C 19 (Tham Meechubot, UNHCR).

¹³⁵ (2000) 101 FCR 501.

¹³⁶ Persecution requires a failure of state protection: *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489.

¹³⁷ Hathaway, *The Law of Refugee Status*, above n 75, 127.

Refugees Convention-based persecution.¹³⁸ Whilst the Australian government accepts this interpretation,¹³⁹ it seems reluctant to accept claims in which a state fails to protect a person from harm inflicted by a non-state actor which is not specifically covered by the *Refugees Convention*, where the state's failure to protect is consistent with the *Refugees Convention*. *Khawar* was the first Australian case to allow this type of claim,¹⁴⁰ much to the chagrin of the government who viewed the decision as widening 'the application of the *Refugees Convention* beyond the bounds intended.'¹⁴¹

The *MLAA* definition of persecution does not include any reference to the failure of state protection as being an element of persecution, even though it is commonly accepted that 'the nexus between the *Convention* reason and the persecution can be provided *either* by the serious harm limb *or* by the failure of the state protection limb.'¹⁴² On this basis, a claim such as that made in *Khawar* is entitled to succeed, yet by failing to address the issue of state protection in the *MLAA*, the Australian government appears to be directing decision-makers towards the paradigm case of a refugee fleeing persecution by the state.¹⁴³ Whilst not explicitly discounting the *Khawar*-type claim, the reluctance to entertain such a claim is strongly implied.

Such an attitude can only impact negatively on women asylum seekers who are often victims of persecution by non-state actors in the 'private' sphere, and who may experience difficulty in gaining effective state protection.¹⁴⁴ In these cases the reluctance of the Australian government to interfere in the 'private' sphere is obvious. Unfortunately, this reluctance can have the effect of further entrenching a gender hierarchy of dominant males and subservient females within society. This perpetuates the discrimination faced by women in all areas of life and provides little recourse to effective remedies. States parties are obliged to prevent these human rights violations from occurring,¹⁴⁵ and the *Refugees Convention*, itself based on principles of non-discrimination,¹⁴⁶ is one avenue for redressing some of the most egregious examples of discrimination.

While it is not proposed that the refugee definition be extended to assist every person who is ill-treated or discriminated against, the *Refugees Convention* should be applied in a manner consistent with its broader anti-discrimination and humanitarian objectives. At the very least, there should be a detailed examination

¹³⁸ *Chan* (1989) 169 CLR 379, 430 (McHugh J).

¹³⁹ Refugee and Humanitarian Division, above n 90, 95.

¹⁴⁰ *Khawar v Minister of Immigration and Multicultural Affairs* [1999] FCA 1529 (Unreported, Branson J, 5 November 1999). This approach was supported by the majority in the Full Federal Court in *Minister of Immigration and Multicultural Affairs v Khawar* [2000] FCA 1130 (Unreported, Hill, Mathews and Lindgren JJ, 23 August 2000), and by the High Court in *Khawar* (2002) 187 ALR 574.

¹⁴¹ Explanatory Memorandum, above n 8, [19].

¹⁴² *Refugee Appeal No 71427/99* (Unreported, RSAA (New Zealand), Chairperson Haines QC and Member Tremewan, 16 August 2000) [112].

¹⁴³ See *Khawar* (2002) 187 ALR 574, [22] (Gleeson CJ); UNHCR, *Guidelines on the Protection of Refugee Women*, above n 38, [33].

¹⁴⁴ For example, such 'private' persecution can include domestic abuse and female genital mutilation.

¹⁴⁵ See, eg, *ICCPR*, above n 18, preamble, arts 2–3; *CEDAW*, above n 14, preamble, art 2; *CERD*, above n 18, arts 2, 5.

¹⁴⁶ *Refugees Convention*, above n 7, art 3.

of the impact that any changes to the application of the *Refugees Convention* may have on women asylum seekers. This requirement is even noted in the *Gender Guidelines*, which require a decision-maker to give conscious consideration to the gender-related aspects of a case. It is required even where gender is not the central issue, in order 'to understand that totality of the environment from which an applicant claims a fear of persecution or abuse of their human rights.'¹⁴⁷

Finally, there seems little justification for restricting *Khawar*-type claims from succeeding if a human rights-based approach is taken. Such an approach has been applied by the UNHCR, the UK and New Zealand, all of which focus on the right to be free from discrimination. The private or non-state party does not need to intend to harm the asylum seeker for a *Refugees Convention* reason, however, because all states are responsible for eliminating discrimination. If a state fails to ensure that human rights are enjoyed 'without discrimination' against any kind of status (including gender), then that failure becomes a contributing cause of the persecution. This provides the nexus that may not be altogether apparent when purely private conduct is being examined.¹⁴⁸ A state that ignores or is unable to respond to legitimate expectations of protection fails to comply with its most basic duty, thereby raising the prospect of a need for surrogate protection. In the recent High Court decision in *Khawar*, it was held that the motive of the non-state actor can become irrelevant where a state is unwilling to protect women from abuse for a *Refugees Convention* reason.

The use of a human rights approach also assists in breaking down the public-private barriers that frequently prevent women's experiences from being heard. For example, domestic violence has now been recognised as a 'public' matter in the Canadian and UK immigration authorities, as well as by the United States Immigration and Naturalization Service.¹⁴⁹ As has been found in these jurisdictions, this recognition can be effective without opening the floodgates to domestic abuse cases. Firstly, most domestic abuse cases will also have a religious or political dimension, thus explicitly providing the *Refugees Convention* reason.¹⁵⁰ Secondly, the approach still requires there to be a 'relevant' nexus between the harm and a *Refugees Convention* reason. Thirdly, it is necessary that all the criteria of the *Refugees Convention* be fulfilled, and in most cases claims turn not on the nexus point but on whether a claimant has a well-founded fear.¹⁵¹

4 Conclusion

Under the guise of providing clearer guidelines for decision-makers, the *MLAA* in fact narrows the application of the *Refugees Convention* and restricts the likelihood of success for claims based on gender-related persecution. It effectively shifts the onus from the decision-maker to the claimant, who must

¹⁴⁷ DIMA (Australia), *Gender Guidelines*, above n 23, [2.15].

¹⁴⁸ UNHCR, *Guidelines on International Protection*, above n 76, [20]–[21].

¹⁴⁹ Immigration and Refugee Board (Canada), *Guidelines for Women Refugee Claimants Fearing Gender-Related Persecution: Update* (1996) [A.I.3]; Immigration Appellate Authority (UK), *Asylum Gender Guidelines* (2000) [2A.24]; Coven, above n 62, 4.

¹⁵⁰ Mary Crock, *Immigration and Refugee Law in Australia* (1998) 149.

¹⁵¹ Email from DIMIA Training Coordinator to Leanne McKay, 24 October 2002.

determine the reasons for the persecution and then argue that a *Refugees Convention* reason is the essential and significant reason for the persecution. This potentially raises difficulties for women seeking protection in Australia and runs contrary to Australia's anti-discrimination and humanitarian obligations towards asylum seekers within its territory.

B *The Family as a Particular Social Group*

Under s 91S of the *MLAA*, a person cannot claim that their family constitutes a particular social group when the reason for their fear is the persecution of another family member (the primary victim) for a non-*Refugees Convention* reason.¹⁵²

This section was implemented in response to *Minister for Immigration and Multicultural Affairs v Sarrazola [No 2]*,¹⁵³ where the claimant feared returning to Colombia because criminal elements were pursuing her for the repayment of a debt on which her now deceased brother had reneged. The Federal Court found that one of the reasons the claimant was being pursued was because of her familial relationship to her brother and therefore it could be found that she feared persecution for reason of her membership of the family group.

The government felt that this type of case fell outside the scope of persecution under the *Refugees Convention*. It was proposed that s 91S would 'prevent the family being used as a vehicle to bring within the scope of the *Refugee Convention* persecution motivated for non-*Refugee Convention* reasons.'¹⁵⁴ It would also deter 'persons with criminal associations' from seeking protection in Australia.¹⁵⁵ However, s 91S risks excluding not only cases such as *Sarrazola* (arguably itself a marginal case¹⁵⁶) but also other cases that might more clearly fall within the *Refugees Convention*.

Family connections are often a reason for persecution,¹⁵⁷ and women are frequently selected as targets in retaliation for the actions of a male family member both by state and non-state actors. As discussed above, sexual violence can be a tool of persecution used to shame not only the female victim but also an entire family or community.¹⁵⁸

Further, a woman may be ignorant about the activities of her male relatives and may have little or no understanding as to why she is being persecuted. This poses difficulties for the woman asylum seeker trying to lodge a refugee claim and for decision-makers trying to establish clear grounds on which to base the claim. These difficulties are now exacerbated by the restrictive approach taken by the government.¹⁵⁹

¹⁵² *MLAA* s 91S(1)(a).

¹⁵³ (2001) 107 FCR 184 ('*Sarrazola*').

¹⁵⁴ Explanatory Memorandum, above n 8, [30], [31].

¹⁵⁵ DIMA (Australia), Submission No 12, above n 64, 9.

¹⁵⁶ Evidence to Senate Legal and Constitutional References Committee, *Reference: Migration Legislation Amendment Bill [No 6] 2001*, Parliament of Australia, Canberra, 21 September 2001, L&C 40 (Penelope Mathew).

¹⁵⁷ *Ibid.*

¹⁵⁸ See above Part IV(A)(1).

¹⁵⁹ See above Part IV(A)(3).

Applying a human rights-based approach could more consistently accommodate these claims. This approach was applied by the Full Court of the Federal Court in *Sarrazola*, arguably providing a more responsive method for maintaining the currency of refugee law in today's world. Merkel J noted that the present state of authority in that jurisdiction was that a particular family could constitute a particular social group under the *Refugees Convention* and that

[a] member of such a family who is at risk of persecution by reason of his or her association with another family member may have a well-founded fear of persecution for a *Convention* reason ... notwithstanding that

- the persecutors may have more than one motive for persecuting him or her; and
- the other family member could not claim to be a refugee within the meaning of the *Convention*.¹⁶⁰

This approach was consistent with a contextual reading of the *Refugees Convention*,¹⁶¹ where the preamble reaffirms the principle of non-discrimination and assures refugees the widest possible exercise of their fundamental rights and freedoms.

Family membership is one such fundamental right. The *UDHR*, *ICCPR* and *ICESCR* all recognise that the 'family is the natural and fundamental group of society and is entitled to protection by society and the State.'¹⁶² Other provisions prohibit arbitrary interference with the family and reaffirm the right to marry and to found a family.¹⁶³ States are also obliged to protect all families and their members without discrimination.¹⁶⁴ Merkel J pointed out that it is commonplace for a person to experience discrimination based on their membership of a family.¹⁶⁵ He therefore noted that the *Refugees Convention* allows that 'a person's freedom from persecution on the basis that he or she is a member of a particular social group, namely a family, can be one of the fundamental rights and freedoms assured to refugees.'¹⁶⁶

In *Shah*, Lord Hoffman determined that the inclusion of the particular social group ground was recognition by the founders of the *Refugees Convention* that there may be other criteria for discrimination that are equally as offensive to the principles of human rights as those covered in the other four *Refugees Convention* grounds.¹⁶⁷

The Federal Court found that the RRT had erred in its conclusion that the family connection formed no part of the reasons for the persecution of Ms Sarrazola and that the interest was purely personal.¹⁶⁸ Merkel J stated:

¹⁶⁰ *Sarrazola* (2001) 107 FCR 184, [30] (Merkel J; Heerey and Sundberg JJ concurring), citing *Giraldo v Minister for Immigration and Multicultural Affairs* [2001] FCA 113 (Unreported, Sackville J, 23 February 2001), [42], [44].

¹⁶¹ This approach was also followed by Lord Hope in *Shah* [1999] 2 AC 629, 655–8.

¹⁶² See *UDHR*, above n 18, art 16(3); *ICCPR*, above n 18, art 23(1); *ICESCR*, above n 18, art 10(1).

¹⁶³ See *UDHR*, above n 18, art 16(1); *ICCPR*, above n 18, arts 17(1), 23(2).

¹⁶⁴ See *UDHR*, above n 18, art 2; *ICCPR*, above n 18, art 2; *ICESCR*, above n 18, art 2(2).

¹⁶⁵ *Sarrazola* (2001) 107 FCR 184, [33] (Merkel J; Heerey and Sundberg JJ concurring).

¹⁶⁶ *Ibid* [31].

¹⁶⁷ *Shah* [1999] 2 AC 629, 651 (Lord Hoffman).

¹⁶⁸ *Sarrazola* (2001) 107 FCR 184, [56] (Merkel J; Heerey and Sundberg JJ concurring).

To find, as the RRT did, that she was later pursued and threatened because it was believed she has the means to pay, cannot negative the significance of the fact that she was selected as the target to pay because of her family membership.¹⁶⁹

The government's reactionary approach to *Sarrazola* is concerning because it limits one of the fundamental roles of the courts in a liberal democracy, that is, to assist in the development and interpretation of the law and Australia's international obligations.¹⁷⁰ It also appears unnecessary if the prime concern is to limit the types of claims that can succeed for refugee status. In *Ward*, it was pointed out that the *Refugees Convention* has built-in limitations and was not intended to offer protection to all suffering individuals. The particular social group ground is limited by the general objectives of the *Refugees Convention*. There must be a well-founded fear of serious harm and a lack or failure of state protection. Further, the *Refugees Convention* also contains exclusion and cessation clauses that can operate to exclude the most serious criminal elements from receiving protection.¹⁷¹

The analysis in *Ward* determined, in an approach that has been broadly followed by various jurisdictions,¹⁷² that a particular social group could be defined by: (1) an innate or unchangeable characteristic; (2) voluntary association for reasons so fundamental to the member's human dignity that they should not be forced to forsake the association; or (3) a former voluntary status, unalterable due to its historical permanence.¹⁷³

Under this analysis, either membership of a family is an immutable, unchangeable characteristic or the right to belong to a family is a recognised human right. Therefore, even if family membership was changeable, a person should not be asked to forsake such membership. Unfortunately this approach has not been followed in either Canada¹⁷⁴ or Australia.

The approach of Canadian and now Australian tribunals and courts skews the focus of the decision-maker towards whether the *primary victim* was persecuted for a *Refugees Convention* reason, rather than assessing the real issue of whether the right sought to be exercised by the claimant is a fundamental human right.

¹⁶⁹ Ibid [52].

¹⁷⁰ This reactive approach is not however unique. Following the delivery of the judgment by Sackville J at first instance in *Minister for Immigration and Ethnic Affairs v Respondent A* (1994) 127 ALR 383, the Minister both appealed the decision and introduced the Migration Legislation Amendment Bill [No 3] 1995 (Cth), which would have amended the *Migration Act* to provide that the fertility control policies of foreign governments cannot be used to found a claim that a person belongs to a particular social group for the purposes of making out a claim for refugee status. In the event, the Bill was never put to the vote in Parliament because the Full court of the Federal Court reversed the finding of Sackville J in *Minister for Immigration and Ethnic Affairs v Respondent A* (1995) 57 FCR 309. This ruling was subsequently confirmed by the High Court in *Applicant A* (1997) 190 CLR 225.

¹⁷¹ *Refugees Convention*, above n 7, arts 1(C), 1(F).

¹⁷² See, eg, *Refugee Appeal No 1312/93*; *Re GJ* (Unreported, RSAA (New Zealand), Chairperson Haines and Member Wang Heed, 30 August 1995); *Shah* [1999] 2 AC 629.

¹⁷³ *Ward* [1993] 2 SCR 689, 739.

¹⁷⁴ See, eg, *Rodriguez v Minister of Citizenship and Immigration* (Unreported, Federal Court of Canada, Heald DJ, Docket No IMM-4573-96, 26 September 1997); *Klinko v Minister for Citizenship and Immigration* (Unreported, Federal Court of Canada, Rothstein J, Docket No IMM-2511-97, 30 April 1998).

This human rights-based approach would not open up the particular social group ground too widely,¹⁷⁵ as under international human rights law there are situations when it is considered legitimate to restrict certain rights in order to achieve a broader public good.¹⁷⁶ This could therefore resolve situations where members of terrorist groups or criminal rings seek protection.

Moreover, the adoption of a human rights-based approach for assessing the grounds under which a person can claim asylum is consistent with the common practice of using this approach to analyse other components of the refugee definition, such as persecution. This extension of the use of a human rights analysis is in keeping with the *Refugees Convention* itself,¹⁷⁷ as well as with general trends in international law.¹⁷⁸ The approach could equally be applied to cases of gender-related persecution and would ensure that claims by women asylum seekers are approached in a manner that is in keeping with Australia's anti-discrimination and humanitarian obligations. Instead, the current implementation of the *MLAA* risks breaching Australia's *non-refoulement* obligations, and runs contrary to the humanitarian object and purpose of the *Refugees Convention* itself.

V CONCLUSION

As Sedley J commented in *R v Immigration Appeal Tribunal; Ex parte Shah*,¹⁷⁹ unless the *Refugees Convention* is seen as a living instrument, adopted by civilised countries for a humanitarian end which remains constant and yet allows for a mutable form, it will become an anachronism. The fact that the *Refugees Convention* has been exploited or abused requires decision-makers to pay scrupulous attention to each claim but cannot justify a redefinition of its meaning.

By implementing legislation that restricts the *Refugees Convention* definition and requires the adherence to strict procedures, the Australian government has allowed the intrusion of overtly political considerations into what should be an objective decision-making process. Issues of national security, people smuggling, sovereignty and election votes have dehumanised the asylum seeker, denying him or her the legitimate right to request protection.

Further, such legislation discriminates against women asylum seekers in both the procedural and substantive aspects of their claims. This denies them not only

¹⁷⁵ Krista Daley and Ninette Kelley, 'Particular Social Group: A Human Rights-Based Approach in Canadian Jurisprudence' (2000) 12(2) *International Journal of Refugee Law* 148, 170.

¹⁷⁶ See, eg, *ICCP*, above n 18, arts 4, 12(3); *ICESCR*, above n 18, art 4.

¹⁷⁷ As noted in the preamble, the international protection of all human rights and fundamental freedoms underlies the *Refugees Convention*.

¹⁷⁸ In 1993, at the World Conference on Human Rights, the UN committed itself to mainstreaming human rights in all UN activities: *Vienna Declaration and Programme of Action*, above n 103. States also reaffirmed their commitment to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms. Areas such as international environmental law are increasingly utilising international human rights law to hold states accountable for their actions.

¹⁷⁹ [1997] Imm AR 145, 152 (Sedley J).

the right to non-discrimination, which is ‘a basic and general principle’ necessary for the ‘protection of human rights,’¹⁸⁰ but also their status as human beings.

In light of the discriminatory nature of the *MLAA* and the risk that legitimate claims by women asylum seekers will be declined and innocents *refouled*, the Australian government must repeal the *MLAA* and amend DIMIA policy to comply with Australia’s legally binding international obligations towards women asylum seekers within its territory.¹⁸¹ Such a human rights-based approach to the refugee status determination process in Australia would result in a legitimate system that offers recognition and protection to those most in need and would be favourably judged by the international community.¹⁸²

¹⁸⁰ UN Human Rights Committee, ‘CCPR General Comment 18: Non-Discrimination’ (adopted 10 November 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003) [1].

¹⁸¹ See *CEDAW*, above n 14, preamble, art 2(f), the latter of which states that all states parties to the *Refugees Convention* (including Australia) must ‘take all appropriate measures to, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.’ *CEDAW* also states that states should ‘repeal all national penal provisions which constitute discrimination against women’: *ibid* art 2(g).

¹⁸² Executive Committee of the High Commissioner’s Program, above n 11, 22. Goal 6 requires a rights-based approach solidly premised on mainstreaming gender-equality.