FLAWED FOUNDATIONS: AN HISTORICAL EVALUATION OF DOMESTIC VIOLENCE CLAIMS IN THE REFUGEE TRIBUNALS

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Contemporary Australian refugee decision-making typically ascribes personal motives to intimate partner violence. Given the requirement in the Convention Relating to the Status of Refugees *('*Convention*') that persecution be linked to one of five protected grounds, this classification may result in claimants being denied* Convention *status. This article argues, based on an evaluation of 27 years of tribunal jurisprudence, that conventional explanations focused on the 'public–private' divide provide an incomplete picture, lacking the intersecting policy and legal factors peculiar to Australia which reinforce the current approach. Case law analysis shows an abrupt shift from a fledgling early conception of violence as a gendered structural phenomenon to a private form of harm unrelated to the* Convention *— a shift which can be traced to two external events in 1996 and 1997: namely, ministerial threats to tribunal independence and* Applicant A v Minister for Immigration and Ethnic Affairs *(1997) 190 CLR 225 (*'Applicant A'*). The article examines their combined impact, arguing that the fraught policy environment and misinterpretation of aspects of* Applicant A *have contributed to a flawed approach to the assessment of nexus in intimate partner violence claims. Through discussion of previously unexplored jurisprudence, the article suggests steps towards fair and principled decision-making as well as improved outcomes for claimants in the future.*

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I Introduction

A *Background and Purpose*

It is now undisputed that gender claims are encompassed by the definition of 'refugee' in the *Convention Relating to the Status of Refugees* ('*Convention*').[1] That this was ever in doubt is, in part, owed to the omission of sex/gender from

[1] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1A(2) ('*Convention*'), read in conjunction with the *Protocol Relating to the Status of Refugees*, adopted 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) art 1(2) ('*Protocol*'); 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 (7 May 2002) 3 [6] ('*UNHCR Guidelines*'). For an overview of key gender advances, see Alice Edwards, 'Age and Gender Dimensions in International Refugee Law' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 46, 51–7.

the wording of the *Convention*,[2] and to the traditional public–private distinction underpinning all areas of law, with matters associated with the 'public' sphere — government, politics, and economics — deemed the appropriate subject of legal regulation, and 'private' sphere matters — associated with women — excluded from purview.[3] In refugee law, commentators from the 1980s onwards have attributed women's struggles to bring their claims within the *Convention* framework to this ideology.[4] Due to the *Convention*'s requirement that claimants demonstrate a well-founded fear of being persecuted for one of five protected grounds (from which their state is unable or unwilling to protect them),[5] feminist scholars have observed that the construction of men's

[2] It is now widely accepted that the absence of explicit reference to gender does not exclude gender-related claims from the *Convention*'s scope; a gender-sensitive interpretation of all aspects of the *Convention* is required: see, eg, *UNHCR Guidelines* (n 1) 2 [2], 3 [6]. However, note that some commentators favour gender being explicitly made a sixth *Convention* reason to address the failure of gender-sensitive approaches to resolve issues in gender-related claims: see, eg, Mattie L Stevens, 'Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category' (1993) 3(1) *Cornell Journal of Law and Public Policy* 179; Melanie Randall, 'Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States' (2015) 23(4) *American University Journal of Gender, Social Policy and the Law* 529.

[3] Catherine Moore, 'Women and Domestic Violence: The Public/Private Dichotomy in International Law' (2003) 7(4) *International Journal of Human Rights* 93, 95. International law has operated according to a similar international–domestic distinction, traditionally concerned with matters *between*, not within, states: Anthea Roberts, 'Gender and Refugee Law' (2002) 22 *Australian Yearbook of International Law* 159, 161.

[4] See, eg, Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate Publishing, 2000) 97–100; Audrey Macklin, 'Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims' (1998) 13(1) *Georgetown Immigration Law Journal* 25, 28 ('Cross-Border Shopping'); Heaven Crawley, 'Women and Refugee Status: Beyond the Public/Private Dichotomy in UK Asylum Policy' in Doreen Indra (ed), *Engendering Forced Migration: Theory and Practice* (Berghahn Books, 1999) 308, 329 ('Women and Refugee Status').

[5] Namely, race, religion, nationality, political opinion and membership of a particular social group: *Convention* (n 1) art 1A(2). The connection between the risk of being persecuted and the five grounds is commonly referred to as the element of 'nexus': James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 362.

experiences as the norm,[6] and women's experiences as private,[7] has resulted in harms affecting women not being recognised as persecution or as occurring for a discriminatory *Convention* reason.[8]

While progress has been made, particularly in the recognition of rape, female genital mutilation ('FGM'), and other gendered harms as persecution,[9] the gap between policy guidance and its implementation,[10] as well as inconsistent outcomes in gender-related refugee claims, continues to be documented.[11] The continued exceptional treatment of these claims,[12] despite

[6] Alice Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010' (2010) 29(2) *Refugee Survey Quarterly* 21, 23 ('Transitioning Gender'). This critique was previously made in relation to international law generally: see Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *American Journal of International Law* 613, 621; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) 4.

[7] Crawley, 'Women and Refugee Status' (n 4) 329. See also Doreen Indra, 'Gender: A Key Dimension in the Refugee Experience' (1987) 6(3) *Refuge* 3, 3; Jacqueline Greatbatch, 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1(4) *International Journal of Refugee Law* 518, 519; Heaven Crawley, *Refugees and Gender: Law and Process* (Jordan Publishing, 2001) 19–20 ('*Refugees and Gender*'); Spijkerboer (n 4) 97–8.

[8] See, eg, Ninette Kelley, 'The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress' (2001) 13(4) *International Journal of Refugee Law* 559, 561 for a summary of early issues in the jurisprudence:

> Even where women feared persecution for the same reason as their male counterparts (religion, race, political opinion), if the persecution was gender-specific (such as rape), it was not readily recognized as a persecutory act within the meaning of the Convention. Secondly, women who had a well-founded fear that was gender-specific, such as fear of persecution for failing to follow strict discriminatory codes of conduct for women, were not regarded as fleeing for a Convention refugee ground.

[9] Ibid 562. But see Jane Freedman, *Gendering the International Asylum and Refugee Debate* (Palgrave Macmillan, 2nd ed, 2015) 53.

[10] Efrat Arbel, Catherine Dauvergne and Jenni Millbank, 'Introduction' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 1, 6; Christel Querton, 'Gender and the Boundaries of International Refugee Law: Beyond the Category of "Gender-Related Asylum Claims"' (2019) 37(4) *Netherlands Quarterly of Human Rights* 379, 380. See also Querton's citation of empirical studies: at 380 n 7.

[11] Karen Musalo, 'A Tale of Two Women: The Claims for Asylum of Fauziya Kassindja, Who Fled FGC, and Rody Alvarado, a Survivor of Partner (Domestic) Violence' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 73, 74 ('A Tale of Two Women'); Querton (n 10) 380. For the US, see Blaine Bookey, 'Gender-Based Asylum Post-*Matter of A-R-C-G-*: Evolving Standards and Fair Application of the Law' (2016) 22(1) *Southwestern Journal of International Law* 1, 2 ('Gender-Based Asylum Post-*Matter of A-R-C-G-*').

[12] This has long been a critique of gender claims: see, eg, Deborah Anker, Lauren Gilbert and Nancy Kelly, 'Women Whose Governments Are Unable or Unwilling to Provide Reasonable

decades of 'gender-sensitive' jurisprudence, is attributed to the persistence of the public–private dichotomy.

Claims centring domestic violence as the feared persecution appear to be particularly challenging for adjudicators. Various explanations for the perception of these claims as complex,[13] or atypical, have been suggested, many of which recall public–private concerns: the existence of domestic violence in adjudicators' own societies;[14] relatedly, its 'quotidian' nature by contrast to 'exoticized' gendered harms, like FGM, that are more readily thought to warrant refugee status;[15] and its distance from paradigmatic, state-directed political

Protection from Domestic Violence May Qualify as Refugees under United States Asylum Law' (1997) 11(4) *Georgetown Immigration Law Journal* 709, 745; Spijkerboer (n 4) 128–32; Arbel, Dauvergne and Millbank (n 10) 7. The exceptional treatment of gender-related claims is embodied in a recent US domestic violence decision, *Matter of A-B-*, 27 I & N Dec 316, 346 (A-G, 2018) ('*Matter of A-B-*'), in which then Attorney-General Jefferson Sessions referred himself A-B-'s claim and overturned previous precedent establishing particular social group ('PSG') as a basis for domestic violence claims. Jastram and Maitra argue that the Attorney-General's dicta, which included broad statements such as that '[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum', was 'clearly intended to instruct adjudicators that they should subject claims by domestic violence survivors to, at the very least, heightened standards and unique scrutiny': Kate Jastram and Sayoni Maitra, 'Matter of A-B- One Year Later: Winning Back Gender-Based Asylum through Litigation and Legislation' (2020) 18(1) *Santa Clara Journal of International Law* 48, 56, 68, quoting *Matter of A-B-* (n 12) 320. See also Jaclyn Kelley-Widmer and Hillary Rich, 'A Step Too Far: *Matter of A-B-*, "Particular Social Group," and *Chevron*' (2019) 29(2) *Cornell Journal of Law and Public Policy* 345, 403. In June 2021, however, *Matter of A-B-* (n 12) was vacated by the current Attorney-General, restoring previous precedent in intimate partner violence ('IPV') claims: *Matter of A-B-*, 28 I & N Dec 307 (A-G, 2021).

13 'Whether the treatment of women in a given country might constitute persecution of the type contemplated by the *Convention*, *particularly in relation to domestic violence, is an issue of some complexity*': *Faddoul v Minister for Immigration and Multicultural Affairs* [1999] FCA 87, [19] (Moore J) (emphasis added) ('*Faddoul*').

14 Siobhán Mullally, 'Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?' (2011) 60(2) *International and Comparative Law Quarterly* 459, 459 ('Domestic Violence Asylum Claims'); Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17(2) *Human Rights Quarterly* 213, 263–7 ('Refugee Women'); Theresa A Vogel, 'Critiquing *Matter of A-B-*: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence' (2019) 52(2) *University of Michigan Journal of Law Reform* 343, 355.

15 Arbel, Dauvergne and Millbank (n 10) 12. See also Macklin, 'Refugee Women' (n 14) 272; Sherene Razack, 'Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender' (1995) 8(1) *Canadian Journal of Women and the Law* 45, 50. For an empirical study of the treatment of domestic violence compared with FGM cases in Canada, see Efrat Arbel, 'The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases' (2013) 58(3) *McGill Law Journal* 729 ('The Culture of Rights Protection').

persecution due to its perpetration by non-state agents in the home,[16] within a personal relationship.[17] Given the global prevalence of domestic violence,[18] potentially large numbers of claims are subject to these perceptions, impacting their resolution.

Developments in international human rights law have had some alleviating effect: it is recognised that states have binding obligations to prevent, investigate and punish violations of human rights including those, like domestic violence, occurring within the family.[19] Within refugee law, this enabled recognition that host states may owe surrogate protection to claimants whose states have failed to fulfil these domestic responsibilities, challenging the traditional public–private divide.[20] Key cases in common law jurisdictions allowed for the possibility of establishing the link between a *Convention* ground and the persecution feared (known as 'nexus') through either the infliction of harm or the failure of state protection in claims involving non-state agents, such as domestic violence.[21]

While these cases led to better outcomes for women, at least initially,[22] restrictive interpretation of case law in some jurisdictions has resulted in recognition of refugee status only in instances where the state refuses protection on

[16] 'She is not afraid of persecution because of her membership of a particular social group such as women, or Christian women, if such a term could be applied. She is afraid of persecution individually and specifically within her *home* environment': *N97/18518* [1998] RRTA 3497 (emphasis added).

[17] Mullally, 'Domestic Violence Asylum Claims' (n 14) 460.

[18] Worldwide, almost one third (30%) of all women who have been in a relationship have experienced physical and/or sexual violence perpetrated by their intimate partner: World Health Organisation, *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence* (Report, 2013) 16.

[19] See, eg, *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN Doc A/RES/48/104 (23 February 1994) art 4(c) ('*DEVAW*').

[20] Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) 399–400 [13.110]–[13.113]; Rachel Bacon and Kate Booth, 'The Intersection of Refugee Law and Gender: Private Harm and Public Responsibility' (2000) 23(3) *University of New South Wales Law Journal* 135, 154 ('The Intersection of Refugee Law and Gender').

[21] *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, 648–53 (Lord Hoffmann) ('*Shah and Islam*'); *Refugee Appeal No 71427/99* (New Zealand Refugee Status Appeals Authority, Chairperson Haines and Member Tremewan, 16 August 2000) 37–8 [112]; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 13 [30] (Gleeson CJ), 28–9 [84]–[86] (McHugh and Gummow JJ), 39–41 [117]–[121] (Kirby J) ('*Khawar*'); *Re Kasinga*, 21 I & N Dec 357, 367 (BIA, 1996).

[22] Siobhán Mullally, 'Gender Asylum Law: Providing Transformative Remedies?' in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar, 2013) 196, 196–7 ('Gender Asylum Law').

the basis of gender,[23] allowing views that domestic violence occurs for personal or private reasons to proliferate. In Australia, the view prevails that such violence is difficult to bring within the *Convention* framework where states are merely unable — as opposed to unwilling — to prevent it.[24] A key feature of Australian domestic violence jurisprudence is the perception that the *perpetration* of violence is personally motivated and therefore lacking nexus to a *Convention* ground in the absence of discriminatory denials of protection.[25]

Such claims routinely turn upon the application of two of the most legally complicated elements of the refugee definition: nexus and the particular social group ('PSG') ground.[26] However, putting aside the ordinary challenges of legal construction — which arise in other types of claims with lesser impact — this article seeks to demonstrate that domestic violence cases are not inherently complex,[27] or ill-suited, to the refugee framework. It does so through an account of the case law of two tribunals: the former Refugee Review Tribunal ('RRT') and current Administrative Appeals Tribunal ('AAT'), with a particular focus on the assessment of nexus.[28]

[23] *Shah and Islam* (n 21) 653 (Lord Hoffmann); Kelley (n 8) 565, citing *Shah and Islam* (n 21). This is the dominant approach in Australia: see below discussion in Part III(A).

[24] This type of case was explicitly framed as difficult by the House of Lords: *Shah and Islam* (n 21) 654–5 (Lord Hoffmann).

[25] *Minister for Immigration and Multicultural Affairs v Ndege* (1999) 59 ALD 758, 769 [46]–[53] (Weinberg J) ('*Ndege*'); *Kahloo v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Davies J, 1 December 1997) 2; *Basa v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, Sackville J, 17 July 1998) 7, 9 ('*Basa*'); *Faddoul* (n 13) [4], [11] (Moore J); *Milosevska v Minister for Immigration and Multicultural Affairs* [1999] FCA 1414, [8] (Kiefel J) ('*Milosevska*'); *Jayawardene v Minister for Immigration and Multicultural Affairs* (1999) 60 ALD 425, 434 [34] (Goldberg J) ('*Jayawardene*'); *AZAAR v Minister for Immigration and Citizenship* [2009] FMCA 157, [24] (Lindsay FM) ('*AZAAR*'); *Minister for Immigration and Citizenship v SZONJ* (2011) 194 FCR 1, 10 [34] (Emmett, Rares and Perram JJ) ('*SZONJ*').

[26] '[N]one has been subject to the degree of rigorous scrutiny, debate and conflicting interpretative approaches as the most nebulous of the grounds: "membership of a particular social group"': Michelle Foster, 'The "Ground with the Least Clarity": A Comparative Study of Jurisprudential Developments Relating to "Membership of a Particular Social Group"' (Legal and Protection Policy Research Series PPLA/2012/02, UNHCR Division of International Protection, August 2012) 2 ('The "Ground with the Least Clarity"').

[27] In relation to gender claims more broadly, Querton (n 10) 396 has similarly argued in favour of 'a revision of the narrative that "gender-related asylum claims" are particularly complex cases … or cases which must be considered outside the traditional boundaries of international refugee law'.

[28] Various commentators have observed the difficulty decision-makers have with the element of nexus in domestic violence related gender claims: see, eg, Patricia A Seith, 'Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women' (1997) 97(6) *Columbia Law Review* 1804, 1820; Karen Musalo, 'Revisiting Social Group and Nexus in Gender Asylum

The designation of domestic violence as private, personal, and lacking *Convention* nexus has long been criticised both internationally[29] and domestically,[30] with scholars largely attributing this phenomenon to the lasting influence of the public–private distinction. Yet, as this article argues, in the Australian context this is not a complete explanation for the contemporary determination of domestic violence claims. The reason why the notion that domestic violence is personally motivated has so firm a foothold in this jurisdiction can only be discovered, and addressed, through consideration of the conditions peculiar to Australia which have cultivated it — an explanation that is absent from the literature.

An historical appraisal of tribunal jurisprudence provides local contextualisation, suggesting two relevant factors. First, that despite the established public–private divide, Australian decision-makers have not always considered domestic violence to be 'private' harm: in the mid-1990s, the RRT accepted that domestic violence perpetration is gendered and within *Convention* scope. Secondly, that this positive trajectory was disrupted by two external events: namely, the public criticism of tribunal members who had found abused women to be refugees by then Minister for Immigration and Multicultural Affairs, Philip Ruddock, and the (mis)interpretation of the High Court's decision in *Applicant A v Minister for Immigration and Ethnic Affairs* ('*Applicant A*'),[31] which, while

Claims: A Unifying Rationale for Evolving Jurisprudence' (2003) 52(3) *DePaul Law Review* 777 ('Revisiting Social Group and Nexus'); Bacon and Booth, 'The Intersection of Refugee Law and Gender' (n 20) 136; Mullally, 'Gender Asylum Law' (n 22) 203. On nexus, see generally James C Hathaway and Michelle Foster, 'The Causal Connection ("Nexus") to a Convention Ground' (2003) 15(3) *International Journal of Refugee Law* 461, 463–9; Colloquium on Challenges in International Refugee Law, 'The Michigan Guidelines on Nexus to a Convention Ground' (2002) 23(2) *Michigan Journal of International Law* 211.

[29] See, eg, Spijkerboer (n 4) 97–101; Audrey Macklin, 'A Comparative Analysis of the Canadian, US, and Australian Directives on Gender Persecution and Refugee Status' in Doreen Indra (ed), *Engendering Forced Migration: Theory and Practice* (Berghahn Books, 1999) 272, 288–90 ('A Comparative Analysis').

[30] On domestic violence, see Roberts (n 3) 185; Roz Germov and Francesco Motta, *Refugee Law in Australia* (Oxford University Press, 2003) 312–17; Susan Kneebone, 'Women within the Refugee Construct: "Exclusionary Inclusion" in Policy and Practice' (2005) 17(1) *International Journal of Refugee Law* 7, 8 ('Women within the Refugee Construct'). Relatedly, on trafficking, see Anna Dorevitch and Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9(1) *Melbourne Journal of International Law* 1. On witchcraft accusations as gender-related persecution, see Sara Dehm and Jenni Millbank, 'Witchcraft Accusations as Gendered Persecution in Refugee Law' (2019) 28(2) *Social & Legal Studies* 202, 204. On forced marriage, see Catherine Dauvergne and Jenni Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73(1) *Modern Law Review* 57. These final two works of scholarship both consider Australian jurisprudence as part of broader comparative studies.

[31] (1997) 190 CLR 225 ('*Applicant A*').

not concerned directly with domestic violence, has profoundly influenced decision-making in this area.

It will be argued that these combined circumstances caused an illegitimate shift, moving the tribunals away from refugee status determination which, in recognising gender inequality as a reason for persecution, had previously begun to put aside arbitrary public–private distinctions, with significant repercussions for claimants.

B *Methodology*

This article draws on a close reading of every published tribunal decision[32] involving intimate partner violence ('IPV')[33] since the 1993 establishment of the RRT.[34] A search of RRT and AAT decisions using the search terms 'domestic violence', 'domestic abuse', 'family violence' and 'gender-based violence' was carried out. Each decision was checked to determine if it was within scope: those cases involving violence between current and former intimate partners were included in the case sample;[35] those involving other types of family violence, such as violence perpetrated by in-laws or other relatives, were excluded.[36] In

[32] The RRT made 40% of its decisions publicly available: Migration Review Tribunal and Refugee Review Tribunal, *Annual Report 2011–12* (Report, 2012) 10. In relation to protection decisions within the Migration and Refugee Division, the AAT publishes 'a proportion' of decisions which have been randomly selected as well as other decisions of particular interest: Administrative Appeals Tribunal, *Publication of Decisions* (Policy Document, 24 September 2020) 3 [2.6]–[2.7].

[33] Defined as 'any behaviour … within an intimate relationship, that causes physical, sexual or psychological harm to the other person in the relationship': UN Women, *A Framework to Underpin Action to Prevent Violence against Women* (Report, 2015) 10 ('*A Framework to Underpin Action*'). In addition to marital or cohabiting partners, relevant intimate relationships include current or former non-married or dating partners, including where cohabitation has not occurred. 'Intimate partner violence' is a gender-neutral term but I use it in this article for the sake of clarity as it indicates the scope of the violence. IPV, however, is overwhelmingly committed by men against women and is a form of violence against women: World Health Organisation, *Understanding and Addressing Violence against Women: Intimate Partner Violence* (Information Sheet, 2012) 1.

[34] The RRT was amalgamated with the AAT on 1 July 2015: Administrative Appeals Tribunal, *Amalgamation of Commonwealth Merits Review Tribunals* (Fact Sheet, July 2015) 1. Four hundred and ninety-six cases involving intimate partners were found for the RRT and 103 for the AAT. For the purposes of this article, the case law is up to date as of 6 May 2020. Select key decisions as of August 2021 have also been taken into account.

[35] This included cases where abusers used violence to coerce women into relationships with them.

[36] Older RRT cases are discussed in this article despite the passage of time because the article aims to trace the origins of current jurisprudence. RRT decisions are instructive about the years after the events of 1996 and 1997 discussed in this article and in many respects set the course

order to understand how the concepts of IPV and gender are conceptualised by decision-makers, the analysis considered what *Convention* ground was used and how nexus assessments were undertaken, including whether nexus was connected to the state or perpetrator and whether decision-makers considered the nature, dynamics, and causes of IPV by reference to local, international or United Nations High Commissioner for Refugees ('UNHCR') gender guidelines; human rights instruments; and other expert evidence.[37]

IPV was selected as the focus because it is the most common form of gender-based violence.[38] Such claims represent a significant portion of the domestic violence case load, and it is here that the relevant issues coalesce most acutely.

Tribunal jurisprudence was selected because it is within the administrative context that specialist merits review takes place.[39] Tribunals implement higher-court guidance day after day, with real impact on claimants' lives, and, given that there is no precedent system, and as the analysis indicates, common issues affect applicants year after year. It is at this level that the gap between international standards and practice is at its widest,[40] and yet these decisions have the least (academic) scrutiny.[41] While leading cases on domestic violence in a range

of decision-making which determined the AAT's approach. Additionally, given that almost half of the AAT's 103 relevant cases do not discuss nexus/*Convention* reason in detail (either not considering future risk of IPV and/or denying the claim on credibility grounds) there is not yet a large body of jurisprudence in this area to draw from.

37 As this analysis forms part of a separate ongoing project which considers a principled approach to using the political opinion ground in IPV claims, another significant aspect of the analysis (outside the scope of this article) was to consider whether the political opinion ground was claimed or considered, or whether it could have been on the facts and materials presented to the adjudicator.

38 *In-Depth Study on All Forms of Violence against Women: Report of the Secretary-General*, UN Doc A/61/122/Add.1 (6 July 2006) 37 [112] ('*In-Depth Study*'). See also Claudia García-Moreno et al, 'Prevalence of Intimate Partner Violence: Findings from the WHO Multi-Country Study on Women's Health and Domestic Violence' (2006) 368(9543) *Lancet* 1260, 1265–6.

39 Merits review is an important step in the process because a successful review results in the grant of a visa; judicial review in the courts will merit only reconsideration of the claim.

40 Arbel, Dauvergne and Millbank (n 10) note that many administrative decisions do not meet the standards set by gender guidelines issued in the early 1990s: at 6. While this observation was made in relation to first instance decision-making, which due to practical constraints is not covered in this article, it is equally applicable to merits review in tribunal and board settings.

41 Sharon Pickering has noted that in contrast to often sophisticated court-based decisions, 'under-scrutinised primary decisions … act … as routine gatekeepers for women's asylum claims': Sharon Pickering, *Women, Borders, and Violence: Current Issues in Asylum, Forced Migration, and Trafficking* (Springer, 2011) 82.

of jurisdictions have been compared,[42] or select key lower-level cases analysed in detail,[43] the only systematic reviews of various levels of appellate decision-making focus on isolated national jurisdictions (and none have considered Australian tribunal jurisprudence in detail).[44]

C *Overview*

The article is structured as follows. In Part II the proper application of the *Convention* definition to IPV claims is considered. Part III examines the Australian approach to nexus, first through an overview of the contemporary approach

[42] See, eg, pieces examining *Shah and Islam* (n 21), *Khawar* (n 21) and *Refugee Appeal No 71427/99* (n 21): Deborah Anker, 'Refugee Status and Violence against Women in the "Domestic" Sphere: The Non-State Actor Question' (2001) 15(3) *Georgetown Immigration Law Journal* 391; Karen Musalo, 'Revisiting Social Group and Nexus' (n 28); Rachel Bacon and Kate Booth, 'Persecution by Omission: Violence by Non-State Actors and the Role of the State under the Refugees Convention in *Minister for Immigration and Multicultural Affairs v Khawar*' (2002) 24(4) *Sydney Law Review* 584 ('Persecution by Omission'); Penelope Mathew, 'Islam v Secretary of State for the Home Department, and Regina v Immigration Appeal Tribunal, ex parte Shah [1999] 2 AC 629' (2001) 95(3) *American Journal of International Law* 671. See also Kneebone, 'Women within the Refugee Construct' (n 30) as an example of literature on the Australian case of *Ndege* (n 25).

[43] See, eg, on the United States ('US') case of *Re R-A-*, 22 I & N Dec 906 (A-G, 2001; BIA, 1999): Musalo, 'A Tale of Two Women' (n 11); Amber Ann Porter, 'The Role of Domestic Violence in the Consideration of Gender-Based Asylum Claims: *In re R-A-*, an Antiquated Approach' (2001) 70(1) *University of Cincinnati Law Review* 315; Marisa Silenzi Cianciarulo and Claudia David, 'Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women' (2009) 59(2) *American University Law Review* 337. On the US case of *Matter of A-R-C-G-*, 26 I & N Dec 388 (BIA, 2014), see Bookey, 'Gender-Based Asylum Post-*Matter of A-R-C-G-*' (n 11); Carolyn M Wald, 'Does *Matter of A-R-C-G-* Matter That Much? Why Domestic Violence Victims Seeking Asylum Need Better Protection' (2015) 25(2) *Cornell Journal of Law and Public Policy* 527. The renewed focus on this category of claims since the 2018 US decision in *Matter of A-B-* (n 12) is reflected in a flurry of literature on this case: see, eg, Natalie Nanasi, 'Are Domestic Abusers Terrorists? Rhetoric, Reality, and Asylum Law' (2019) 91(2) *Temple Law Review* 215; Jastram and Maitra (n 12); Kelley-Widmer and Rich (n 12); Fatma Marouf, 'Becoming Unconventional: Constricting the "Particular Social Group" Ground for Asylum' (2019) 44(3) *North Carolina Journal of International Law* 487 ('Becoming Unconventional'); Vogel (n 14).

[44] For Canada, see Constance MacIntosh, 'Domestic Violence and Gender-Based Persecution: How Refugee Adjudicators Judge Women Seeking Refuge from Spousal Violence — and Why Reform Is Needed' (2009) 26(2) *Refuge* 147, 147–52, a quantitative and qualitative study considering 135 Refugee Protection Division ('RPD') decisions between 2004 and 2009 and 89 judicial review decisions from 2005 to 2009 on IPV; Arbel, 'The Culture of Rights Protection' (n 15) 746, comparing 528 RPD decisions (involving other types of family violence broader than IPV) from 1993 to 2013 with decisions involving forced abortion or compulsory sterilisation and FGM. For the US, see Blaine Bookey, 'Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the US from 1994 to 2012' (2013) 24(1) *Hastings Women's Law Journal* 107, examining decisions of the immigration courts and Board of Immigration Appeals from December 1994 to May 2012.

before turning to an analysis of key cases between 1994 and 1996 accepting IPV as a *Convention* claim. In Part IV, the article considers the two events which, it is contended, derailed Australia's progress in this regard: as indicated above, the threat to the RRT's independence and *Applicant A*. Given that this case confirmed Australia's approach to PSG and that most IPV claims are decided under this ground, it is briefly discussed.[45] However, the focus is the significant and unintended impact this case has had on later nexus assessments. Part V considers the lessons to be drawn from the examination of 27 years of specialist decision-making.[46]

II Intimate Partner Violence under the *Convention*

In order to obtain refugee status, pursuant to art 1A(2) of the *Convention*, a woman outside her country of nationality fearing IPV must demonstrate a well-founded fear of being persecuted; that this persecution would be 'for reasons of' race, religion, nationality, membership of a PSG or political opinion; and that she is unable or, owing to her fear, unwilling to avail herself of the protection of her country of origin.[47]

As indicated at the outset, in many jurisdictions, difficulties establishing that claims meet this definition have arisen; in some, the nexus requirement presents a significant obstacle. A related issue is the tendency of decision-makers to overlook relevant *Convention* reasons other than PSG, and, in certain states, to reject finding PSGs based on gender alone, preferring narrow and often

[45] There is already a significant amount of scholarship on this ground. On the PSG ground generally, see Foster, 'The "Ground with the Least Clarity"' (n 26). On gender as a PSG, see, eg, David L Neal, 'Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum' (1988) 20(1) *Columbia Human Rights Law Review* 203; Fatma E Marouf, 'The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender' (2008) 27(1) *Yale Law and Policy Review* 47; Musalo, 'Revisiting Social Group and Nexus' (n 28); Randall (n 2). In relation to domestic violence and the PSG ground, see, eg, Andrea Binder, 'Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention' (2001) 10(2) *Columbia Journal of Gender and Law* 167; Roberts (n 3); Michael G Heyman, 'Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence' (2003) 36(4) *University of Michigan Journal of Law Reform* 767. See above n 43 for recent US sources on PSG. In other related contexts regarding PSG, see Dehm and Millbank (n 30) 216–18; Dauvergne and Millbank (n 30).

[46] While institutional and organisational features of the tribunals likely affect their decision-making (including the absence of a system of precedent or one with leading decisions, the process of renewals and appointments, and the merging of the former RRT with the AAT) these are not the principal focus of this article, which examines jurisprudential influences.

[47] In Australia, art 1A(2) is codified in s 5H of the *Migration Act 1958* (Cth) ('*Migration Act*'). Selected elements of the refugee definition are further elaborated in ss 5J–5M.

convoluted group formulations.[48] However, these issues largely stem from assumptions and misconceptions about the nature and dynamics of IPV, rather than the refugee definition itself. As a matter of principle, IPV can fulfil *Convention* criteria. Indeed, leading cases in many jurisdictions accept that IPV may satisfy each element of the definition, as described below.

Internationally, IPV is considered a human rights violation that may amount to persecution.[49] In Australia, while the concept of persecution is modified by the statutory requirement of 'serious harm' and 'systematic and discriminatory conduct',[50] such violence has been recognised as serious harm,[51] which may be inflicted by non-state agents and amount to persecution where the state is unable or unwilling to protect the victim.[52]

Since the late 1990s it has been formally recognised that IPV can be linked to the *Convention* either where the perpetrator commits violence for a *Convention* reason, whether or not the state's failure to provide protection is so motivated, or where the state's failure to provide protection is for a *Convention* reason, regardless of the perpetrator's reasons.[53] Social groups defined as 'women' or a subset thereof have, as elsewhere, been accepted in Australia as a relevant *Convention* reason underlying an applicant's risk.[54] While it is

48 Foster, 'The "Ground with the Least Clarity"' (n 26) 44–6.

49 See, eg, Immigration Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (Policy Guidelines, 13 November 1996) ('*Canadian Gender Guidelines*'); *Refugee Appeal No 71427/99* (n 21) [81]–[83] (Chairperson Haines and Member Tremewan); *Shah and Islam* (n 21) 639 (Lord Steyn), 648 (Lord Hoffmann); Phyllis Coven, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (Memorandum, 26 May 1995) ('*US Gender Guidelines*'). Persecution is not defined in art 1A(2), but it is widely accepted as 'the sustained or systemic violation of basic human rights demonstrative of a failure of state protection': Hathaway and Foster, *The Law of Refugee Status* (n 5) 185.

50 *Migration Act* (n 47) ss 5J(4)(b)–(c).

51 *Khawar* (n 21) 18–19 [53] (McHugh and Gummow JJ). The definition of 'serious harm' is further codified in s 5J(5) of the *Migration Act* (n 47).

52 *Khawar* (n 21) 10–11 [22], 13 [30] (Gleeson CJ), 39–41 [117]–[121] (Kirby J). Justices McHugh and Gummow conceived of the persecution in this case as the lack of state protection itself: at 28–9 [84]–[87].

53 Ibid 13 [31] (Gleeson CJ); *Refugee Appeal No 71427/99* (n 21) [120] (Chairperson Haines and Member Tremewan). See also UNHCR, *Guidelines on International Protection: 'Membership of a Particular Social Group' 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/02/02 (7 May 2002) 5 [22]–[23] ('*Membership of a Particular Social Group*').

54 *Khawar* (n 21) 13–14 [32]–[33] (Gleeson CJ), 28 [81]–[83] (McHugh and Gummow JJ), 42 [127]–[129] (Kirby J).

possible to link IPV to any *Convention* ground, including political opinion,[55] PSG is the most adopted *Convention* ground in IPV claims. Using the political opinion and/or PSG grounds provides scope to recognise IPV's gendered and structural causes.[56]

One reason for the disconnect between the in-principle acceptance of the viability of IPV claims at higher levels of decision-making and the ordinary adjudication of claims is a failure to refer to the international legal framework,[57] which provides a good conceptualisation of IPV supporting the *Convention*'s application.[58]

The United Nations ('UN') identifies IPV as the product of historically unequal power relations between men and women,[59] and a primary manifestation

[55] See, eg, *Refugee Appeal No 76044* (New Zealand Refugee Status Appeals Authority, Chairperson Haines and Member Dingle, 11 September 2008) [90], a decision of the New Zealand tribunal construing the applicant's assertion of autonomy and right to control her own life as a political challenge to the unequal power structures in her society. This decision was relied on in *Refugee Appeal No 76250* (New Zealand Refugee Status Appeals Authority, Member Baddeley, 1 December 2008) [54]–[56]. See also *AB (Malawi)* [2015] NZIPT 800672, [83] (Member Aitchison); *BC (Turkey)* [2018] NZIPT 801262, [68] (Member Aitchison). In relation to sexual violence, see also the US cases of *Lazo-Majano v Immigration & Naturalization Service*, 813 F 2d 1432, 1435–6 (9th Cir, 1987); *Hernandez-Chacon v Barr*, 948 F 3d 94, 102–5 (2nd Cir, 2020). Academic commentators have recognised the potential of the political opinion ground in domestic violence claims: see, eg, Anker (n 42) 401; CJ Harvey, 'Engendering Asylum Law: Feminism, Process and Practice' in Susan Millns and Noel Whitty (eds), *Feminist Perspectives on Public Law* (Cavendish Publishing, 1999) 211, 239–41; Kneebone, 'Women within the Refugee Construct' (n 30) 16. Cf Macklin, 'A Comparative Analysis' (n 29) 298–9; Macklin, 'Cross-Border Shopping' (n 4) 56, 58, 67.

[56] While there are various theories on gender-based violence, all agree that there is no single cause; rather, it 'arises from the convergence of specific factors within the broad context of power inequalities at the individual, group, national and global levels': *In-Depth Study* (n 38) 27–8 [67]. This article takes a human-rights-based, ecological approach (as explained further in this Part).

[57] Mullally, 'Domestic Violence Asylum Claims' (n 14) 482–3. A similar observation was made in relation to Canadian domestic violence decision-making in Arbel, 'The Culture of Rights Protection' (n 15) 754.

[58] The link between human rights law and refugee law is well established, and scholars have called for attention to the international human rights framework in these claims: Anker, Gilbert and Kelly (n 12) 719; Macklin 'A Comparative Analysis' (n 29) 205. MacIntosh has recommended that the Canadian gender guidelines be revised to reflect the international human rights law understanding of domestic violence: MacIntosh (n 44) 153. Cf Crawley's caution that in some respects, including in the portrayal of women, international human rights law is limited: Heaven Crawley, '(En)gendering International Refugee Protection: Are We There Yet?' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff, 2016) 322.

[59] *DEVAW* (n 19) Preamble para 6. The Preamble also recognises violence against women as a violation of women's human rights.

of discrimination against women.[60] The body charged with interpreting the terms and monitoring the implementation of the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW Committee'), has explained that violence against women is

> rooted in gender-related factors, such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behaviour.[61]

Gender relations in societies where women are seen as subordinate to men thus may be the reason for both perpetration of violence and/or denial of protection. IPV is motivated by a desire to dominate and control women linked to beliefs that women are inferior.[62] Gender-related persecution includes persecution of women who do not 'conform to social criteria specific to men and women'.[63] Thus, in this context, as acknowledged by the CEDAW Committee, violence may also be motivated by a desire to punish or prevent transgressions of social norms which guide the way a woman/wife is expected to behave. This conception corresponds to the UNHCR's definition of gender as

> the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another …[64]

Intersecting factors such as race/ethnicity, nationality, age, and economic status may enhance or compound the risk: such factors in combination with

[60] *Report of the Committee on the Elimination of Discrimination against Women*, UN Doc A/47/38 (1 February 1992) 1 [6] ('*General Recommendation 19*'). It is similarly recognised in regional texts that IPV is a manifestation of discrimination against women: see *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, opened for signature 11 May 2011, CETS No 10 (entered into force 1 August 2014) art 3(a).

[61] Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation No 35 on Gender-Based Violence against Women, Updating General Recommendation No 19*, UN Doc CEDAW/C/GC/35 (26 July 2017) 7 [19]. For further relevant international and regional sources, see Mullally, 'Domestic Violence Asylum Claims' (n 14) 461–70.

[62] Roberts (n 3) 186.

[63] Nicole LaViolette, 'Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines' (2007) 19(2) *International Journal of Refugee Law* 169, 182.

[64] *UNHCR Guidelines* (n 1) 2 [3]. This definition is adopted by the AAT: Administrative Appeals Tribunal, *Migration and Refugee Division Guidelines on Gender* (Guidelines, July 2015) 3 ('*Guidelines on Gender*').

gender explain why a woman is targeted or particularly vulnerable,[65] including by impacting her ability to access protection. It is well accepted that there may be more than one *Convention* reason relevant to persecution and that these reasons often overlap.[66]

Within systemic contexts of gender inequality, there are individual factors increasing the likelihood of perpetrating and experiencing violence. UN bodies adopt an ecological model, bringing together individual, relationship, community and society-level factors which contribute to violence.[67] UN Women, for instance, includes alcohol abuse, unemployment, depression, and individual beliefs in support of unequal gender roles as individual determinants of IPV perpetration.[68] These factors operate together with societal acceptance of traditional gender roles and norms perpetuating inequality as well as impunity for violence against women. It is thus conceivable that factors relating to the particular perpetrator or relationship will be provided as an explanation for the violence in some claims. These may or may not be *Convention*-related. In any event, the presence of non-*Convention*-related reasons does not negate the existence of a *Convention* reason: there may be mixed reasons for persecutory harm provided that the *Convention* reason is a 'relevant contributing factor'.[69]

It is thus apparent that the *Convention* encompasses IPV claims. While the adjudication of IPV claims overall is not reflective of such clarity in approach, and Australia's problematic approach to nexus is present elsewhere,[70] the case law of certain jurisdictions confirms the capacity of the *Convention* to apply to

[65] 'Multiple discrimination … makes some women more likely to be targeted for certain forms of violence because they have less social status than other women and because perpetrators know such women have fewer options for seeking assistance or reporting': *In-Depth Study* (n 38) 101 [361].

[66] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/REV.3 (December 2011) 15–16 [66]–[67] ('*Convention Handbook*'); Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation No 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women*, UN Doc CEDAW/C/GC/32 (14 November 2014) 6 [16].

[67] *In-Depth Study* (n 38) 29 [73]; *A Framework to Underpin Action* (n 33) 22–4.

[68] *A Framework to Underpin Action* (n 33) 26.

[69] *UNHCR Guidelines* (n 1) 5 [20]. In Australia, a *Convention* ground must be the 'essential and significant reason' for the persecution: *Migration Act* (n 47) s 5J(4)(a). For further discussion of mixed motives see below nn 90–1.

[70] Dorevitch and Foster (n 30) 36–7.

IPV claims. In both New Zealand and Canada, nexus to a *Convention* reason is rarely an issue,[71] with gender accepted as the reason for risk.[72]

III Australia's Approach to Intimate Partner Violence Cases: The Nexus Enquiry

A *The Current Approach*

1 *Overview*

Australian refugee law has not followed the international shift to conceive of IPV as a gendered structural phenomenon, described above.[73] There has been a clear trend since 1997 rejecting a causal connection between gender and the commission of violence.

Domestic violence disproportionately affects women and girls.[74] The case law substantiates this: of the nearly 600 cases analysed, only four involved male IPV victims.[75] The AAT's own guidelines specify that it is a form of 'gender-

[71] There are limited exceptions where IPV is construed as individual or private harm. For New Zealand, see, eg, *BJ (Sri Lanka)* [2014] NZIPT 800512, [58] (Member Moor); *AD (South Africa)* [2011] NZIPT 800034, [74] (Chair Mackay and Member Shaw). For Canada, see, eg, *Re X* (Immigration and Refugee Board of Canada, 30 April 2010, Member Lim) [12]; *Re KBP* (Immigration and Refugee Board of Canada, 23 April 1997, Member Morrison) [12].

[72] New Zealand and Canada take different approaches to PSG. In New Zealand, groups formulated as 'women' are routinely accepted; in Canada, narrower groups formulated as some version of 'women subject to domestic abuse' are the norm in IPV claims. This type of formulation has been criticised for circularity, in that groups are defined by the persecution feared: Shauna Labman and Catherine Dauvergne, 'Evaluating Canada's Approach to Gender-Related Persecution: Revisiting and Re-Embracing "Refugee Women and the Imperative of Categories"' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 264, 274. Other issues in Canadian IPV jurisprudence, including the assessment of state protection and credibility, have been noted: see MacIntosh (n 44) 163; Arbel, 'The Culture of Rights Protection' (n 15) 756–8.

[73] Australia is not the only state lacking a contemporary human rights understanding of domestic violence. Mullally has noted the overall failure of refugee law to keep pace with international human rights law developments: Mullally, 'Domestic Violence Asylum Claims' (n 14) 460.

[74] Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85*, UN Doc E/CN.4/1996/53 (5 February 1996) 7 [23].

[75] *N96/10302* [1997] RRTA 546; *N97/13764* [1997] RRTA 2107; *0901646* [2009] RRTA 491; *1611346 (Refugee)* [2016] AATA 4737. In an additional two cases involving same-sex relationships, female perpetrators inflicted abuse on female victims: *N96/12684* [1997] RRTA 1290; *1311051* [2013] RRTA 898.

based violence',[76] defined as 'any violence, sexual, physical or psychological, including threats of harm, *directed at a person on the basis of gender or sex*'.[77]

Nevertheless, the perpetration of IPV is consistently de-gendered and classified as non-*Convention* harm. Decision-makers commonly deny nexus where they consider harm is perpetrated:

1 By or towards an individual and/or on an individual basis;

2 Because of a personal relationship between the perpetrator and victim;

3 For (various) personal/relationship reasons; or

4 Because of factors personal to the persecutor such as substance abuse or a propensity to violence.

Of the 525 publicly available RRT and AAT decisions issued from 1997, only 11 established nexus to the perpetration of violence on the basis of PSGs involving a gendered aspect.[78] In these circumstances, women will generally only successfully meet the nexus requirement where they establish that the state does not protect them for a *Convention* reason.[79] The leading Australian authority on IPV claims, *Khawar v Minister for Immigration and Multicultural Affairs* ('*Khawar*'), has been praised for, and in many cases has resulted in, the extension of protection to women whose states 'tacitly accept' violence perpetrated by non-

[76] *Guidelines on Gender* (n 64) 4.

[77] Ibid (emphasis added).

[78] *V06/18399* [2006] RRTA 95; *0801505* [2008] RRTA 233; *0802332* [2008] RRTA 547; *1008440* [2010] RRTA 1136; *1002606* [2010] RRTA 484; *1005828* [2010] RRTA 748; *1008739* [2010] RRTA 1177; *1110677* [2012] RRTA 655; *1219337* [2013] RRTA 653; *1603193 (Refugee)* [2019] AATA 3428; *1615776 (Refugee)* [2019] AATA 4380. In one of these cases, the decision-maker noted that a *Convention* reason (PSG of 'widows in Zambia') existed because an additional customary aspect to the harm brought it beyond mere domestic violence: *1008440* [2010] RRTA 1136, [128] (Member Caravella). In that case, as in many others, narrow PSGs reflecting particular, often cultural, circumstances were preferred. For example, in *1002606* [2010] RRTA 484, [104] (Member Urquhart), the PSG was defined as 'Cambodian women who are second wives'. See also *1008739* [2010] RRTA 1177, [89] (Member Caravella), where the PSG was defined as 'Christian women married into families who follow traditional ethnoreligious practises and rituals in Tanzania'. There are four other cases establishing nexus to the perpetrator on the basis of religion; another case each on the basis of race and political opinion (being pro-Communist), and four more on the basis of another type of PSG, including 'family' and groups based on lesbian sexual orientation. In one of the latter cases, the applicant's sexual orientation was the critical factor in establishing nexus to the perpetrator: 'In the Tribunal's view then, this matter extends beyond a matter of violence between domestic partners, were [sic] one may say that there is no Convention reason for the violence being directed at the partner': *071848546* [2008] RRTA 162, [58] (Member Duignan).

[79] *Membership of a Particular Social Group* (n 53) 5 [22]–[23].

state agents against them;[80] but it has been of less assistance where states are willing but incapable of offering protection.

While *Khawar* acknowledged that nexus may be established to either the risk of harm or the failure of protection, this principle has not translated into practice. The High Court did not displace the RRT's finding that Ms Khawar's personal relationship was the cause of violence.[81] As a result, its subsequent application has entrenched the assumption that a causal connection will only apply to a failure of protection and not the violence itself. As Catherine Briddick has noted, *Khawar* 'is problematic because … domestic violence is discrimination against women' and, as such, the nexus to a *Convention* ground may be found in both the violence and the failure of the state to provide protection.[82] IPV is also referred to by the Court as being personally or privately motivated, including through Gleeson CJ's framing of the key issue:

> Whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances where the *motivation of the perpetrators of the violence is private*, can result in persecution of the kind referred to in Article 1A(2) of the *Convention*.[83]

Federal Court decisions have contributed to this understanding: it has been described as 'obvious enough' that a violent partner did not assault an applicant by reason of her gender.[84] The result in practice is that IPV perpetration is rarely linked to the *Convention*.

Ascertaining whether an applicant fears being persecuted for a *Convention* reason is a decision-maker's fundamental task.[85] In Australia, the causal connection to a *Convention* reason is determined by reference to the perceptions

[80] Bacon and Booth, 'Persecution by Omission' (n 42) 584.

[81] Germov and Motta (n 30) 310–12. As Roberts notes, contrary to the popular view of *Khawar*'s success, it 'reinforces gendered public/private distinctions': Roberts (n 3) 185.

[82] Catherine Briddick, 'Some Other(ed) "Refugees"?: Women Seeking Asylum under Refugee and Human Rights Law' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, 2019) 281, 289. See also Heyman (n 45) 808; Anker, Gilbert and Kelly (n 12) 741; Anker (n 42) 401–2.

[83] *Khawar* (n 21) 7 [5] (emphasis added). Chief Justice Gleeson also refers to 'personally motivated' domestic violence: at 11–12 [25]–[26].

[84] *SZONJ* (n 25) 4 [12] (Emmett, Rares and Perram JJ). See also cases cited above at n 25.

[85] *Convention Handbook* (n 66) 15–16 [66]–[67]; Dorevitch and Foster (n 30) 40. Nevertheless, the role of legal representatives can be crucial in terms of framing of argument (particularly formulation of PSGs) and tendering of relevant country and expert information.

and motivation of the persecutor.[86] In addition to direct evidence of intent, including derogatory comments issued during the infliction of harm, circumstantial evidence such as the location, timing, and nature of the harm may identify the *Convention* reason.[87] Relatedly, the societal context — including discrimination and widespread violence against particular groups — should be part of the circumstantial enquiry, providing insight into the perpetrator's beliefs or choice of target.[88] As the Australian courts have directed, underlying circumstances are relevant to nexus determinations.[89] Where apparently personal motives are present, decision-makers must not ignore the 'real or essential underlying reason';[90] there is no 'simple dichotomy' between personal and *Convention* motivations.[91]

In IPV cases, given IPV's recognition as a gender-specific, gender-based form of harm, whether the applicant's gender was a factor in her persecution must be considered.[92]

2 *Problems with the Current Approach*

Other commentators have raised issues with the assessment of nexus in gender-related claims in Australia. Dorevitch and Foster have identified the RRT's

[86] *Ram v Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 314, 317 (Burchett J) ('*Ram*'). A discussion of the different approaches to nexus is beyond the scope of this article; however, the alternative 'predicament approach' to causation would be helpful in domestic violence cases to direct attention away from a singular focus on the persecutor's (subjective) perceptions of the applicant and towards a fuller explanation of what has placed the applicant at risk. For a discussion in relation to trafficking cases, see Dorevitch and Foster (n 30) 40–1. The predicament approach does not require evidence of intention of either the persecutor or the state and considers only whether a *Convention* reason underlies the applicant's predicament: see generally Hathaway and Foster (n 5) 376–82.

[87] Hathaway and Foster (n 5) 368.

[88] Ibid 368, 373.

[89] *SZFZN v Minister for Immigration and Multicultural Affairs* [2006] FMCA 1153, [17], [21]–[22] (Smith FM) ('*SZFZN*'). See also *Rajaratnam v Minister for Immigration and Multicultural Affairs* (2000) 62 ALD 73, 86 [48]–[51] (Finn and Dowsett JJ); *VXAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 198 FLR 455, 465 [25]–[26] (Pascoe CFM) ('*VXAJ*'). Dorevitch and Foster conclude that *VXAJ* (n 89) demonstrates

> that a direct or obvious motivation is not necessarily the same as the "essential and significant reason" for persecution. Importantly, the *Migration Act* only requires the latter to be linked to the *Refugee Convention*.

Dorevitch and Foster (n 30) 45.

[90] *SZFZN* (n 89) [21] (Smith FM).

[91] *Minister for Immigration and Citizenship v MZYRI* [2012] FCA 1107, [33] (Jagot J).

[92] Roberts (n 3) 186. The individual or societal context may also give rise to other *Convention* reasons to be assessed.

'cursory and insular' assessments in the trafficking context.[93] The IPV case law reveals that a nexus assessment is either not carried out in relation to the infliction of harm,[94] or is limited to superficial considerations.[95] International human rights norms are largely neglected in the assessment of nexus and other definition elements.[96]

At times, the designation of IPV as 'private harm' motivated by private reasons deters a considered nexus enquiry.[97] As Roz Germov and Francesco Motta observe, to characterise persecution as either 'private' or 'public' is an artificial distinction unwarranted by the *Convention*.[98] Pre-emptive characterisation of certain types of claims as antithetical to the *Convention* hinders the determination of claims according to their merits and fundamental refugee law principles.

A deeper examination of *Convention* reasons is often foreclosed by ascription of personal reasons to the violence. Decision-makers construe its infliction within personal relationships or individual circumstances as evidence of personal motivations; conflate immediate triggers for a particular instance of

[93] Dorevitch and Foster (n 30) 38–40. In other gendered contexts, see also Dehm and Millbank (n 30) 216; Dauvergne and Millbank (n 30) 73–5.

[94] *N01/38457* [2001] RRTA 732; *0903917* [2011] RRTA 299, [114]–[116] (Member Short); *1107179* [2012] RRTA 313, [113]–[115] (Member Powles); *1200137* [2012] RRTA 779, [82]–[86] (Member Urquhart); *1218287* [2013] RRTA 383, [40]–[50] (Member Rozdilsky); *1406853* [2014] RRTA 581, [21] (Member Murphy); *1613224 (Refugee)* [2019] AATA 5826, [32] (Member Smidt); *N04/48769* [2004] RRTA 482.

[95] *1712387 (Refugee)* [2018] AATA 923, [24]–[27] (Member Baker); *N04/48769* [2004] RRTA 482; *N01/38385* [2001] RRTA 756; *0808859* [2009] RRTA 137, [70]–[72] (Member Raif).

[96] There are some exceptions: see, eg, *N02/43491* [2003] RRTA 469, referring to the *DEVAW* (n 19); *0801505* [2008] RRTA 233, [69] (Member Ledson), using extracts from the CEDAW Committee's *General Recommendation 19* (n 60) in assessing country of origin information ('COI').

[97] See, eg, *N96/12294* [1997] RRTA 2333; *N95/08704* [1997] RRTA 1056; *N97/18501* [1997] RRTA 4849; *N97/19550* [1998] RRTA 2991; *N97/15435* [1998] RRTA 429; *N97/19743* [1998] RRTA 2152; *N97/20008* [1999] RRTA 79; *V98/09505* [1999] RRTA 641; *N00/35103* [2002] RRTA 961; *N05/52362* [2005] RRTA 304; *1000167* [2010] RRTA 163, [54] (Member Jacovides); *1105236* [2011] RRTA 842, [62] (Member Mullin); *1508621 (Refugee)* [2017] AATA 2364, [50] (Member Cranston).

[98] Germov and Motta (n 30) 313–14. See also *Brahmbhatt v Minister for Immigration and Multicultural Affairs* [2000] FCA 1686, [8] (Whitlam J) in relation to family violence directed at lesbian applicants:

> Whatever may be the scope offered by the *Refugees Convention* for the protection of the type of human rights asserted by the applicants in this case, any such notion of 'private reason' would seem to represent a distraction from applying the text of the *Convention* definition.

violence as the cause;[99] and cite broader factors such as marital conflict,[100] substance abuse,[101] and propensity to violence[102] as exhaustive explanations, without further examination of whether *Convention* reasons are present.

Two principal objections to this approach have been raised in the literature. First, it has been observed that focusing on immediate triggers of violence does not adequately explain its underlying reasons, and secondly, that some reasons for violence are not personal, but in fact pertain to structural issues.[103]

On the first point, Anthea Roberts explains that '[a] triggering event may explain why a husband gets annoyed or angry at any given moment, but it does not explain why he believes that beating his wife is an acceptable response'.[104] It also fails to account for the reason women are the target for this type of violence more broadly.[105]

Relatedly, attributing violence to marital conflict or propensity to violence does not explain the *reasons* for the violence. Most persecutors who deploy physical violence likely possess this predisposition. Similarly, conflict is

[99] For cases attributing IPV to disputes over money, see, eg, *N96/12735* [1997] RRTA 2422; *N95/08734* [1997] RRTA 1187; *N97/16449* [1998] RRTA 2830; *N00/34437* [2001] RRTA 458; *N04/49354* [2004] RRTA 612; *1412576 (Refugee)* [2015] AATA 3396, [34] (Member Mosjin).

[100] See, eg, *N97/17424* [1998] RRTA 2140; *N02/42225* [2002] RRTA 938, [34] (Member Cheetham); *N02/45322* [2003] RRTA 888; *1008090* [2010] RRTA 1064, [96] (Member Pope); *1008220* [2010] RRTA 1052, [73]–[74] (Member Grau); *1603667 (Refugee)* [2018] AATA 4862, [23] (Member Smidt).

[101] See, eg, *N97/17048* [1998] RRTA 1016; *N97/17056* [1998] RRTA 857; *N97/15314* [1998] RRTA 2570; *N97/19550* [1998] RRTA 2991; *N97/20298* [1998] RRTA 3072; *N97/17961* [1999] RRTA 673; *N01/37047* [2001] RRTA 608; *N01/38651* [2003] RRTA 124; *N03/47837* [2004] RRTA 268; *0909648* [2010] RRTA 161, [82] (Member Hardy).

[102] See, eg, *N96/12294* [1997] RRTA 2333; *N97/15435* [1998] RRTA 429; *N97/20298* [1998] RRTA 3072; *N99/28792* [2000] RRTA 289; *N00/31725* [2002] RRTA 28; *N02/42225* [2002] RRTA 938; *N00/35103* [2002] RRTA 961; *N01/38651* [2003] RRTA 124; *N03/45774* [2003] RRTA 1132; *N05/52362* [2005] RRTA 304; *1008269* [2010] RRTA 1153, [53] (Member Muling); *1613287 (Refugee)* [2019] AATA 5262, [17] (Member Noonan); *1806813 (Refugee)* [2019] AATA 6786, [23] (Member Grant).

[103] Roberts (n 3) 186–7.

[104] Ibid 186.

[105] Roberts observes that '[d]omestic violence has a gender-specific outcome because it is a manifestation of socially ingrained beliefs' including 'that women are inferior and that men have the right to treat them as they wish': ibid. See also Germov and Motta (n 30) 312. For similar discussion in the trafficking context, see Dorevitch and Foster (n 30) 39–40. Where beliefs about the inferiority of women have been acknowledged, they have been perceived as idiosyncratic to the perpetrator. For example, in *N97/20694* [1998] RRTA 3187, the Member considered that the rape and threats to kill experienced by the applicant were not motivated by a *Convention* reason, but that 'the applicant's husband treated her in this way because he is a brutal man who considered himself entitled to treat his wife as his personal property to do with what he wanted'. See also similar reasoning in *N97/17077* [1998] RRTA 2118; *N97/19811* [1999] RRTA 1714.

often a source of persecution: the question is whether a *Convention* reason underpins it.

Secondly, as Roberts has identified, some triggers of violence are categorised as personal when a deeper examination reveals an underlying *Convention* reason.[106] Women are often subjected to violence over matters which may be considered personal or trivial but in fact pertain to gender norms and their (perceived) violation. For example, violence may be triggered by inadequately performed household or childcare duties, rejection of sexual advances, and disobedience.[107] These reasons relate to culturally constructed gender roles and status.[108] Women are punished for failing to perform duties associated with female gender roles or for subverting the authority associated with male roles. Moreover, classifying abuse as mere jealousy,[109] or revenge for leaving a relationship,[110] discounts male entitlement to women, linked to gender and status as a chattel.[111]

For example, in *1412142 (Refugee)*, violence occurred when the applicant 'questioned or challenged [her partner], for example when she insisted that she would go out with friends'.[112] Nevertheless the decision-maker considered that she experienced violence because of the personal dynamic of their relationship and the perpetrator's 'own violent tendencies, his drug problem, mental health issues and his desire to control her rather than because she is a woman in

[106] Roberts (n 3) 186.

[107] R Emerson Dobash and Russell Dobash, *Violence against Wives: A Case against the Patriarchy* (Open Books, 1980) 98–103; Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (South End Press, 1982) 221–3.

[108] Roberts (n 3) 186; Radhika Coomaraswamy, *Violence against Women in the Family*, UN Doc E/CN.4/1999/68 (10 March 1999) 4–5 [9].

[109] See, eg, *V97/06313* [1997] RRTA 2773; *N97/15064* [1997] RRTA 4418; *N97/15314* [1998] RRTA 2570; *N97/17961* [1999] RRTA 673; *1501572 (Refugee)* [2017] AATA 304, [25] (Member Mullin); *1512766 (Refugee)* [2017] AATA 591, [43] (Member Mullin); *1513666 (Refugee)* [2017] AATA 676, [48]–[50] (Member Thwaites).

[110] See, eg, *V93/00752* [1996] RRTA 208; *N97/19354* [1997] RRTA 4892; *N95/08704* [1997] RRTA 1056; *N97/13425* [1997] RRTA 1390; *N96/12834* [1997] RRTA 1702; *N97/16449* [1998] RRTA 2830; *N97/15643* [1998] RRTA 3179; *N97/15819* [1998] RRTA 4606; *N97/18496* [1999] RRTA 1177; *1008220* [2010] RRTA 1052, [74] (Member Grau); *1210036* [2013] RRTA 8, [67] (Member Pope); *1414009 (Refugee)* [2016] AATA 3692, [20], [35] (Member Titterton); *1806813 (Refugee)* [2019] AATA 6786, [23] (Member Grant).

[111] Bookey, 'Gender-Based Asylum Post-*Matter of A-R-C-G-*' (n 11) 17. See also Nancy KD Lemon, Expert Declaration to Center for Gender & Refugee Studies (4 December 2018) [24]–[26] (available on request from the Center for Gender & Refugee Studies). See also Jessica Marsden, 'Domestic Violence Asylum after *Matter of L-R-*' (2014) 123(7) *Yale Law Journal* 2512, 2525.

[112] [2015] AATA 3566, [15] (Member Titterton).

Turkey'.[113] The perpetrator's 'desire to control' is designated as personal, overlooking the broader discriminatory context — including culturally and institutionally prescribed gender norms sanctioning male dominance — permitting men to use violence to control women.[114]

In other cases, the circumstances in which harm is perpetrated are conspicuously gendered, such as a male partner's objection to the female applicant earning more than him,[115] or to her inability to have children,[116] but the gendered nature of these triggers is ignored.

Roberts' analysis is in keeping with broader Australian jurisprudence on nexus contemplating underlying causes of harm as well as modern feminist approaches to domestic violence, such as the ecological model discussed in Part II. The existence of individual trigger factors does not contradict the systemic context. Indeed, these factors are common determinants of violence alongside societal beliefs about women. Yet in tribunal case law, individual factors such as alcohol abuse are accepted as a complete explanation.[117]

An obvious way to ascertain a persecutor's motivations is to consider any statements made in the course of committing persecutory acts.[118] However, where applicants have provided direct evidence that the perpetrator expressed a hatred of women, this, while found credible, has been substituted by a member's opinion that it was not motivated for reasons of gender:

> The Applicant added that during the episodes of violence toward her by her husband, he used offensive taunts and language referring to her gender such as 'women are good for nothing', 'all women are bitches and prostitutes' and 'that women were only good to serve men'.[119]

[113] Ibid. For decisions where forms of disobedience were classified as personal triggers: *N00/32866* [2000] RRTA 787; *N03/47392* [2004] RRTA 100; *1008269* [2010] RRTA 1153, [53] (Member Muling); *1500666 (Refugee)* [2016] AATA 4200, [31], [43] (Member Roushan); *V06/18399* [2006] RRTA 95.

[114] See also *0906559* [2009] RRTA 1050, [42] (Member Gagliardi), where the applicant argued that she experienced violence because it was her husband's right to inflict it and her role to endure it.

[115] See, eg, *N97/17061* [1998] RRTA 518; *N00/32300* [2000] RRTA 815.

[116] *N97/15385* [1998] RRTA 2631; *1219337* [2013] RRTA 653, [30] (Member Wysocka); *1515754 (Refugee)* [2018] AATA 466, [7], [20] (Member Sripathy).

[117] See above n 101.

[118] Hathaway and Foster (n 5) consider that evidence of persecutor intention may be a 'sufficient' but not 'necessary' condition for satisfying nexus: at 368–73.

[119] *N97/15435* [1998] RRTA 429 (Member McIllhatton). See also *N97/17137* [1998] RRTA 805, where the applicant stated that her partner abused her because he believed all women were

In support of the applicant's claim, her agent referred to international guidance on IPV but the RRT considered that the applicant's husband was a 'violent and dysfunctional man' who 'believe[d] that he ha[d] the power to rule her and her children in the manner that he want[ed] and also act[ed] violently towards her out of revenge'.[120] In another case, the RRT considered that the applicant's husband's motivation for harming her was 'entirely personal or individual', discounting the applicant's evidence that 'she overheard her husband saying that he really liked to mistreat women and that he derived great pleasure from doing so'.[121]

Such cases demonstrate the depth of the preconception that IPV is personal. The pre-emption of claims is also unmistakable in cases where gender and other structural issues are acknowledged as a cause, but violence is still attributed to personal reasons. In *1619703 (Refugee)*, the AAT considered that

> the motivation and reasons for her husband inflicting harm on her in the past was conflict associated with their marriage and custody of the children, *and also perhaps a combination of gender-related social and cultural factors, such as patriarchal and aggressive attitudes …*

but went on to hold that the 'violence was not inflicted on her because she was the member of a particular social group, such as women … but was rather a series of personal attacks'.[122] The AAT also failed to appreciate the gendered implications of cultural norms in Jordan, stating in another decision that 'the harm feared by the applicant is a personal matter to do with traditional concepts of "family honour" and transgression of social norms'.[123] Casting honour

sinners and inferior, and he had abused a previous female partner; *N96/12834* [1997] RRTA 1702 (Member Hardy), finding:

> Firstly, the Applicant's evidence shows that any future pursuit or persecution of her by her ex-husband is closely linked to the fact that he does not accept their divorce and her legal independence from [him]. This might be because of his concept of the place of women in society but in the end the matter is a criminal one and not *Convention*-related.

120 *N97/15435* [1998] RRTA 429.

121 *N01/39474* [2002] RRTA 816.

122 [2017] AATA 1522, [24] (Member Marquard) (emphasis added). The Member did not consider that gender was not the 'essential and significant reason' for the persecution; there was no reasoning along these lines, merely an assertion that the violence was personal rather than gendered: at [52]–[53]. See also *N97/17973* [1998] RRTA 4086; *1215076* [2014] RRTA 27, [22] (Member Irish); *1312962* [2014] RRTA 15, [23]–[24] (Member Irish); *1509438 (Refugee)* [2017] AATA 1819, [48] (Member Burns), acknowledging the role of gender norms and status of women but favouring an interpersonal explanation for violence.

123 *1500666 (Refugee)* [2016] AATA 4200, [43] (Member Roushan). The applicant was able to successfully link the failure of state protection to her membership of the PSG 'women in Jordan': at [46].

as a personal or family matter mischaracterises a concept which is fundamentally about control of women.[124]

In other cases, country of origin information ('COI') indicated a gendered or other societal cause for violence to no avail. Information presented in *1008269* identified gendered causes for domestic violence in Bangladesh, including patriarchal gender roles reinforcing 'the superiority of men and subordination of women' and unequal power relations 'result[ing] in … dominance exercised through violence'.[125] The feminisation of poverty increased incidence of and vulnerability to harm.[126] However, the applicant established nexus only to the state's denial of protection because the abuse was committed

> not for a *Convention* reason but because of the circumstances of her relationship with her former husband, his apparent anger issues and propensity for violence towards her at times of rage and a desire to seek revenge for her actions in obtaining an intervention order …[127]

The contemporary approach to IPV adjudication in the tribunal setting reflects attitudes towards IPV which do not comport with domestic or international understandings of this violence.[128] Relatedly, it is detached from domestic[129] and international frameworks which should guide refugee status determination ('RSD') in this area.

[124] For an excellent discussion of the nature of honour, and the gendered and political implications of honour killings, see *Refugee Appeal No 76044* (n 55) [74]–[80].

[125] [2010] RRTA 1153, [47] (Member Muling). See similar decisions regarding COI from India in *1310346* [2014] RRTA 136, [48]–[66] (Member Carney), and from Jordan in *1500666 (Refugee)* [2016] AATA 4200, [28]–[45] (Member Roushan).

[126] *1008269* [2010] RRTA 1153, [47] (Member Muling). The full citation was not given by the Tribunal, but it relied on an article by the Chairperson of the 'NGO Coalition on Beijing Plus Five' and former chair of the CEDAW Committee: Salma Kahn, *Violence against Women: Bangladesh Context* (2005) 40 (June) *Focus* 2.

[127] *1008269* [2010] RRTA 1153, [53] (Member Muling).

[128] Recent dicta similarly classifying IPV as a personal matter in US refugee jurisprudence, discussed above n 12, have been criticised by US commentators as 'antiquated': Marouf, 'Becoming Unconventional' (n 43) 513; Jastram and Maitra (n 12) 58.

[129] The case law analysis reveals that the tribunals' and departments' gender guidelines have rarely been cited in relation to substantive aspects of domestic violence claims. By contrast, in the related context of sexual orientation, one author notes the positive influence of internal guidelines and citation of international materials on the resolution of such claims: Jaz Dawson, 'Past and Present: From Misunderstanding Sexuality to Misunderstanding Gender Identity in Australian Refugee Claims' (2019) 65(4) *Australian Journal of Politics and History* 600, 617.

3 *Consequences*

(a) Impact on Claimants

Undertaking a partial or cursory examination of the causal connection may have severe consequences. Limiting nexus to the discriminatory denial of protection denies the discriminatory character of domestic violence and means that, in practice, women's claims will only succeed where there is egregious discrimination against women indicating a discriminatory denial of protection.[130] If a state has made even minimal efforts to address domestic violence, such that it is not seen to actively discriminate against women, the refugee aspect of a claim may be dismissed for lack of nexus before the *adequacy* of state protection is considered. A personalised inquiry into whether a particular applicant, having established nexus to the commission of violence, will receive protection from the state (taking into account any relevant individual and intersectional factors)[131] is substituted with a wholesale, unnuanced, decision about an entire country's system.

The line between refusing and failing to provide protection may be unclear and difficult to demonstrate[132] — hinging outcomes on this is problematic. Tribunal case law shows internally inconsistent decision-making in relation to certain countries. Some applicants from countries such as India, Fiji and Malaysia have been successful where others have not: much depends on how the decision-maker interprets the often limited COI involving an unfamiliar cultural context. In some instances, there are different results within the same year for applicants from the same country.[133] In these circumstances, there is a real danger that Australia may return women to harm.

[130] Dorevitch and Foster (n 30) 37 have noted the limitations of *Khawar* (n 21) with similar effect in the analogous trafficking context:

> Considering the Tribunal's tendency in trafficking-related claims to focus on the symbolic willingness of a state to eradicate trafficking rather than its practical ability to do so, as well as its failure to view rampant corruption (including police participation in trafficking) as de facto toleration, the Tribunal is likely to reject *Khawar*-style nexus arguments, even where state complicity of this kind exists.

[131] *A v Minister for Immigration and Multicultural Affairs* (1999) 53 ALD 545, 554 [39] (French, Merkel and Finkelstein JJ); Department of Immigration and Border Protection, *PAM3 Refugee and Humanitarian: Refugee Law Guidelines* (Guidelines, 1 July 2017) [9.4] ('*Refugee Law Guidelines*').

[132] Including finding COI proving that a failure to provide protection is deliberate: Anker (n 42) 402. See also Mathew (n 42) 675–6; Vogel (n 14) 427.

[133] Compare, in relation to Malaysia, *1619703 (Refugee)* [2017] AATA 1522, [35] (Member Marquard) where it was considered that there was a discriminatory denial of protection, with *1513177 (Refugee)* [2017] AATA 2666, [53] (Member Pennell), *1612277 (Refugee)* [2017]

(b) Impact on Australian Refugee Law

To recognise the status of women as the reason for a government's failure to address domestic violence on the one hand, but, in the course of the same decision, deny that these same concerns contribute to the commission of violence, illustrates a further, fundamental inconsistency.[134] As Felicite Stairs and Lori Pope observed, as long ago as 1990, the perpetration of IPV 'does not occur in a vacuum', uninfluenced by social and cultural attitudes towards women and the legal framework reflecting these.[135]

This is a cause for concern for the overall integrity and coherence of Australian refugee law, as is the fact that, unlike in other types of claims, establishing nexus to either risk of harm or state denial of protection is generally unavailable to victims of domestic violence.

While the complementary protection regime affords protection to applicants unable to establish refugee status,[136] and avoids issues with nexus to a protected ground (protecting applicants from 'significant harm' arising for any reason),[137] pragmatic and principled reasons caution against its use as a substitute for refugee protection in claims capable of resolution under the *Convention*.[138] First, the primacy of the *Convention* must be maintained.[139] In this

AATA 2085, [75]–[76] (Members Darcy and Pennell), and *1705375 (Refugee)* [2017] AATA 2843, [57]–[58] (Member Pennell) where it was found that effective protection was available. Compare, in relation to Fiji, *1003781* [2010] RRTA 795, [122]–[124] (Member Cipolla) where it was found that effective state protection was available, with *1004031* [2010] RRTA 641, [45]–[47] (Member Cranwell) where it was found that the standards of protection were insufficient. Compare, in relation to India, *060500394* [2006] RRTA 140 (Member Inder) where the Tribunal did not find an absence of state protection, with *1201571* [2012] RRTA 534, [79]–[80] (Member Speirs) where an absence of state protection was found.

134 See, eg, *1202163* [2012] RRTA 396, [141], [146] (Member Wearne); *1412142 (Refugee)* [2015] AATA 3566, [15], [19] (Member Titterton); *1416419 (Refugee)* [2016] AATA 4307, [62], [64]–[68] (Member Thwaites); *1508621 (Refugee)* [2017] AATA 2364, [50]–[54] (Member Cranston); *1603667 (Refugee)* [2018] AATA 4862, [23] (Member Smidt).

135 Felicite Stairs and Lori Pope, 'No Place like Home: Assaulted Migrant Women's Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds' (1990) 6 *Journal of Law and Social Policy* 148, 186.

136 Contained in the *Migration Act* (n 47) ss 36(2)(aa), (2A)–(2B).

137 Ibid s 36(2A).

138 For example, upon introduction of the regime, then Minister for Immigration and Citizenship Chris Bowen cited certain types of gender-based violence as examples of claims benefitting from the new regime: Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1356. This demonstrates issues with RSD in gender-related persecution claims, rather than delineating the correct scope of complementary protection.

139 The UNHCR's Executive Committee affirmed that the *Convention* and *Protocol* 'continue to serve as the cornerstone of the international refugee protection regime' and '*not*[*ed*] *in this*

respect, it is noted that the *Convention* contains an array of rights while complementary regimes assure only protection from non-refoulement.[140] Moreover, if claims that are properly within *Convention* scope are treated as without, the evolution of refugee law may stagnate,[141] and Australia's contribution to the cross-fertilisation of refugee law be lessened. Secondly, relegating women to a less robust regime is discriminatory. Finally, in the Australian context, complementary protection may be a more vulnerable source of protection, as past attempts to repeal or narrow the relevant provisions show.[142]

In the next section, a step back from the present circumstances is taken, to consider how the Australian position on IPV has evolved. It turns first to examine the RRT's early jurisprudence which both reveals the previous gender-centred approach to these claims and, by highlighting the ways that decisions in this area *should* be made, provides a framework for the discussion of future decision-making in Part V.

B *Early Gender Claims: Jurisprudence 1994–96*

From 1994 to late 1996, the RRT accepted that perpetrators of IPV abused women because they were women. In a key early case, *N93/00656* (involving a Philippines national who had experienced long-term abuse by her jealous, controlling husband, often under the influence of alcohol),[143] the RRT considered that gender is both an innate/immutable characteristic and, following the Federal Court's approach in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* ('*Morato*'),[144] that women constituted a cognisable PSG due to shared social characteristics, including

regard the fundamental importance of their full application by State Parties': Executive Committee of the High Commissioner's Programme, *Report of the Fifty-Sixth Session of the Executive Committee of the High Commissioner's Programme*, UN Doc A/AC.96/1021 (7 October 2005) 11 [21] (emphasis in original).

140 See, eg, *Convention* (n 1) arts 14–16. For protection against non-refoulement under complementary protection regimes, see, eg, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3.

141 It has been observed that gender and sexuality claims continue to push the advancement of refugee law in general: see Arbel, Dauvergne and Millbank (n 10) 4.

142 Migration Amendment (Regaining Control over Australian Protection Obligations) Bill 2013 (Cth); Migration Amendment (Complementary Protection and Other Measures Bill) 2015 (Cth).

143 [1994] RRTA 1580.

144 (1992) 39 FCR 401, 416 (Lockhart J) ('*Morato*').

> the ability to give birth, the role of principal child-rearers, nurturers, keepers of the family home, supportive partners in a relationship. And, as in the present case, it is commonly expected throughout most societies that it is characteristic of women to remain loyal to their husbands, to keep marriages together, regardless of their treatment within that marriage.[145]

The decision-maker acknowledged that these characteristics and women's common social status animated both the harm women faced in the Philippines and the state's failure to offer protection.[146] A striking feature of this case is the understanding of gender as socially and culturally constructed; the reasoning appreciates the significance of gender roles and norms in gender-related claims.[147]

This decision was a significant one for the RRT. Contrary to its usual practice, *N93/00656* was explicitly relied on by decision-makers in subsequent decisions.[148] The proposition in *N93/00656* that women constituted a PSG resulted in the acceptance of a number of IPV claims in the following years.[149] These later decisions used elements of *N93/00656* to consider the discriminatory conditions contributing to the commission of domestic violence.

N94/05706 is an illustrative example.[150] The RRT investigated attitudes causing domestic violence, using a local survey on IPV and evidence from the

145 *N93/00656* [1994] RRTA 1580.

146 'Furthermore the Tribunal finds that women can face harm based on who they are as women, and therefore for their membership of this particular social group': ibid. In 'Cross-Border Shopping' (n 4) at 65 (footnotes omitted), Macklin praised this decision as 'superb', noting that:

> Hunt's decision does not rely on racist or orientalist stereotypes of other cultures, does not implicitly (and falsely) exaggerate the remedies available to battered women in the West, does not depend on the status or occupation of the abuser, does not speculate on the 'personal' motives of individual men that systematically beat their wives …

Cf Pickering (n 41) 73–4 who criticises the decision-maker's examples as problematic gendered stereotypes excluding women who do not conform to these roles.

147 The AAT now defines gender as socially and culturally constructed: *Guidelines on Gender* (n 64) 3.

148 Only higher-court decisions are binding: see *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140, 149 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). There is no general system of precedent within the Tribunal, though s 420B of the *Migration Act* (n 47) provides that a decision may be designated as a guidance decision to be complied with by the Tribunal in reaching other decisions. On the desirability of consistency of tribunal decision-making, see *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 60 (Deane J) (Full Court of the Federal Court).

149 *N93/02263* [1996] RRTA 1049; *N94/06730* [1996] RRTA 2897; *N94/05706* [1996] RRTA 1651; *N95/08225* [1996] RRTA 1817; *N95/08354* [1996] RRTA 1938; *V96/04080* [1996] RRTA 2270; *V96/04260* [1996] RRTA 1342, [26], [57], [65] (Member Borsody). See also, for cases which did not explicitly rely on *N93/00656* but followed its example in relation to nexus and *Convention* reason, *N95/09047* [1996] RRTA 2136; *N93/01197* [1996] RRTA 52.

150 [1996] RRTA 1651 (Member Byron).

Friends of Women Foundation, an expert Thai non-government organisation. The survey indicated that

> [a]ccording to the (old) Law of Husband and Wife … the husband had the right to beat his wife if she did something wrong, whereas the wife had no right to fight back or even to scold … him. … This law reflects the traditional concept that a wife is considered as property of her husband. … *Though the old law was abolished, yet the practice continues because it has been internalized by man and women* [sic] *through socialization*. As a consequence, wife beating is considered as a male right over his wife …[151]

The RRT's research supported its conclusion that the applicant's risk from her husband was due to her subordinate status in society, and thus it was appropriate to link membership of the PSG 'women' to the risk of harm, drawing on the Tribunal's decision in *N93/00656*.[152]

Subsequent decisions followed suit. Several decision-makers recognised that the gender hierarchy generated discrimination and violence and, in this way, the perpetration of IPV — not just the state's refusal to protect women from it — was capable of being linked to a gender-defined PSG.

The benefits of a contextual approach are clear in these decisions. In *N95/09047*, the Member recognised that the broader context was key not only to the formulation of social groups, but also to the question of whether and how women were targeted as a group.[153] The RRT concluded that the position of women was reflected in local legal, social and cultural conditions which contributed to and facilitated violence.[154]

In *N94/06178*, the RRT considered that 'it was the applicant's status as a woman that caused Mr X to be violent to her'.[155] The applicant, a citizen of the United States ('US'), feared harm at the hands of her ex-partner. Neither the type of harm, nor the similar (western) country context, predetermined the nexus assessment. The adjudicator carried out her statutory task, considering the context underpinning violence in the US, just as for any other form of persecution in any other country. The RRT found that

> [d]ue to the Applicant's social status as a woman Mr X believed that he had the right to own her, to possess her exclusively, and to threaten her life if he could

[151] Ibid (emphasis added).

[152] The same reasoning was applied by Member Byron in *N95/08225* [1996] RRTA 1817 and *N95/08354* [1996] RRTA 1938.

[153] [1996] RRTA 2136 (Member McIllhatton).

[154] Ibid.

[155] [1995] RRTA 2253 (Member Huntsman).

> not own or possess the Applicant exclusively. The attitude held by Mr X was due to the traditionally perceived social characteristics appropriate to women in US society: that women were the property of men and that if a man wanted to secure his property in the woman, through intimidation or violence, or to express his dominance over the woman by beating her, then, historically, the State would not interfere.[156]

The applicant was ultimately unsuccessful because adequate state protection was available to her.[157] However, the RRT's approach avoided conflation of the nexus and state protection enquiries. In a further case, the RRT considered that the

> domestic violence to which the applicant was subjected is at least partly attributable to women's social status in Turkey and the inferior position to which they are relegated in relation to their husbands.[158]

It was 'apparent' to the RRT that 'certain Turkish laws, reflective of entrenched social beliefs, enshrine in certain key respects the role and behaviour of women who have entered into a marriage' and that the husband's personal reasons for persecuting the applicant 'cannot sensibly be viewed in isolation from the context of prevailing laws and mores governing the role and expectations of married women'.[159] Thus, personal factors — whether to do with the perpetrator or the marital relationship — did not take away from the gender-related factors which contributed to and facilitated the perpetration of violence.

These cases constitute a high point in gender-sensitive tribunal decision-making in Australia. From a consistent understanding of gender and approach to PSG formulation, decision-makers investigated the discriminatory context in which IPV occurred in the particular country in question, using expert sources, in order to assess nexus to a *Convention* reason. Such an understanding

156 Ibid.

157 Ibid.

158 *V95/03574* [1996] RRTA 912 (Member Brewer).

159 Ibid. See also *V95/03448* [1995] RRTA 1993, where the Tribunal considered that domestic violence was a 'product' of the 'social, cultural, traditional and religious norms affecting women in Iran'; *V96/04260* [1996] RRTA 1342, [47]–[51], [55] (Member Borsody), where the decision-maker used a book on the position of women in the Middle East, and other secondary sources, to determine that 'the applicant is at risk because of the status of women in Lebanon'; *N95/09633* [1996] RRTA 1997, where the decision-maker found that 'such violence would not have been perpetrated on such a scale and in such a way if she had been a man'; *N96/10190* [1996] RRTA 2239, where it was held that '[i]n the applicant's case the violence and threats made against her were because she is a woman'. See also *N96/11816* [1996] RRTA 2758, which considered that the applicant's risk of experiencing violence could be greater because of her status as a woman but did not need to decide this matter because there was no real chance that her husband would pursue her in the future.

was new to Australia, but not radical. In the absence of domestic gender guidelines (which were issued in mid-1996),[160] these early cases, such as *N94/06178*,[161] were reasoned by careful reference to existing international,[162] and UNHCR,[163] guidance and contemporaneous Federal Court of Australia jurisprudence on nexus and PSG.[164]

Tribunal decision-making at this stage was broadly in line with the present approach to nexus in domestic violence claims in other jurisdictions, such as New Zealand and Canada, and scholarly guidance on the proper determination of such claims. These decisions were also consistent with present expert evidence[165] and international human rights instruments on IPV.[166] Importantly, they align with the approach in other types of claims where nexus may be established to either the non-state persecutor's actions or the state's response.

As demonstrated by this series of decisions, in the mid-90s Australia's emerging domestic violence jurisprudence dealt with the difficult concepts of PSG and nexus in a straightforward manner using targeted expert information. If the jurisprudence had evolved along this trajectory, Australian gender jurisprudence would be of the highest standard. These early cases promised an interpretation of the *Convention* which would have enabled principled outcomes for women and better overall decision-making. However, within less than a year

160 Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision-Makers* (Department Guidelines, July 1996) ('*Guidelines on Gender Issues for Decision-Makers*').

161 [1995] RRTA 2253.

162 *Canadian Gender Guidelines* (n 49); *US Gender Guidelines* (n 49).

163 *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the Work of Its Thirty-Sixth Session*, UN Doc A/40/12/Add.1 (10 January 1986) 32–3 [115]; *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the Work of Its Forty-Fourth Session*, UN Doc A/48/12/Add.1 (19 October 1993) 14–16 [21]; UNHCR, *Note on Refugee Women and International Protection*, UN Doc EC/SCP/59 (28 August 1990); Office of the United Nations High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women* (Guidelines, July 1991). Cf the Member's statement in *N97/15435* [1998] RRTA 429 that UNHCR Guidelines were 'merely a "statement of the point of view espoused by the High Commissioner"', citing and extending the views of Hill J in *Barzideh v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 417, 427 regarding the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/IP/4/ENG/Rev.1 (January 1992).

164 *Ram* (n 86); *Morato* (n 144).

165 Lemon (n 111).

166 *DEVAW* (n 19); *Elimination of Domestic Violence against Women*, GA Res 58/147, UN Doc A/RES/58/147 (19 February 2004); *Intensification of Efforts to Prevent and Eliminate All Forms of Violence against Women and Girls: Domestic Violence*, GA Res 71/170, UN Doc A/RES/71/170 (7 February 2017).

of the last decision in this series, due, at least in part, to the events discussed below, the position was radically transformed.

IV Historical Account

A *Event 1: Ministerial Comments, December 1996*

In December 1996, the then Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock, publicly criticised two RRT Members who had accepted IPV claims. Under the headline 'Beaten Wives Given Asylum; Political Refugees to Suffer', *The Advertiser* reported Ruddock's comments that some members had '"taken it upon themselves" to go outside their mandate by granting refugee status to applicants who did not qualify under internationally agreed principles'.[167] Ruddock was reported as saying that 'the poor decisions jeopardised the integrity of the refugee system worldwide and would inevitably result in genuine refugees missing out on resettlement'.[168]

In further interviews, Ruddock indicated that that he 'would not rule out' abolishing the RRT as the result of a contemporaneous wider inquiry into the tribunal,[169] and that he would not seek to renew the appointments of members who made decisions outside of international refugee law.[170]

Maintaining the independence of administrative tribunals is critical to safeguarding the separation of powers and the integrity of individual decision-making. Stephen Legomsky noted contemporaneously that 'it is difficult to imagine fair and accurate determinations by an adjudicator whose job depends on the outcome of the case' and observed that RRT members he spoke to at the time were indeed fearful.[171] The Minister's comments appear to have affected decision-making: general set-aside rates (the proportion of cases in which the RRT overturned a negative departmental decision) decreased in the months

[167] Scott McKenzie, 'Beaten Wives Given Asylum; Political Refugees to Suffer', *The Advertiser* (Adelaide, 16 December 1996) 2.

[168] Ibid.

[169] Mike Steketee, 'Ruddock Flags Tougher Line on Refugee Bids', *The Australian* (Sydney, 26 December 1996) 1.

[170] Ibid. A spokesperson's confirmation that Ruddock had 'made it clear that members of the RRT would not be reappointed if they made decisions that went beyond the law' was also reported: Stephen H Legomsky, 'Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia' (1998) 76(1) *Washington University Law Quarterly* 243, 249.

[171] Legomsky (n 170) 251–3.

postdating the comments.[172] In 1995–96, the set aside rate was 18%.[173] During April 1997, the month during which interviews for reappointment were conducted, the percentage fell to 2.7%.[174] By 1997–98, the annual rate was down to 10%.[175]

Only 19 of 35 Tribunal Members who applied for reappointment in 1997 were successful.[176] It appears that the Members criticised by the Minister were among those who lost their warrants.[177] While others who had granted domestic violence decisions retained their positions, they changed their approach to nexus (as discussed in more detail below).[178] The rate of success in domestic violence claims also decreased, suggesting that the RRT was influenced by the external pressures of reappointment.[179]

The Minister's comments conveyed a firm view that domestic violence claims were outside the *Convention*'s scope. The article turns now to explore *Applicant A*, delivered two months after the Minister's comments, and the way it has been interpreted in line with the Howard government policy position.

B *Event 2:* Applicant A, *24 February 1997*

This section argues that the RRT's interpretation of *Applicant A* — which was carried over to the AAT — led to a change in approaches to IPV claims. Their interpretation arose out of a misplaced emphasis on the source (individuals and personal relationships) and perceived nature — private — of domestic

[172] Crock and Berg (n 20) 361 [12.96]. The authors observe that these figures suggest that politics influences the treatment of refugees and refugee decision-making: at 361 [12.99].

[173] Senate Legal and Constitutional References Committee, Parliament of Australia, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (Report, June 2000) 170 [5.114] ('*A Sanctuary under Review*').

[174] Legomsky (n 170) 250.

[175] *A Sanctuary under Review* (n 173) 170 [5.114]. Crock and Berg note that following Ruddock's remarks, general acceptance rates at first instance were also affected (down by a third): Crock and Berg (n 20) 361 [12.96].

[176] Susan Kneebone, 'Is the Australian Refugee Review Tribunal "Institutionally" Biased?' in François Crépeau et al (eds), *Forced Migration and Global Processes: A View from Forced Migration Studies* (Lexington Books, 2006) 237, 248 ('Australian Refugee Review Tribunal').

[177] From her analysis of relevant decisions, Kneebone has suggested that the two decisions Ruddock referred to were *V96/04080* [1996] RRTA 2270, decided by Member Calabro, and *N94/06730* [1996] RRTA 2897, decided by Member Tsamenyi: Kneebone, 'Australian Refugee Review Tribunal' (n 176) 258 n 65. Members Calabro and Tsamenyi were not among those reappointed to the Tribunal in May 1997.

[178] See below n 278.

[179] Kneebone, 'Australian Refugee Review Tribunal' (n 176) 247.

violence.[180] This is owing, in part, to a failure to fully appreciate the meaning of McHugh J's references to both individual and private persecution in *Applicant A*. This case is mistakenly seen to justify the current tendency, as canvassed in Part III(B) above, for individual circumstances and personal relationships to either obscure, or preclude an in-depth enquiry into, relevant *Convention* reasons.

1 *Background*

Applicant A concerned husband and wife appellants fearing compulsory sterilisation pursuant to China's former one-child policy.[181] The claim turned on the proper interpretation of the PSG ground and whether the appellants faced persecution for reason of their membership of any of the putative groups. The RRT had found for the appellants on the basis of a PSG defined as 'those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised'.[182]

This group was defined by reference to the persecution the appellants feared; the High Court was tasked with deciding whether this gave rise to error.[183] It was decided by majority that it did: McHugh J stated that 'the group must exist independently of, and not be defined by, the persecution'.[184]

More broadly, the High Court confirmed Australia's shift away from the dominant 'protected characteristics' approach to the formulation of social groups.[185] Under this approach, PSGs are constituted by a common innate or immutable characteristic such as gender, sexuality, or family ties.[186] The High

[180] See Germov and Motta's cogent arguments as to why domestic violence is not a private matter: Germov and Motta (n 30) 314.

[181] *Applicant A* (n 31) 239 (Dawson J).

[182] Ibid.

[183] Ibid.

[184] Ibid 263. See also Dawson J's similar statement at 242. However, McHugh J considered that in some circumstances persecution may be relevant to the formation of a social group as 'the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society': at 264.

[185] Ibid 234 (Brennan CJ).

[186] *Membership of a Particular Social Group* (n 53) 2–3 [6]:

> A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.

See also *Matter of Acosta* (BIA, 24159781, 1 March 1985) slip op 233–4 (Chairman Milhollan, Members Maniatis, Dunne, Morris and Vacca); *Canada (A-G) v Ward* (1990) 67 DLR (4th) 1, 5–9 applying this approach.

Court preferred a plain-meaning interpretation which followed a 'social perception' approach, whereby PSGs are examined by reference to distinguishing characteristics.[187] As Dawson J concluded, a valid PSG under this approach is constituted by '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'.[188]

The High Court also examined the relationship between the phrases 'persecuted', 'for reasons of' and 'membership of a particular social group', adopting the Federal Court's reasoning in *Ram v Minister for Immigration and Ethnic Affairs* ('*Ram*')[189] that to establish nexus in social group cases:

> There must be a common unifying element binding the members together … 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.[190]

2 *The RRT's Perception of* Applicant A

Although the Tribunal was familiar with many of the principles espoused in *Applicant A*, as demonstrated by its application of the key Federal Court cases of *Morato* and *Ram* in IPV claims,[191] the High Court's judgment was felt as a seismic shift. In June 1997, six months after *Applicant A*, the RRT declined to follow the previously influential *N93/00656* decision, discussed in Part III(B) above, which had accepted 'women' as a PSG, because it 'was decided prior to *Ram* and *Applicant A*, which have changed the Australian caselaw with regard to the interpretation of the term "particular social group"'.[192]

Several RRT cases suggested that *Applicant A* effected even deeper change: '[*Ram* and *Applicant A*] have made it more difficult to assess harm done to an

[187] See *Membership of a Particular Social Group* (n 53) 3 [7].

[188] *Applicant A* (n 31) 241 (Dawson J), confirming the approach in *Morato* (n 144) 416 (Lockhart J).

[189] *Ram* (n 86).

[190] *Applicant A* (n 31) 284–5 (Gummow J), citing *Ram* (n 86) 318 (Burchett J).

[191] See, eg, *V04/16542* [2004] RRTA 338; *N97/13795* [1998] RRTA 795, where, after summarising the approach to PSG in *Applicant A* (n 31), the RRT said '[t]hese principles reflect the principles established in *Morato*'. It also quoted extracts from *Ram* (n 86) on defining social groups and again noted that 'these principles were affirmed by the High Court in *Applicant A*'.

[192] *N97/13287* [1997] RRTA 2145 (Member Layton).

individual by another individual in a relationship which does not involve state support for the harm'.[193]

3 *Understanding* Applicant A*'s Impact*

(a) Particular Social Group Determination

Applicant A was not directly concerned with a risk of domestic violence. However, it inevitably affected these claims as they are habitually decided under the social group ground. The most direct effect was that groups comprising 'women victims of domestic violence' or some variation thereof were no longer permissible.[194]

There was one explicit reference in *Applicant A* to domestic violence claims: McHugh J's discussion at footnote 148 of a Canadian case accepted under the PSG 'Trinidadian women subject to wife abuse'.[195] While his opinion that '[t]he decision must surely be wrong even if the definition of refugee is given a very liberal interpretation' could appear a general statement excluding domestic violence from the *Convention*, his next sentence is qualifying: 'It is difficult to see how the *designated group* was a particular social group for *Convention* purposes.'[196] The group was defined by the persecution, which McHugh J went on, in the very next paragraph of his judgment, to reject as a valid basis for social groups.[197] In the footnote, he also identified nexus as a secondary issue with circular PSGs such as this one: 'it does not follow that the applicant was abused

[193] *V97/06622* [1997] RRTA 3510. See also similar sentiments expressed in *N97/19550* [1998] RRTA 299; *N97/15435* [1998] RRTA 429; *N97/17048* [1998] RRTA 1016; *N97/20622* [1998] RRTA 5371; *N97/20008* [1999] RRTA 79; *N97/17961* [1999] RRTA 673.

[194] See, eg, *N96/12294* [1997] RRTA 2333 where the Tribunal acknowledged that

> [i]t is clear that the definition of the phrase 'particular social group' propounded by the High Court in *Applicant A*'s case precludes the formulation of a particular social group comprising 'women victims of domestic violence', or any similar formulation which includes the persecution feared in the definition of the group.

Groups defined by subjection to domestic violence were previously discussed in *V93/00802* [1994] RRTA 498; *V95/03639* [1996] RRTA 996; *N94/03591* [1994] RRTA 2000; and accepted in *N94/05415* [1995] RRTA 587; *N94/05320* [1995] RRTA 1357; *V94/02695* [1995] RRTA 386. However, there are examples in later RRT and AAT case law of social groups framed by reference to the persecution: see, eg, *1111292* [2012] RRTA 87, [70] (Member Urquhart); *1501572 (Refugee)* [2017] AATA 304, [26] (Member Mullin); *1513177 (Refugee)* [2017] AATA 2666, [47] (Member Pennell); *1612277 (Refugee)* [2017] AATA 2085, [71] (Members Darcy and Pennell); *1705375 (Refugee)* [2017] AATA 2843, [189] (Member Pennell).

[195] *Applicant A* (n 31) 262–3 n 148, citing *Minister of Employment and Immigration (Canada) v Mayers* [1993] 1 FC 154.

[196] *Applicant A* (n 31) 262–3 n 148 (emphasis added).

[197] Ibid 263.

because of her *membership* of that group'.[198] While this footnote impacted some RRT decisions immediately after *Applicant A* was issued,[199] it was not a statement on the viability of domestic violence as a basis for other group formulations or claims in general.

For a period of years following *Applicant A*, the RRT no longer straightforwardly recognised 'women' as a PSG: in most cases, women were not sufficiently distinguishable from the rest of society and were too broad a group to be cognisable,[200] despite a previous dismissal of this proposition.[201] In this period, many decisions rejected the existence of a PSG and, in the alternative, any nexus to the risk of harm.

Despite the RRT's perception of *Applicant A*'s effect, a significant change in approach to domestic violence cases was not necessarily required. The decision confirmed Federal Court jurisprudence already applied by the RRT, including a social perception approach to formulation of PSG,[202] and that groups should

198 Ibid 262–3 n 148 (emphasis in original).

199 The Tribunal cited this footnote in the discussion of social group in at least nine cases. In all, the existence of a social group and any nexus is rejected. In at least one other case, the footnote appears to be perceived as having wider effect: *N95/07780* [1997] RRTA 3343. The Tribunal noted that while the facts suggested that the grounds of religion, political opinion and PSG (namely, 'married woman in Indonesia') may be relevant to the persecutor's motivation, there may be 'difficulties' with these arguments, 'particularly given the comments of McHugh J in *Applicant A*'s case at [262–3], footnote [148]'. However, the Member did not need to decide whether nexus could be established to the persecutor as there was sufficient evidence to establish a discriminatory denial of protection. A similar holding by the RRT is discussed in *Ndege* (n 25). In that case, Weinberg J noted that the footnote was 'particularly important' in understanding the RRT's decision: at 763 [24]. It was the RRT's choice, because of the footnote, not to link *Convention* nexus to the perpetrator's actions and to instead construe 'persecution' as the Tanzanian state's denial of protection which was in question on appeal by the Minister: at 763 [25]. Justice Weinberg agreed with the Minister that the RRT had erred in its understanding of persecution and the case was remitted to the RRT for reconsideration: at 772 [78].

200 See, eg, *N97/13533* [1997] RRTA 4664; *N97/17134* [1997] RRTA 4921; *N97/15435* [1998] RRTA 429; *V04/16542* [2004] RRTA 338. These cases usually acknowledged that *Applicant A* (n 31) left open the possibility for women to be recognised as a group, but this was conceivable only in relation to 'extremely patriarchal societies where males define the legal and cultural norms and women are subjected to serious systemic and entrenched discrimination at all levels of society — legal, religious and social': *N97/13533* [1997] RRTA 4664.

201 In *N94/06178* [1995] RRTA 2253, the Tribunal dismissed the suggestion in *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100, 122 (Wilcox J) that 'young, single women' was too broad a category to be a social group on the grounds that this was an obiter comment made by a single Federal Court judge. However, *Morato* (n 144) and *Minister for Immigration and Ethnic Affairs v Respondent A* (1995) 57 FCR 309, the earlier decision in what would become *Applicant A* (n 31), were judgments of the Full Federal Court permitting social groups of 'women'.

202 To a certain extent, the High Court's elucidation of the social perception approach also functioned as confirmation, not invention, of Lockhart J's approach in *Morato* (n 144) 417. The

not be defined by the persecution they face.[203] Moreover, though the RRT had to formally shift away from the 'protected characteristics' approach it had used in the past, the social perception approach does not preclude gender-defined social groups.[204]

The case law indicates a subsequent return to groups defined by gender[205] in the years following *Khawar*,[206] though the jurisprudence remains inconsistent on whether gender alone can define a PSG.[207] A corresponding improvement in the resolution of the nexus enquiry has not ensued.

(b) Assessing Nexus

As mentioned, in the immediate post-*Applicant A* period, RRT Members indicated that establishing nexus became less feasible:

> The difficulty must be the greater when the harm feared is private harm from a single individual. According to McHugh J [in *Applicant A*], the *Convention* was not designed to provide havens for individual persecutions (at 360).[208]

RRT already assessed social groups by reference to women's social characteristics which included societal norms dictating their treatment, the discrimination they faced, and special measures responding to discriminatory practices: see, eg, *N93/00656* [1994] RRTA 1580.

203 In the abovementioned precedent case of *N93/00656* [1994] RRTA 1580 (Member Hunt), for example, the RRT did not accept 'women subject to domestic violence' as a social group because it was defined by the nature of the persecution and, in reliance on *Morato* (n 144), the '*Convention* reason must pre-exist the persecution'.

204 Dorevitch and Foster (n 30) 35, citing *Khawar* (n 21) 14 [35] (Gleeson CJ).

205 Successful groups are often a subset of 'women': see, eg, *V95/03574* [1996] RRTA 912, which recognised 'married women' as a group; *1509438 (Refugee)* [2017] AATA 1819, which recognised women in a particular country as a group (in this case, 'women in PNG').

206 This may be because the same country circumstances indicating a discriminatory denial of protection may identify women as a group in that society. It must also be noted that from December 2014, amendments to the *Migration Act* (n 47) reintroduced the possibility of establishing a group on the basis of innate characteristics: at s 5L.

207 For RRT cases using narrower groups, see, eg, *0901487* [2009] RRTA 621, [55] (Member Gregory); *1111292* [2012] RRTA 87, [70] (Member Urquhart); *1412234* [2015] RRTA 272, [25] (Senior Member Raif). For AAT examples, see *1501572 (Refugee)* [2017] AATA 304, [26] (Member Mullin), accepting 'women in Papua New Guinea who have left an abusive domestic relationship'; *1513177 (Refugee)* [2017] AATA 2666, [47] (Member Pennell) and *1612277 (Refugee)* [2017] AATA 2085, [71] (Members Darcy and Pennell), both accepting 'vulnerable women in abusive marriages' and 'women who are victims of domestic violence'; *1615776 (Refugee)* [2019] AATA 4380, [26] (Member Lamont), recognising 'single/divorced women', 'single mothers in India' and 'women who have breached religious and social and cultural norms by separating from their husbands'.

208 *N97/19550* [1998] RRTA 2991. See also *N97/15435* [1998] RRTA 429; *N97/17048* [1998] RRTA 1016; *N97/20622* [1998] RRTA 5371; *N97/20008* [1999] RRTA 79; *N97/17961* [1999] RRTA 673.

Prior to this time, the RRT was plainly aware of the need to establish nexus between the PSG and the applicant's risk of harm. *Ram* was decided on 27 June 1995 and was applied by members in many of the mid-90s cases establishing nexus between an applicant's status as a woman and her violent treatment.[209]

Given that the RRT was already comfortably applying *Ram*'s guidance, subsequently adopted by *Applicant A*, it is curious that the latter case has been perceived as warranting a reversal of its jurisprudence. This is a critical episode to decipher because although nexus is an issue to be determined in each case, the understanding of *Applicant A* has contributed, as shown below, to two decades of jurisprudence rejecting IPV as being motivated by a *Convention* reason.

(i) The Key Paragraphs

Two paragraphs of McHugh J's judgment have had the greatest impact on establishing nexus in IPV cases.[210] These extracts are reproduced below in full, with emphasis on key aspects, to aid the discussion which follows.

> When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group. *Discrimination — even discrimination amounting to persecution — that is aimed at a person as an individual and not for a* Convention *reason is not within the* Convention *definition of refugee*, no matter how terrible its impact on that person happens to be. The *Convention* is primarily concerned to protect those racial, religious, national, political and social groups who are singled out and persecuted by or with the tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return. *Persecution by private individuals or groups does not by itself*

[209] *N94/05706* [1996] RRTA 1651; *N95/08225* [1996] RRTA 1817; *N95/08354* [1996] RRTA 1938; *N95/09047* [1996] RRTA 2136; *V95/03574* [1996] RRTA 912; *V96/04260* [1996] RRTA 1342, [20] (Member Borsody); *V95/03448* [1995] RRTA 1993.

[210] At times, the RRT also cited McHugh J's comments that '[d]efining the group widely increases the difficulty of proving that a particular act is persecution "for *reasons* of … membership" of that group': *Applicant A* (n 31) 256–7 (emphasis in original). However, it is well established that, as with other *Convention* grounds, a social group may be broad or encompass a significant portion of a population because there is no requirement that everyone within the identified group be at risk: Hathaway and Foster (n 5) 441. As was also set out in *Applicant A* (n 31), a social group can be composed of many millions of people: at 241 (Dawson J). There is no requirement that they be closely affiliated with each other: at 266 (McHugh J). Once the group is identified, a factual assessment on a case-by-case basis follows as to whether the particular applicant has a well-founded fear of persecution connected to membership of the group: at 267 (McHugh J).

> *fall within the definition of refugee unless the State either encourages or is or appears to be powerless to prevent that private persecution*. The object of the *Convention* is to provide refuge for those groups who, having lost the *de jure* or *de facto* protection of their governments, are unwilling to return to the countries of their nationality.[211]
>
> …
>
> However, the association of the term 'membership of a particular social group' with race, religion and nationality indicates that 'a particular social group' was probably intended to cover only a relatively large group of people. The concepts of race, religion and nationality imply groups of hundreds of thousands, in some cases millions, of people. It is unlikely that, in adding 'a particular social group' to the *Convention* categories, the makers of the *Convention* had in mind comparatively small groups of people such as members of a club or association. *The* Convention *was not designed to provide havens for individual persecutions*. It seems unlikely therefore that, having turned their back on individual persecution, the makers of the *Convention* intended the phrase 'a particular social group' to be confined to small groups of individuals 'closely affiliated with each other' as is perhaps suggested in *Sanchez-Trujillo*.[212]

(ii) 'Private' Persecution

As previously discussed, during the mid-90s the RRT had essentially shifted away from a distinction between so-called private and public forms of harm in domestic violence claims by recognising IPV as a human rights violation with a gendered cause capable of supporting a refugee claim. From 1997, however, the RRT began referring to domestic violence as a form of 'private harm', citing *Applicant A* in support.[213] While in the AAT the link to *Applicant A* is no longer explicitly made, domestic violence is commonly perceived as private and thus unrelated to a *Convention* reason.[214]

The sole reference to 'private persecution' in *Applicant A* is McHugh J's statement, as set out above, that '[p]ersecution by private individuals or groups does

[211] *Applicant A* (n 31) 257–8 (emphasis added).

[212] Ibid 266 (emphasis added) (citations omitted), citing *Sanchez-Trujillo v Immigration and Naturalization Service*, 801 F 2d 1571, 1576 (Breezer J for the Court) (9th Cir, 1986).

[213] See, eg, *N97/18501* [1997] RRTA 4849; *N97/19743* [1998] RRTA 2152; *N00/35103* [2002] RRTA 961; *N97/19550* [1998] RRTA 2991; *N97/17961* [1999] RRTA 673; *N97/15435* [1998] RRTA 429; *1000167* [2010] RRTA 163, [54] (Member Jacovides).

[214] See, eg, *1501572 (Refugee)* [2017] AATA 304, [25] (Member Mullin); *1416419 (Refugee)* [2016] AATA 4307, [62] (Member Thwaites); *1508621 (Refugee)* [2017] AATA 2364, [50] (Member Cranston); *1806813 (Refugee)* [2019] AATA 6786, [23] (Member Grant); *1603428 (Refugee)* [2018] AATA 5412, [48] (Member Pennell).

not by itself fall within the definition of refugee unless the State either encourages or is … powerless to prevent that private persecution.'[215] Here McHugh J was examining the object and purpose of the *Convention* as an aid to interpreting the meaning of 'membership of a particular social group'. He noted that the *Convention* was designed to protect individuals who: a) face discriminatory persecution for one of the enunciated grounds; and b) have lost the protection of their state against this persecution.[216]

'Private persecution' appears in the second half of the above sentence as shorthand for the reference to 'persecution by private individuals' in the first half. While McHugh J emphasised the causal connection to a *Convention* reason in the same paragraph, the reference to private persecution does not relate to nexus. It relates to one of the fundamental purposes of the *Convention* — the obligation on host states to provide 'surrogate' protection where the protection of the country of origin is lacking — and constitutive elements of the concept of persecution.[217] The requirement that there be some element of state involvement in the notion of persecution — 'the State either encourages or … appears to be powerless to prevent'[218] — is necessarily emphasised in the context of 'private persecution' because, in contrast to state-perpetrated persecution, in cases involving non-state agents this requirement is not self-evident. That this was his Honour's point is made clear by the sentence which directly follows: 'The object of the *Convention* is to provide refuge for those groups who, having lost the *de jure* or *de facto* protection of their governments, are unwilling to return to the countries of their nationality.'[219]

The Federal Court has considered this paragraph, stating in *Ndege* that McHugh J meant 'persecution for a convention related reason'[220] or 'private, but convention related, persecution'.[221] Thus, the only reference to private persecution in *Applicant A* was to persecution carried out by non-state agents.

[215] *Applicant A* (n 31) 258.

[216] Ibid 256–8.

[217] Hathaway and Foster (n 5) 184–5.

[218] *Applicant A* (n 31) 258.

[219] Ibid.

[220] *Ndege* (n 25) 769 [47] (Weinberg J).

[221] Ibid 768 [44]. In the same paragraph, Weinberg J stated:

> It seems from this last observation by McHugh J that had the respondent's husband's intended violence against her been motivated by one or more of the indicia of race, religion, nationality or political opinion, or the respondent's 'membership of a particular social group' it would have been open to the RRT to find that she had a 'well-founded fear of being persecuted' for a convention related reason. Such a finding, which the applicant conceded might have been open to the RRT on the material before it, would have entitled the

Subsequent Tribunal decisions indicate a different interpretation. Some applicants have been rejected in part because private persecution is misinterpreted as a synonym for non-*Convention* harm, as a reference to nexus. By way of example, in *N97/19743* the Tribunal found that the applicant was the victim of 'aberrant behaviour' inflicted by her husband because of their former relationship, rather than for any *Convention* reason.[222] In its conclusion, the Tribunal contrasted *Convention*-motivated harm with private harm using the language of *Applicant A*:

> I find that the harm feared by the Applicant is not persecution in terms of the *Convention*, as it is not directed at her for reason of her membership of a particular social group, within the meaning of that term as it appears in the *Convention*; the harm feared is essentially a private harm inflicted on the Applicant as an individual.[223]

In a 2002 decision, the RRT explicitly linked this interpretation to McHugh J's judgment.[224] The Nepali applicant's husband was said to be motivated to harm her due to a propensity for violence, alcohol abuse and marital quarrels.[225] In assessing nexus, the RRT considered that

> the applicant's difficulties with her husband were essentially a form of *'private persecution' unrelated to a* Convention *reason* (see *Applicant A & Anor v MEA & Anor* (1997) 190 CLR 225, at 257–8 per McHugh J). The Tribunal is not satisfied … that she is at risk of harm by her husband solely or primarily due to her gender.[226]

In 2010 the RRT attributed a Tongan applicant's risk of harm to her husband's violent nature, finding that it was 'harm of [a] private nature which is unrelated to the *Refugees Convention*' and concluding that 'the applicant's difficulties with her husband were essentially a form of "private persecution" unrelated to a *Convention* reason (see *Applicant A* … per McHugh J)'.[227] The positioning within the decision — in a paragraph assessing nexus — and the explicit classification

> RRT to conclude that Tanzania either encouraged, or was powerless to prevent, that private, but convention related, persecution. A finding that the respondent was eligible for a protection visa could then properly have been made.

222 [1998] RRTA 2152. See also *N97/18501* [1997] RRTA 4849; *N96/12294* [1997] RRTA 2333.

223 *N97/19743* [1998] RRTA 2152.

224 *N00/35103* [2002] RRTA 961.

225 Ibid.

226 Ibid (emphasis added). See also *N05/52362* [2005] RRTA 304 where the Filipina applicant's claim of being harmed by her husband for religious reasons was rejected for the same reasons.

227 *1000167* [2010] RRTA 163, [54] (Member Jacovides).

of IPV as harm of a 'private nature' indicates that McHugh J's comment was employed to refer to the character rather than agent of persecution. At this stage of the decision, it was redundant to observe that the persecutor was a non-state agent.

The evolution of 'private', in the sense of private actor, to private character and therefore non-*Convention* reason, is substantiated by the language in subsequent cases such as *1008090*, where the RRT found that the persecution did not arise for a *Convention* reason but was 'private harm arising from a troubled domestic relationship',[228] and *1008220* where the harm was inflicted not for a *Convention* reason but for 'private reasons resulting from marital breakdown and arguments'.[229]

The RRT's association between private actors and private/personal reasons — 'it seems that the harm she fears … is *private harm*, from an individual, for personal reasons'[230] — continues in AAT jurisprudence, where domestic violence claims are routinely attributed to personal reasons,[231] including in several 2019 decisions.[232] The AAT recently stated that domestic violence 'could be categorized as a private matter'.[233]

Justice McHugh's reasoning does not justify this view. Indeed, because *Applicant A* involved state-perpetrated persecution, non-state-agent persecution was not addressed in any detail. He excluded from the ambit of *Convention* protection only persecution which has no discriminatory basis to it, irrespective of its source or nature.[234]

[228] [2010] RRTA 1064, [96] (Member Pope). See also *060860015* [2006] RRTA 210 where it was found that the harm the applicant feared was private and not *Convention*-related.

[229] [2010] RRTA 1052, [74] (Member Grau).

[230] *1210036* [2013] RRTA 8, [55] (Member Pope) (emphasis added). See also similar language of 'persecution from private agents for private reasons' in *V01/12621* [2002] RRTA 451 and *N01/37314* [2003] RRTA 144.

[231] See, eg, *1412142 (Refugee)* [2015] AATA 3566, [15] (Member Titterton); *1414009 (Refugee)* [2016] AATA 3692, [35] (Member Titterton); *1512766 (Refugee)* [2017] AATA 591, [43] (Member Mullin); *1501572 (Refugee)* [2017] AATA 304, [25] (Member Mullin); *1508615 (Refugee)* [2017] AATA 2945, [92] (Member Rice).

[232] *1806813 (Refugee)* [2019] AATA 6786, [23] (Member Grant); *1807317 (Refugee)* [2019] AATA 4387, [40] (Member Roushan); *1613287 (Refugee)* [2019] AATA 5262, [19] (Member Noonan). In *1613224 (Refugee)* [2019] AATA 5826, Member Smidt did not consider the partner's motivation at all: at [36].

[233] *1508621 (Refugee)* [2017] AATA 2364, [50] (Member Cranston). However, the applicant's claim was accepted due to India's discriminatory failure to protect women from this type of violence: at [52]–[54] (Member Cranston).

[234] 'Whether or not conduct constitutes persecution in the *Convention* sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group': *Applicant A* (n 31) 258 (McHugh J).

Nevertheless, divorcing 'private persecution' from its original context has bestowed on domestic violence a particular character unlikely to give rise to a *Convention* reason and perpetuated the idea that *Applicant A* affected the assessment of nexus in IPV claims.

(iii) Individual Basis

The RRT's perception that it is more difficult to bring certain types of case within the *Convention*'s scope included, in addition to 'private' harm, instances involving one individual persecuting another. It is apparent from the case law that this aspect — the intimacy — of IPV has presented challenges to decision-makers adjudicating these claims. The fact that individuals are involved as perpetrator and victim, and that the harm occurs within personal relationships, has grounded an assumption that the perpetrator is motivated to harm the victim 'as an individual' — rather than for *Convention* reasons.[235] At times, the presence of these individual circumstances acts as a barrier to a complete enquiry into the existence of a *Convention* reason because of the association between personal circumstances and personal motivations. These assumptions, which reflect historical attitudes to domestic violence, have been buttressed by the construction given to *Applicant A*.

The RRT regularly quoted two passages of McHugh J's judgment in support of rejections based on individual circumstances: namely, '[d]iscrimination … aimed at a person as an individual and not for a *Convention* reason is not within the *Convention* definition of refugee'[236] and '[t]he *Convention* was not designed to provide havens for individual persecutions'.[237] As with private harm, while the AAT rarely cites *Applicant A* directly in nexus assessments, it embraces the RRT's view, traceable to *Applicant A*, that individual circumstances or personal relationships exclude *Convention* protection.[238]

Justice McHugh's overall point is that persecution within the refugee framework must be motivated by a *Convention* reason. The first reference underscores McHugh J's explanation of the guiding purpose of the *Convention*: to protect against persecution which occurs for a *Convention* reason.[239] The need for a causal connection between persecution and *Convention* grounds is

[235] Ibid 257–8.

[236] Ibid 257.

[237] Ibid 266.

[238] See, eg, *1416419 (Refugee)* [2016] AATA 4307, [62] (Member Thwaites); *1806813 (Refugee)* [2019] AATA 6786, [23] (Member Grant); *1603428 (Refugee)* [2018] AATA 5412, [48] (Member Pennell).

[239] See also Hathaway and Foster (n 5) 390–1 on the *Convention*'s anti-discrimination foundation.

uncontroversial and echoed by other judges in *Applicant A*.[240] Thus, in context, 'persecution aimed at a person as an individual' refers to persecution motivated by an attribute or circumstance unrelated to a *Convention* reason, or indiscriminate harm.[241] That is, harm perpetrated on an individual basis might be considered as opposite to *Convention* harm, which generally relates to purposive discrimination, often targeted at class-based distinctions.

The second reference was made during discussion of the formulation of PSGs. In dismissing US jurisprudence requiring voluntary association between members of a group, McHugh J stated that the PSG ground is to be interpreted in light of the other *Convention* grounds which contemplate discrimination against large numbers of people.[242] He reasons that it was unlikely that the *Convention*'s drafters intended that social groups be limited to small groups of people closely affiliated with each other and in this sense refers to the similar rejection of 'individual persecutions'.[243] Thus, it may be read — as was the earlier discussion of 'individual' as non-discriminatory persecution — with reference to the *Convention*'s purpose in protecting people from class-based persecutory harm — ie harm that is underpinned by discrimination.[244]

The meaning of 'individual' in these paragraphs has given rise to confusion. Some cases indicate a more literal or ordinary construction of these passages, in the sense that the involvement of individuals as perpetrator or victim renders the persecution unrelated to a *Convention* reason. In one such case, the RRT did not accept that an applicant was at risk because of her membership of any gender-defined PSG because her evidence demonstrated that she feared harm '*from an individual*, who has an interest in her personally' (and a propensity for

[240] Justice Dawson in *Applicant A* (n 31) 242 cites with approval the notion expressed by Burchett J in *Ram* (n 86) 317 that

> a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of', and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group.

Justice Gummow also cites *Ram* (n 86) in relation to nexus: *Applicant A* (n 31) 284–5.

[241] The Department's 1996 Gender Guidelines already mandated that:

> When assessing a woman's claims of well-founded fear of persecution … the evidence must show that what the woman genuinely fears is persecution for a *Convention* reason as distinguished from random violence or criminal activity perpetrated against her as an individual …

Guidelines on Gender Issues for Decision-Makers (n 160) 201 [3.8]. The *Canadian Gender Guidelines* (n 49) contain the same guidance: at 20–2.

[242] *Applicant A* (n 31) 260–1, 266.

[243] Ibid 266.

[244] This interpretation is supported by McHugh J's reasoning on persecution in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 429–31 and *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, 18–20 [55]–[61].

violence stemming from alcoholism).[245] The RRT noted in another case that 'it seems that the harm she fears in Lebanon is private harm, from an individual, for personal reasons and due essentially to the failure of her marriage'.[246]

Similarly, in 2017 the AAT rejected the claim of a woman from Papua New Guinea ('PNG') who had experienced severe physical violence because, while it was acknowledged that gender was relevant to the commission of violence, including 'the status of women and in particular the perceived role of wives in PNG', it concluded that the husband would harm the applicant 'as an individual'.[247] One of the factors in its reasoning was that her 'fear of harm is *from an individual* and the Tribunal finds that such harm would be primarily motivated by personal reasons'.[248] This finding was made despite the acknowledgement of the systemic context of gender inequality and 'endemic' levels of domestic violence in PNG.[249]

Again, the Tribunal's perception of *Applicant A* is instructive; the RRT itself made clear that claims centring harm by a 'single individual' are more difficult after the High Court decision.[250] However, McHugh J's reasoning, when read in context, does not support this interpretation.

[245] *N01/38651* [2003] RRTA 124 (emphasis added). See also *N97/18501* [1997] RRTA 4849; *N97/17048* [1998] RRTA 1016; *N97/17056* [1998] RRTA 857; *N97/13795* [1998] RRTA 795; *1210036* [2013] RRTA 8, [55] (Member Pope). The Federal Court made a similar finding in *Jayawardene* (n 25) 433 [28] (Goldberg J):

> The persecution which the applicant fears is persecution by a single person, namely her former husband, not persecution by any other person. If she were to be subjected to violence from her husband that would not be because she was a single woman or a single woman without protection in Sri Lanka but rather because she was his former wife; that is to say violence would be engendered because of their former relationship of husband and wife.

Note however that in one case prior to *Applicant A* (n 31) the Tribunal observed that:

> Domestic violence involves the abuse of one individual by another. In my view, the victims of such abuse are attacked for who they are as individuals — in other words, because of their individual circumstances, and not because of their membership of a particular social group.

N96/11892 [1996] RRTA 2932 (Member Smidt).

[246] *1210036* [2013] RRTA 8, [55] (Member Pope).

[247] *1509438 (Refugee)* [2017] AATA 1819, [48] (Member Burns).

[248] Ibid (emphasis added).

[249] The AAT relied on Department of Foreign Affairs and Trade ('DFAT') information which indicated that PNG's rates of violence against women were estimated to be among 'the highest in the world outside a conflict zone': ibid [30]–[40] (Member Burns), citing Department of Foreign Affairs and Trade, *DFAT Country Information Report: Papua New Guinea* (Report, 10 February 2017) 17 [3.34], citing Médecins sans Frontières, *Return to Abuser: Gaps in Services and a Failure to Protect Survivors of Family and Sexual Violence in Papua New Guinea* (Report, March 2016) 7.

[250] See, eg, *N97/17048* [1998] RRTA 1016; *N97/15435* [1998] RRTA 429.

The RRT in particular also relied on the fact that the *victim* of violence is a single individual. This happened in one of two ways. First, some cases found that the applicant was an individual harmed because of who she was: a wife. In *N97/17134* the RRT noted that the applicant was at risk 'because she is married to violent man [sic] who wishes to harm her because she is his wife; in other words, because of who she is as an individual'[251] and not because she is a member of a PSG.[252]

The fact that the individual is his wife is relevant to her risk as it denotes his access to her. It does not mean that she is necessarily harmed *as* an individual: it is not any sort of answer as to the reason she is harmed.

Secondly, in other cases the fact that a perpetrator only harms one individual, as opposed to all women, is determinative of the nexus enquiry.[253] In *N97/17424*, the RRT found that the applicant's ex-husband harmed her out of personal antipathy rather than because of her status as a Muslim woman because '[n]o claims were put forward of the applicant's ex-husband having had a record of ill-treatment of women'.[254] The Tribunal referred to McHugh J's comment that the *Convention* 'was not designed to provide havens for individual persecutions'.[255] The Tribunal similarly held that the evidence did not show that the persecutor in *N00/34327* had been violent to previous partners or women in general.[256]

[251] [1997] RRTA 4921 (Member Smidt).

[252] See also *N97/13884* [1997] RRTA 4307; *V97/06289* [1997] RRTA 3132; *N97/15064* [1997] RRTA 4418; *N97/17077* [1998] RRTA 2118; *N97/18481* [1998] RRTA 1639; *N97/16636* [1998] RRTA 2833; *N97/18994* [1998] RRTA 3433; *N97/20331* [1998] RRTA 3651; *N97/18496* [1999] RRTA 1177; *N01/39474* [2002] RRTA 816; *N05/52748* [2006] RRTA 2. In *N97/18496* [1999] RRTA 1177 the Tribunal said (emphasis added):

> I consider that his motivation in pursuing her is therefore not her membership of a particular social group defined as her family but her *individual situation* as her husband's former spouse and the person whom he blames for the end of their marriage.

[253] This has been identified as one of the 'major struggles over the meaning of "for reasons of"' in gender claims around the world: Catherine Dauvergne, 'Women in Refugee Jurisprudence' in Cathryn Costello, Michelle Foster and Jane McAdam, *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 728, 739. For example, the previously discussed problematic US decision of *Matter of A-B-* also contained this flawed reasoning: *Matter of A-B-* (n 12) 339 (A-G).

[254] [1998] RRTA 2140.

[255] Ibid.

[256] [2000] RRTA 1035. See, eg, *N99/26290* [1999] RRTA 658; *N05/52748* [2006] RRTA 2. Cf *1513666 (Refugee)* [2017] AATA 676, [48]–[50] (Member Thwaites), where the applicant's husband's abuse of previous female partners showed nothing more than 'issues in his personal relationships'; it did not demonstrate that he harmed women for the reason that they are women.

Roberts has addressed this issue as a matter of motivation and opportunity. As she argues by analogy to a race-related claim:

> However, a racist person may attack individual members of a race, on the basis of their race, without attacking all members of that race. The individuals chosen as victims are likely to be people whom the persecutor comes into close contact with, or who are particularly vulnerable because of their relationship with the persecutor, or who are unlikely to be protected by the law.[257]

In the same way, she concludes:

> Domestic violence represents the concurrence of motivation to harm women because they are women, with the opportunity to harm one's wife because the state does not intervene to protect women in the domestic sphere.[258]

While the tribunals are rarely clear about what is meant by persecution 'as an individual' in a particular case, in some instances 'individual' may be cited as the opposite of 'group-based' in considering nexus to a PSG.[259] In any event, it does not follow that the applicant is at risk of harm *as an individual* just because they are the only individual at risk. As McHugh J also observed in *Applicant A*:

> Ordinarily, the persecution will be manifested … in a way that shows that, as a class, [members] are being selectively harassed. *In some cases, however, the applicant may be the only person who is subjected to discriminatory conduct*. Nevertheless, as long as the discrimination constitutes persecution and is inflicted for a *Convention* reason, the person will qualify as a refugee.[260]

There is no requirement that an individual persecutor target other women in order for a conclusion to be drawn that he is motivated by gender.[261] While this factor may assist in the determination of nexus,[262] it is not the end of the enquiry. In such circumstances a broader circumstantial enquiry is instructive. In stark contrast to the pattern of decision-making prior to 1997, there has been little discussion of the context in which risk arises, including the operation of gender norms and entrenched inequalities.

257 Roberts (n 3) 187.

258 Ibid 186–7.

259 See, eg, *N97/17056* [1998] RRTA 857; *N97/17961* [1999] RRTA 673; *1509438 (Refugee)* [2017] AATA 1819, [48] (Member Burns); *N05/52748* [2006] RRTA 2; *N97/16636* [1998] RRTA 2833; *N97/13884* [1997] RRTA 4307.

260 *Applicant A* (n 31) 258 (emphasis added).

261 Germov and Motta (n 30) 312.

262 *AZAAR* (n 25) [20] (Lindsay FM).

Relatedly, the locus of the abuse has created an association of IPV with personal motivations, and *Applicant A* has been interpreted to support this reasoning. For example, in *N97/20331*, in holding that the applicant's risk did not fall within the *Convention* as it 'stem[med] from her individual circumstances', the RRT cited McHugh J's 'havens for individual persecutions' observation.[263] In *N97/15643*, the RRT disagreed with the applicant's lawyers that the risk of harm at the hands of her ex-husband arose because of the position of women in Korea's patriarchal society.[264] While it was acknowledged that women were discriminated against, the applicant's risk was classified as 'revenge from her ex-husband for her action in divorcing him'.[265] Therefore, the Tribunal found that it was entirely related to her individual circumstances and, as McHugh J observed in *Applicant A*, referred to above, '[t]he *Convention* was not designed to provide havens for individual persecutions'.[266]

The RRT similarly relied on *Applicant A* in finding that the personal relationship between persecutor and victim demonstrated that the violence was aimed individually. In *V99/10217*, the RRT considered that the

> threats and violence were aimed at her as an individual and arose from the personal relationship that they had had as husband and wife (*Applicant A* per McHugh at 257 …[267]

Since 1997, a significant number of cases have been rejected on the basis of the 'personal relationship' involved;[268] prior to that date, few examples are found.[269]

[263] [1998] RRTA 3651, quoting *Applicant A* (n 31) 266.

[264] [1998] RRTA 3179.

[265] Ibid.

[266] Ibid, citing *Applicant A* (n 31) 360 (McHugh J).

[267] [2000] RRTA 223. In this case, the RRT provided reasoning for its conclusion, inferring that the perpetrator was not motivated by a *Convention* reason because he was motivated by the applicant's money and had been violent towards other people. However, neither of these reasons negates an underlying *Convention* reason for the harm *she* experienced, and a deeper investigation was not carried out. See also *V00/12009* [2001] RRTA 952; *N00/35097* [2000] RRTA 1089.

[268] See, eg, *N97/15917* [1998] RRTA 2602; *N97/17156* [1998] RRTA 4414; *N97/16176* [1998] RRTA 370; *N00/33410* [2000] RRTA 1063; *N99/27637* [2000] RRTA 378; *V99/10217* [2000] RRTA 223; *V00/12009* [2001] RRTA 952; *N00/34416* [2001] RRTA 259; *V01/13327* [2002] RRTA 312; *1008090* [2010] RRTA 1064, [96] (Member Pope). The Federal Court has upheld the RRT's approach in this regard: see *Basa* (n 25) 9 (Sackville J); *Faddoul* (n 13) [4], [19] (Moore J); *Milosevska* (n 25) [8] (Kiefel J); *Jayawardene* (n 25) 434 [34], 435 [37]–[38] (Goldberg J). For AAT cases holding the same, see below nn 270–1.

[269] See, eg, *N95/08990* [1996] RRTA 927, though the Member accepts, in principle, that claims arising out of personal relationships do not preclude *Convention* protection per se.

The AAT continues to follow this approach: several decisions have concluded that an applicant faced abuse because of her personal relationship. For instance, in *1603428 (Refugee)*, the Tribunal held that the 'claim against her ex-husband is a personal dispute based on her personal relationship with him' and 'that the ex-husbands [sic] actions were directed toward her as a result of their personal relationship and not for any convention reason'.[270] Further, in *1613287 (Refugee)* the Tribunal stated that:

> After carefully considering the evidence before it the Tribunal did not consider the violence feared by the applicant is motivated by a refugee reason, rather it is motivated by the circumstances pertaining to her former relationships.[271]

However, it is not clear what evidence beyond the applicant's testimony, if any, was considered: the record does not contain any discussion of gender or cause of violence, or any COI informing the nexus enquiry. The Tribunal granted the claim based on complementary protection, adducing COI only during the discussion of state protection under this jurisdiction.[272] The Tribunal quoted information stating that '[t]raditional social practices and the low status of women in many parts of India result in domestic and gender-based violence'[273] — evidence that was relevant to, but not cited in, the analysis of whether there was a *Convention* reason.

Most *Convention*-accepted harm will arise out of an applicant's personal or individual circumstances. Indeed, these circumstances are likely what attracts a well-founded fear, because random harm is not usually accepted to fall within the *Convention*.[274] It does not inevitably follow, however, that an applicant is targeted 'as an individual'. The decision-maker must investigate the reasons for

[270] [2018] AATA 5412, [48] (Member Pennell).

[271] [2019] AATA 5262, [19] (Member Noonan). The decision-maker considered that these circumstances included propensity to violence and revenge for actioning divorce: at [17] (Member Noonan). See also *1412576 (Refugee)* [2015] AATA 3396, [34] (Member Mojsin); *1412142 (Refugee)* [2015] AATA 3566, [15] (Member Titterton); *1414009 (Refugee)* [2016] AATA 3692, [35] (Member Titterton); *1513666 (Refugee)* [2017] AATA 676, [48]–[50] (Member Thwaites); *1603667 (Refugee)* [2018] AATA 4862, [23] (Member Smidt); *1803786 (Refugee)* [2018] AATA 4881, [57] (Member Murphy).

[272] *1613287 (Refugee)* [2019] AATA 5262, [24]–[28], [40] (Member Noonan).

[273] Ibid [27] (Member Noonan), citing Department of Foreign Affairs and Trade, *DFAT Country Information Report: India* (Report, 17 October 2018) 17 [3.33].

[274] As Germov and Motta (n 30) 314 recognise:

> All violence, whether persecution for a *Convention* reason or random or private violence inflicted for a non-*Convention* reason, can ultimately be reduced to a 'personal' level between the person inflicting the harm and the person harmed.

They observe that the only relevant consideration is whether there is a well-founded fear of being persecuted for a *Convention* reason: at 312.

persecution. The key consideration is whether those personal circumstances are reflective of a status or attribute that attracts discrimination and harm; PSG is like the other *Convention* grounds in that respect.

It may not be an error to find that no *Convention* reason exists in relation to the perpetration of IPV in a particular case.[275] It *is* an error to fail to investigate the causes of domestic violence and to conclude, solely on the basis that individuals or private relationships are involved, that there is no *Convention* nexus.

It is problematic that McHugh J's reasoning has been used in a conclusory sense, supporting a blanket designation of certain types of claims as non-*Convention* claims. This was not the intention or meaning of his Honour's judgment. Indeed, the implication of his reasoning is that the decision-maker must undertake their investigative task to identify whether discriminatory factors are present and that only if they are not can it be said that persecution is aimed at an applicant as an individual. Contrary to the Tribunal's perception, there is nothing in *Applicant A* to signify that this task is more difficult in decisions involving 'private' harm from single individuals.

By contrast, prior to the events of 1996 and 1997, the RRT explicitly recognised the need for orthodox decision-making in claims relating to personal relationships:

> However, it is not necessarily correct that fears relating solely to a 'personal situation in an interpersonal context' preclude all applicants from consideration under the *Convention* (as was put to the Applicant during her interview with the Department). Each case must be considered individually, in light of all the relevant circumstances.[276]

V The Reconstruction of Intimate Partner Violence Jurisprudence

A *Revisiting the Events of 1996 and* Applicant A

While prior to 1997 the RRT had determined on rare occasions that the PSG 'women' was too broad to form the basis of a claim, or that domestic violence

[275] However, given the inferior status of women in almost every society, gender will rarely be irrelevant to the perpetration of violence. This does not mean that every domestic violence case will be successful; the other elements of the definition including well-founded fear and lack of state protection still need to be met in every case.

[276] *N94/02730* [1994] RRTA 2564. See also *N95/08990* [1996] RRTA 927 (Member McIllhatton): 'In the Tribunal's view behaviour by men towards women which arises out of a family or a personal relationship could amount to persecution notwithstanding that such behaviour commonly occurs in the context of the private as opposed to the public domain'. A similar point was made in *N94/06424* [1995] RRTA 1242.

fell outside the *Convention*,[277] the mid-90s decisions discussed in Part III(B) better reflect the Tribunal's approach to gender claims at the time, particularly given that *N93/00656* was being followed by multiple Members.

The departure from this progressive line of jurisprudence was abrupt: the same Members who had decided in 1996 that women experienced domestic violence because they were women were, by 1998, routinely deciding that domestic violence occurred because of individual perpetrators' aberrant behaviour and the personal nature of intimate relationships.[278]

The passage of time since Ruddock's tenure likely means that the threat to Members' livelihoods is no longer having a direct effect.[279] However, the Minister publicly declared that domestic violence did not fall within the *Convention* — a statement of departmental policy to which Tribunal Members were subject.[280] Given the sudden change in approach occurring shortly after these comments, effected by a supporting interpretation of the language of *Applicant A*, it is reasonable to suppose that these views underlie, at least in part, the

277 See *V95/03927* [1996] RRTA 1248; *V93/00752* [1996] RRTA 208; *N95/08990* [1996] RRTA 927; *V95/03639* [1996] RRTA 996; *N96/11892* [1996] RRTA 2932, where it was determined, using the language of *Ram* (n 86) 319, that the perpetrator of violence was motivated to inflict harm on the applicant on an individual basis and not for reason of the applicant's membership of any PSG. In another decision, the decision-maker concluded that domestic violence was not perpetrated for a *Convention* reason: *V94/01484* [1994] RRTA 771. In only a couple of decisions was it determined that the violence had been perpetrated for a personal or non-*Convention* reason: *N93/02009* [1994] RRTA 1402 (though in this case the applicant's husband's ability to dob her in to the Syrian Ba'ath party was characterised as an aspect additional to the domestic violence which established a link to the political opinion ground); *V95/03978* [1996] RRTA 1195. There were also decisions doubting that 'women' or 'women subjected to domestic violence' were a cognisable PSG, with the result that no *Convention* reason was found: see *V93/00802* [1994] RRTA 498; *V95/03639* [1996] RRTA 996.

278 Contrast the decision in *N95/09047* [1996] RRTA 2136 by Member McIllhatton, finding that the position of women and the disadvantages they face contributed to and facilitated domestic violence, with her later decisions such as *N97/15435* [1998] RRTA 429 and *N97/17056* [1998] RRTA 857. Contrast *N95/09633* [1996] RRTA 1997 and *N96/10190* [1996] RRTA 2239 by Member Blair, finding that violence occurred because the applicants were women, with his decision in *N97/15917* [1998] RRTA 2602: 'The husband's attitude to the applicant in the present case can be just as much attributable to his bad character and to the personal nature of their relationship than to any *Convention* related ground.'

279 Moreover, in the meantime, jurisdiction has shifted to the AAT, which is situated within the Attorney-General's portfolio, with appointments based on the Attorney-General's recommendations. However, the AAT is subject to s 499 of the *Migration Act* (n 47), which provides that 'the Minister may give written directions to a person or body having functions or powers under this Act' about 'the performance of those functions' or 'the exercise of those powers'.

280 While this is beyond the scope of the article, it raises questions about the appropriateness of a Minister attempting to bind a tribunal to their preferred legal interpretation: see, eg, *Port of Brisbane Corporation v Commissioner of Taxation* (2004) 140 FCR 375, 386 [26], 387 [28]–[29] (Moore J); *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589–91 (Bowen CJ and Deane J).

contemporary approach to IPV claims. The consistency of the approach between the RRT and the AAT post-amalgamation may indicate that such perspectives have transformed into institutional knowledge on this issue which is passed on regardless of the deciding body.[281]

In combination, the Minister's policy position and *Applicant A* were the catalyst for a new direction for the tribunals. The now entrenched view that IPV and other domestic violence are personal and private is thus based on flawed foundations. Given that is not principled and results in an unjustified sui generis approach to these claims, it is appropriate to reconsider the mid-90s jurisprudence, and of pressing concern to reverse the repercussions of these two events.

B *Reassessing Australian Intimate Partner Violence Claims: Future Steps*

While the unique domestic circumstances described above have shaped the way that IPV decisions are made, Australian decision-making still shares some of the pervasive issues that characterise domestic violence decision-making elsewhere. As such, while the recommendations which follow emerge from the example set by the RRT in the mid-1990s cases, some have been previously raised in the general literature[282] — demonstrating the extent to which these improvements are overdue. The fact that the RRT previously embodied such an approach demonstrates that these improvements are achievable in the Australian context.

An initial notable point is the largely procedural nature of the AAT's gender guidelines[283] with little substantive content to guide decision-makers in the assessment of different types of gender claims. Revision of these guidelines would represent a step towards improving decision-making in this area.[284]

In the absence of substantive formal guidance, a renewed focus on applying ordinary refugee law principles in each case without preconceptions based on the type of harm is required. As Deborah Anker, Lauren Gilbert and Nancy Kelly have argued:

[281] The Explanatory Memorandum to the amalgamating legislation notes that in the transfer of jurisdiction to the AAT, there was no change in jurisdiction and the codes of procedure in pts 5 and 7 of the *Migration Act* (n 47) were maintained: Explanatory Memorandum, Tribunals Amalgamation Bill 2015 (Cth) 4 [24].

[282] See, eg, Bacon and Booth, 'The Intersection of Refugee Law and Gender' (n 20) 154; Vogel (n 14) 432.

[283] *Guidelines on Gender* (n 64).

[284] However, as has been pointed out, gender guidelines are non-binding directions, which do not guarantee outcomes: Macklin, 'A Comparative Analysis' (n 29) 278.

> Women victims of domestic violence must establish the same elements as others claiming asylum protection … These [elements] should not be treated as more difficult or problematic because they arise in a gender-related context.[285]

Specifically, decision-makers must turn their minds, in each individual case, to ascertaining the reason why the applicant is at risk, using a range of independent information. As was understood by the RRT in 1995, whether an applicant faces persecution for reason of her membership of the PSG 'women', or any other *Convention* reason, 'is a question of fact in every such case — looking at the evidence about the harm which is feared, and the situation in the Applicant's county of origin'.[286]

In this regard, decision-makers may usefully refer to those decisions between 1994 and 1996 which considered nexus to perpetrators of IPV.[287] Those decisions appropriately focused on gender roles and norms, power relations between women and men, and the status of women as indicative of a major cause of violence.[288] International human rights norms[289] and country-specific evidence directed at those relevant considerations[290] are key to a more complete understanding of IPV and better decision-making in this area. COI has the potential to inform nexus assessments, if directed at the *reasons* for violence, not just its incidence and the state's formal response. The AAT's gender guidelines contemplate members referring to alternative sources of information including 'other independent research' in addition to human rights reports.[291]

Further, recent amendments to the *Migration Act* provide an opportunity to revisit the approach to PSG. Section 5L sets out that an applicant qualifies as a

[285] Anker, Gilbert and Kelly (n 12) 715. See also Karen Musalo and Stephen Knight, 'Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States' (2001) 13(1–2) *International Journal of Refugee Law* 51, 60–1.

[286] *N94/06178* [1995] RRTA 2253.

[287] While these decisions predate *Khawar* (n 21), the latter decision does not rule out establishing nexus to the perpetrator: see above Part III(A)(1).

[288] This approach comports with academic guidance on the appropriate approach to gender claims. Heaven Crawley, for example, has argued that '[a]ny analysis of the way in which gender … shapes the experiences of asylum-seeking women must … *contextualise* those experiences' in light of the historically, geographically and culturally specific way gender relations and gender differences are understood in the relevant society: Crawley, *Refugees and Gender* (n 7) 6–7 (emphasis in original).

[289] See above n 58 and accompanying text.

[290] As the UN General Assembly has recognised, '[a]nalysis of the gender-based inequalities that give rise to violence must … take into account the specific factors that disempower women in a particular setting': *In-Depth Study* (n 38) 28–9 [71].

[291] *Guidelines on Gender* (n 64) 6 [16]. Secondary sociological and feminist sources on IPV may be useful in addition to reports by experts from the country of origin on the particular cultural, religious, political, and legal context.

member of a PSG if they share a characteristic that *either* is innate or immutable *or* distinguishes the group from society. Therefore, decision-makers may formulate, as the RRT in the mid-90s did, PSGs simply constituted as 'women' using gender as the uniting characteristic.[292] Indeed, one recent AAT decision reasoned:

> It is well established that women are capable of forming a particular social group. The Tribunal finds that women in Peru share, or are perceived as sharing, an innate or immutable characteristic, namely their gender …[293]

While it is a feature of gender-related claims generally to rely primarily on the PSG ground, as observed by other commentators,[294] there are positive examples within the existing body of case law recognising an applicant's race or religion as the reason for IPV which could be built upon.[295] For example, in a recent decision, the AAT found that the applicant's husband, a Sikh, was motivated to harm the applicant in part because of her conversion to Islam as well as her status as a divorced woman.[296] It would benefit the jurisprudence to consider

[292] The *Refugee Law Guidelines* state that '[p]revious case law on gender based groups is unlikely to have much utility in informing whether such groups exist since under s 5L of the Act gender is an *innate* characteristic that is shared by a group': *Refugee Law Guidelines* (n 131) [6.6]. These guidelines are binding on AAT members pursuant to a ministerial direction: Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Cth), *Direction No 84: Consideration of Protection Visa Applications* (24 June 2019), replacing Minister for Immigration and Citizenship (Cth), *Direction No 56: Consideration of Protection Visa Applications* (21 June 2013).

[293] *1603193 (Refugee)* [2019] AATA 3428, [63] (Member Flood) (citations omitted). While the decision-maker found that gender also 'distinguishe[d] Peruvian women from society at large', it should be noted that the wording of s 5L of the *Migration Act* (n 47) is disjunctive and does not require an applicant to show that the given characteristic is both innate and socially distinct.

[294] Dauvergne, 'Women in Refugee Jurisprudence' (n 253) 737. For an overview of the criticism of over-reliance on the PSG ground in gender claims, including in relation to excluding intersectional understandings of individuals' claims, see Georgina Firth and Barbara Mauthe, 'Refugee Law, Gender and the Concept of Personhood' (2013) 25(3) *International Journal of Refugee Law* 470, 482–3. See also Alice Edwards, 'Transitioning Gender' (n 6) 28–9.

[295] See, eg, *N00/33516* [2002] RRTA 585, [55] (Member Cheetham); *N05/51896* [2005] RRTA 331; *N05/52025* [2005] RRTA 343; *0909901* [2010] RRTA 291, [115] (Member Wilson). Cf *1807317 (Refugee)* [2019] AATA 4387, [45] (Member Roushan); *1806813 (Refugee)* [2019] AATA 6786, [23] (Member Grant), rejecting religion as a relevant reason. On race, see *N98/23825* [2000] RRTA 97; *0909901* [2010] RRTA 291, [115] (Member Wilson). While there are no examples of the AAT applying the political opinion ground in this context, it remains open to decision-makers given the political dimensions of this type of violence. See above n 55 for a selection of sources examining the possibility.

[296] *1600479 (Refugee)* [2018] AATA 4148, [53]–[54] (Member McAdam).

other *Convention* grounds where appropriate to better reflect the varied circumstances in which domestic violence can occur.[297]

More broadly, other important benefits would follow. Determining IPV claims in a contextual and informed manner would provide space for women to be properly heard and reduce the risk of returning women to harm, while reshaping Australian refugee protection.

VI Conclusion

While refugee status determination is rarely, if ever, free from 'national ideologies, ideals and anxieties',[298] decision-making in gender-related claims is particularly affected.[299] Re-examining the text of *Applicant A* and the policy context in which it was interpreted reveals that, in Australia, the idea of domestic violence as non-*Convention* harm has a source external to the *Convention*'s definition: a quirk of policy and interpretation coupled with historical attitudes about violence in the so-called private sphere, rather than something innate to this type of harm.

The close examination of the jurisprudence has demonstrated an unprincipled retreat from a prior position that domestic violence occurs because of gender inequality. The adjudication of these claims has followed a course that was set not by direct High Court authority, but by political interference with tribunal independence and a misreading of aspects of key non-domestic violence case law. The interpretation of *Applicant A* has given an appearance of

297 For example, in relation to using the political opinion ground in gender-related claims, refugee scholars have argued that it would recognise both the political aspects of women's claims and women's agency, thus addressing the critique that RSD depoliticises women's acts of resistance and portrays women as passive victims of harm: see, eg, Crawley, *Refugees and Gender* (n 7) 79–81; Spijkerboer (n 4) 102–3, 131. In relation to IPV, see, eg, Kneebone, 'Women within the Refugee Construct' (n 30) 16.

298 Arbel, 'The Culture of Rights Protection' (n 15) 771. In relation to Canadian decision-making, Arbel concludes that 'the choices made in the domestic violence cases [are] informed by a myriad of unstated assumptions, political ideologies, and defensive anxieties'.

299 For example, while a fear of opening the floodgates may underlie all aspects of RSD, particularly in western countries, it appears to plague gender claims most acutely, as demonstrated by the reluctance to recognise 'women' as a PSG due to the size of the group: see, eg, Foster, 'The "Ground with the Least Clarity"' (n 26) 5; Dauvergne, 'Women in Refugee Jurisprudence' (n 253) 737. Relatedly, Pickering has noted, in relation to the disclaimer in *UNHCR Guidelines* (n 1) that not all of the world's women will be able to avail themselves of refugee protection as a result of their content, that there are no

> statements on race or nationality or religion that similarly reassure decision-makers, governments and the public with the comment that indeed not all people of religion or who have a certain nationality are automatically entitled to protection under the *Convention*.

Pickering (n 41) 83.

legality to what are in fact outmoded assumptions about domestic violence and other biases.

This discussion has hinted at general questions of fundamental concern around administrative decision-making, including the desirability of consistency or systems of precedent, independence and bias, the nature and impact of institutional memory or culture, and the limits of ministerial or policy influence on the interpretation of law.

It has also suggested an opportunity to confront the idea that domestic violence is personal and private, and address the misconception that *Applicant A* justifies exceptional treatment of domestic violence claims. It is hoped that future adjudication of these claims might draw on the lessons of the past — determination according to basic principle, and investigation of the discriminatory reasons underpinning persecution, as was in fact intended by *Applicant A* — and undo decades of incomplete protection for women experiencing domestic violence.