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**PARTICULAR SOCIAL GROUP:  
AN AUSTRALIAN PERSPECTIVE**

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## PARTICULAR SOCIAL GROUP

### 1. INTRODUCTION

This paper considers the interpretation and implementation of the term ‘membership of a particular social group’ (MPSG) in the definition of a refugee in the 1951 *Convention* and the 1967 *Protocol Relating to the Status of Refugees*. It is prepared primarily from the perspective of Australian case law and policy.

After considering the nature and scope of the term MPSG, its application in Australia is discussed, firstly in terms of analytical approach and generic definitional criteria, and secondly in relation to a selection of possible groups—family, women and homosexuals—to illustrate the contentious issues that may arise in its application.

The paper concludes with a summary of the main themes and conclusions.

### 2. THE NATURE AND SCOPE OF THE TERM MEMBERSHIP OF A PARTICULAR SOCIAL GROUP (MPSG)

Article 1A(2) of the Convention provides, *inter alia*, that,

For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who ... owing to a well founded fear of being persecuted for reasons of race, religion, nationality, **membership of a particular social group** or political opinion, is outside the country of his nationality and is unable ... to avail himself of the protection of that country...[emphasis added].

The term MPSG is arguably the most problematic of the five Convention grounds, being the most flexible and open to evolution.<sup>1</sup> It may be interpreted so narrowly as to appear superfluous, for example when seen as simply clarifying aspects of the other four Convention grounds.<sup>2</sup> Alternatively, it may be interpreted so loosely from a sociological or humanitarian perspective as to be open-ended and all-embracing.<sup>3</sup> For example, according to Helton,

The ‘social group’ category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up.<sup>4</sup>

In view of these possible variations, an approach to MPSG which reflects underlying Convention themes—the international community’s commitment to the assurance of fundamental human rights without discrimination, as well as its concern to place limits on the definition of a refugee and State obligations and respect State sovereignty—is essential.

Clearly, a degree of tension can exist between these themes, particularly when views about the nature and scope of human rights, the line between matters of private and public concern, and

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<sup>1</sup> In *Canada (Attorney-General) v Ward* (1993) 2 S.C.R 689, pp 43–44, La Forest J identified three approaches to the interpretation of a PSG: a very wide definition, whereby it serves as a safety net to prevent any possible gap in the other four categories; a narrower definition that confines its scope by means of some appropriate mechanism; and an even narrower definition that responds to concerns about morality and criminality by excluding terrorists, criminals and the like. He states that the supporters of the wide definition ‘exaggerate the implications of the intention of the [Convention’s] framers’ (p 46).

<sup>2</sup> According to Hathaway this was an approach adopted in Canada for some years, ‘resulting in the recognition of social group claims only when the social group could be defined on the basis of one of the other four forms of civil or political status’ (1991, p 157).

<sup>3</sup> In *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, Brennan J of Australia’s High Court commented that the inserting of the term PSG in the Convention text ‘was intended to be a “safety net” for any who fell within it’. However, this is different to saying it was intended as a safety net to prevent any possible gap in the other four categories of discrimination.

<sup>4</sup> Helton 1983, cited in Hathaway 1991 p 158, fn 164 & 167. Helton goes on to suggest that all groups protected under any United Nations human rights convention, whether defined in statistical, societal, social or associational terms, should be considered within the scope of the Convention (Helton 1983, cited in Hathaway 1991 p 159).

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the related roles, responsibilities and expectations of State authorities are evolving and often contentious, both within and between countries.

In these circumstances, a measured approach to the ongoing interpretation of Convention obligations is required, based on the rules of treaty interpretation and consistent with the object, purpose, context and manner in which the Convention was constructed. As noted by Dawson J of the High Court of Australia,

... despite the reference in the Convention to the concern that persons enjoy the 'widest possible exercise of ... fundamental rights and freedoms', there are limits on the extent to which the Convention attempts to translate that concern into practical reality. In that respect, the Convention, like many international and municipal instruments, does not necessarily pursue its primary purpose at all costs. The purpose of an instrument may instead be pursued in a limited way, reflecting the accommodation of differing viewpoints, the desire for limited achievement of objectives, or the constraints imposed by limited resources ... It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.<sup>5</sup>

In relation to the interpretation of specific Convention definitions such as MSPG, the approach or framework of analysis that is used should ideally guide decision makers in making consistent and principled decisions that comply with Convention obligations.<sup>6</sup> However, it must also avoid interpretations that were unintended by Convention signatories and which undermine the Convention's coherence and support among States.<sup>7</sup>

## 2.1 THE INTENTIONS OF THE CONVENTION'S FOUNDERS

The Convention text and preparatory documents shed little light on who the drafters intended to benefit when they included persecution for reasons of MSPG as a ground for protection. The term was adopted without discussion at a late stage,<sup>8</sup> at the suggestion of the Swedish delegate, who stated,

... experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included.<sup>9</sup>

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<sup>5</sup> *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225. Gummow J supported this view, adding that there are '... aspects of the background to the adoption of the Convention which show the danger in approaching it as designed, on a broad front, to advance humanitarian concerns. Rather, the text of the Convention manifested a compromise between various interests perceived by the Contracting States'. In *MIMA v Khawar* (2000) FCA 1130, Hill J at 3 similarly noted: 'That is not to say that the meaning of the Convention today must be confined to the problems that presented themselves to the international community in the early 1950s and it is clear enough that there has been a widening over the years of the persons who are genuinely in need of international protection. Nevertheless, the tension between the humanitarian purpose of international intervention to protect those in need of assistance and the legitimate domestic desire of states to limit migration must, to some extent, operate as a restriction on the ability of courts to widen unduly the scope of the [refugee] definition. Particularly, there is a danger of extrapolating, from the fact of ill-treatment, or discrimination and the sympathy or indeed indignation which such ill-treatment or discrimination engenders in those who would wish to promote a civil society, a conclusion that in international law the person who is ill-treated or discriminated against is, just for that reason, a refugee'.

<sup>6</sup> After reviewing relevant overseas jurisprudence, McHugh J in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 commented that, 'Courts and jurists have taken widely differing views as to what constitutes "membership of a particular group" for the purposes of the Convention ... In the result, courts and tribunals ... have given many decisions which cannot be reconciled with each other, having regard to their material facts'. See also Daley & Kelley 2000.

<sup>7</sup> States enjoy a measure of discretion as to how they interpret the scope of treaty terms, although such discretion needs to be exercised within the framework of the general rules of treaty interpretation. Where the Convention text, preparatory documents and circumstances of conclusion of the treaty do not shed light on interpretative issues, a legitimate approach can be to ask whether any of these stand in the way of a particular interpretation. In these circumstances, an interpretation that is not inconsistent with the object and purpose of the treaty may be justified as a legitimate interpretation of a Convention obligation.

<sup>8</sup> Hathaway 1991 p 157, fn 153. The new category was included by resolution of the preparatory committee by 14 votes in favour to none against, with 8 abstentions. If nothing else, the lack of comment during its passage suggests that the drafters did not see it as controversial.

<sup>9</sup> Mr Petren of Sweden in UN General Assembly, Conference of Plenipotentiaries, A/Conf 2/SR3 at 14

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There is arguably little in the term to sanction limiting the criteria for selecting such a group, or to suggest that any limitation was intended. Nevertheless, several observations can be proposed.

Firstly, the words 'membership', 'particular' and 'social' modify the word 'group'. The use of these qualifiers arguably indicates that the drafters envisaged that a PSG would normally encompass certain groups within society rather than every broadly defined segment or demographic division of that society.<sup>10</sup>

Based on Swedish practice and legislation at the time, Tiedemann<sup>11</sup> has suggested that the Swedish understanding of a PSG may have been a group whose members have a consciousness of their common identity, for example members of an aristocratic family, a lingual or other minority group, or an association such as a trade union or free masons.

All drafters would certainly have been aware of the plight of certain groups in the early post-war period whose particular social origins or circumstances were resulting in their persecution. Precisely which of the range of possible groups they had in mind can only be surmised, although as Goodwin-Gill has noted,

The lack of substantive debate on the issue suggests that contemporary examples of such persecution may have been in the minds of the drafters, such as resulted from the 'restructuring' of society then being undertaken in the socialist States and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families.<sup>12</sup>

Secondly, despite the use of the qualifier 'particular', the drafters may have envisaged PSG as covering relatively large groups, or at least as certainly not being limited to small groups. This may be argued in view of the association of PSG with other grounds such as race, religion and nationality (which generally imply large numbers of people), and the fact that the Convention, while it protects individuals, does not provide for persecution on individual grounds.

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 ... 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' ... Further support for this conclusion is given by the fourth paragraph of the Preamble to the Convention which suggests that the Convention was designed to provide refuge for mass movements of persecuted people.<sup>13</sup>

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<sup>10</sup> US Court of Appeals for the Ninth Circuit, *Sanchez-Trujillo v Immigration and Naturalisation Service* (1986) 801 F 2d 1571 at 1576, cited in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 260. In *Lek v MILGEA* (1993) 117 ALR 455 at 469, Wilcox J rejected the idea that 'young single women' constituted a PSG on the basis that it was 'too broad a category' to fall within the Convention terminology. He suggested that while such women constitute a social group in some circumstances, they may not constitute a *particular* social group within the meaning of the Convention.

<sup>11</sup> Tiedemann 2000 pp 5–6

<sup>12</sup> Goodwin-Gill 1996 p 46. R Plender has similarly written that, 'The addition was intended to ensure that the Convention would embrace those—particularly in Eastern Europe during the Cold War—who were persecuted because of their social origins' (1997 p 52, cited in Hathaway 1991 p 161, fn 177).

<sup>13</sup> McHugh J in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, at 266. He continued: 'It follows that, once a reasonably large group of individuals is perceived in a society as linked or unified by some common characteristic, attribute, activity, belief, interest or goal which itself does not constitute persecution and which is known in but not shared by the society as a whole, there is no textual, historical or policy reason for denying these individuals the right to be classified as a "particular social group" for Convention purposes'. However, it is not clear whether McHugh intended to suggest that PSGs now and for the future should have the characteristic of large size. In addition, according to Brennan J in the same case, 'I can see no reason to confine a particular social group to small groups or large ones; a family or a group of millions may each be a particular social group'. Reference to numeric size can be misleading, considering that some of the other Convention categories—for example, religious and political groups—can also be composed of very small numbers, and, as will be seen later, the possibility that groups as small as individual families may constitute a PSG has been accepted in Australian jurisprudence.

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Finally, while there is little indication that the scope of PSG was meant to be limited to the specific historical circumstance and PSGs of the early 1950s—or that it was not—the drafters were clearly concerned to define State obligations with some precision, or at least to avoid unlimited obligations. According to a USA representative,

The obligations of signatory States must be accurately defined and that could not be done unless the categories to benefit were fixed at a given date. The States concerned could subsequently extend the scope of their obligations, but they could not undertake unlimited obligations in advance.<sup>14</sup>

A similar sentiment was expressed by China:

The different categories of refugees to which the proposed convention should apply must be clearly indicated; it would be difficult for the Governments to ratify a Convention which otherwise would amount to a kind of document signed in blank to which could be subsequently added new categories of beneficiaries without number.<sup>15</sup>

In this context, the drafters are unlikely to have conceived of PSG as an infinitely open-ended category, even if they countenanced the possible emergence of new PSGs that did not exist in 1951.<sup>16</sup> As noted earlier, there are tensions in the various themes that underlie the Convention that need to be taken into account in its interpretation. In the words of Gummow J of the High Court in *Ibrahim*,

The Convention was not designed to confer any general right of asylum upon classes or groups of persons suffering hardship and was deliberately confined in its scope ... The interpretation of the protection visa provisions in [Australia's Migration] Act should not be strained to meet a judicially perceived mischief in the delayed development of customary or other international law.<sup>17</sup>

As La Forest J noted about the PSG category in the Canadian case of *Ward*,

The drafters' decision to list these bases [ie the five Convention grounds] was intended to function as another built-in limitation to the obligations of signatory States. The issue that arises, therefore, is the demarcation of this limit.<sup>18</sup>

### 3. APPLICATION IN AUSTRALIA

Australian courts have noted the indeterminate and flexible nature of the term MPSG,<sup>19</sup> and taken the view that it may apply whenever persecution is found directed at a cognisable group or section of society, where the persecution is not necessarily for racial, religious, nationality or political reasons.<sup>20</sup>

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<sup>14</sup> Mr Henkin, UN Doc. E/AC.32/SR.3, January 26 1950, cited in Hathaway 1991 p 159, fn 167

<sup>15</sup> Mr Cha, UN Doc. E/AC.32/SR.5, at 2 January 1950, cited in Hathaway 1991 p 159, fn 167

<sup>16</sup> As noted by Lord Hoffman in *R v Immigration Appeal Tribunal, Ex parte Shah* (1999) 2 WLR 1015 at 1032: '... the concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the Convention may have had in mind. In choosing to use the general term "particular social group" rather than the enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention'.

<sup>17</sup> *MIMA v Ibrahim*, (2000) HCA 55 at 143

<sup>18</sup> *Canada (Attorney-General) v Ward* (1993) 2 S.C.R. 689, p 48

<sup>19</sup> According to McHugh J in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 259, 'Courts and jurists have taken widely differing views as to what constitutes "membership of a particular social group" for the purposes of the Convention. This is not surprising. The phrase is indeterminate and lacks a detailed legislative history and debate. Not only is it impossible to define the phrase exhaustively, it is pointless to attempt to do so'.

<sup>20</sup> See, for example, *Morato v MILGEA* (1992) 39 FCR 401, Lockart J at 65: 'The interpretation of the expression "particular social group" calls for no narrow definition, since it is an expression designed to accommodate a wide variety of groups of various descriptions in many countries of the world which, human behaviour being as it is, will necessarily change from time to time. The expression is a flexible one intended to apply whenever persecution is found directed at a group or section of a society that is not necessarily persecuted for racial, religious, national or political reasons'.

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Attempts to paraphrase or redefine the language of the Convention definition have been resisted in deference to ‘the varieties of despotism, fanaticism, cruelty and intolerance which cannot be foreseen in all their awful manifestations with complete assurance’.<sup>21</sup>

According to the courts, what will in essence distinguish MPSGs from other individuals and groups in their country is a common binding attribute other than persecution, and a societal perception that the PSG is a group that stands apart from broader society.<sup>22</sup>

This latter emphasis on cognisability is what tends to distinguish the approach in Australia from that taken in some other jurisdictions—including Canada, the United States and the United Kingdom—which to date have emphasised the need for the group to exhibit some innate or immutable characteristic.<sup>23</sup>

Based on Australian jurisprudence to date, the important factors to take into account when considering the possible application of the MPSG ground are outlined below.

### 3.1 CASE BY CASE APPROACH

The existence of a PSG will depend on the unique facts of each case, including relevant country information. In view of the lack of definition in the Convention text of what is a PSG and the variations in interpretation that exist in international and Australian case law, decision makers must exercise informed personal judgment in each situation. An approach that considers each claim to refugee status on its individual merits respects the potential flexibility of MPSG.

The importance of the unique facts of each case has been acknowledged by the High Court:

... the phrase ‘particular social group’ ... is impossible to delimit ... by a precise definition ... [C]ourts and agencies should turn away from attempts to formulate abstract definitions. Instead, they should recognise ‘particular social groups’ on a case by case basis. This approach ... accepts that an element of intuition on the part of decision makers is inescapable, based on the assumption that they will recognise persecuted social groups of particularity when they see them.<sup>24</sup>

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<sup>21</sup> Kirby J in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, citing *Ram v MIEA* (1995) 57 FCR 565 at 568 and *Morato v MILGEA* (1992) 39 FCR 401 at 416

<sup>22</sup> See, for example, *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, and *MIMA v Zamora* (1998) 51 ALD 1

<sup>23</sup> An immutable characteristic being one that is fundamental to a person’s identity and which he or she should not be required to change. See, for example, *Canada (Attorney-General) v Ward* (1993) 2 S.C.R. 689 at 739; US Board of Immigration Appeals, *Matter of Acosta*, Interim Decision 2986, 1 March 1985 at 37–39; *Islam, Secretary of State for the Home Department*, (1999) UKHL 20 at 17, 25, 45, 47–8, 66. It is noted, however, that under the rule on PSG proposed in July 2000 by the US Immigration & Naturalisation Service, and drawing on the 1999 decision *Matter of R-A-* by the Board of Immigration Appeals (Interim Decision 3403 (BIA 1999)), factors that may be considered when determining whether a PSG exists include whether the group is recognised to be a societal faction or is otherwise a recognised segment of the population in question, and whether the society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society; Federal Register, vol 65 No 236, Thursday December 7 2000, ‘Proposed Rules’, p 76594.

<sup>24</sup> *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, Kirby J at 303–308. Kirby continued: ‘Whilst this is not an entirely satisfactory conclusion, it is preferable to an attempt by courts unduly to narrow the operation of the Convention or to impose upon its deliberately broad and ambulatory language categories which are by no means exhaustive of the actual words used. The development and expression of such categories, at least in the first instances, is the province of administrators and review tribunals with experience of refugee claims. It is not the task of appellate courts to whom these cases are but occasional visitors’. That said, the desirability of guidelines or standards being developed to assist decision makers was noted by Gummow J in the same case: ‘It has been suggested ... that the terms of Art 1 of the Convention ... are such that any attempt to discern specificity may not be a “reasonable enterprise”, and that the application of the criteria therein is left to decision makers on the basis that they will recognise persecuted social groups when they see them. Such propositions appear to abandon the quest for standards by which administrative decisions may determine the fate of individuals and in respect of the application of which there is judicial review for error of law’.

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### 3.2 IDENTIFYING THE PARTICULAR SOCIAL GROUP (PSG)

The way in which a social group is defined can be of crucial importance, not only to the issue of whether it is a PSG for Convention purposes, but also to whether the persecution feared is motivated for reason of the applicant's membership in the PSG.

The nature of the PSG may be proposed by the applicant or—since self-identification as a MPSG is not a pre-requisite<sup>25</sup>—the decision maker.<sup>26</sup> However, in either event it must have a common sense basis consistent with the nature of the applicant's claims and the social context in the country of origin.<sup>27</sup>

### 3.3 PERSECUTION NOT A DEFINING FEATURE

The principle that persecution or fear of it cannot be a defining feature of a PSG is well accepted in Australia and overseas.<sup>28</sup> If it were, the definition of a Convention refugee would be reversed. Persecution must be driven by one of the five grounds and not vice versa.<sup>29</sup>

In addition, as noted by the High Court,

Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the 'particular social group' ground to take on the character of a safety net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of 'fear of persecution', 'for reasons of' and 'membership of a particular social group' in the definition of 'refugee'. It would also make the other four grounds of persecution superfluous.<sup>30</sup>

That said, actions of persecutors may help identify or cause the creation of a PSG.

Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group ... [b]ut it would be

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<sup>25</sup> *Applicant A & Anor v MIEA & Anor*, 190 CLR 225, Kirby J at 296

<sup>26</sup> This is not to say that a decision maker must make out an applicant's case on his or her behalf. They are required only to respond to the claims made, but in doing so it may be appropriate to take a generous rather than technical approach to the way claims may be presented.

<sup>27</sup> Some of these 'common sense' elements have been identified by Dawson J in *Applicant A & Anor v MIEA & Anor*, 190 CLR 225: 'A "group" is a collection of persons ... the word "social" ... may be defined to mean "pertaining, relating, or due to ... society as a natural or ordinary condition of human life". "Social" may also be defined as "capable of being associated or united to others" or "associated, allied, combined". The adjoining of "social" to "group" suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word "particular" in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group.'

<sup>28</sup> See, for example, *Applicant A & Anor v MIEA & Anor*, 190 CLR 225 at 242 and 263; also *MIMA v Zamora*, (1998) 51 ALD 1, at 6–7. According to the US Department of Justice, and referring to *Gomez v INS*, 947 F 2d 660664 (2d Cir. 1991), 'It is well established in the case law that this type of circular reasoning does not suffice to articulate a particular social group' (rejecting the applicant's claim to MPSG of women who have been previously battered and raped by Salvadorean guerillas); Federal Register, vol 65 No 236, Thursday, December 7 2000, 'Proposed Rules', p 76594. In the UK in *Islam v Secretary of State for the Home Department*, 2 App Cas 629 (H.L 1999), Lord Steyn said, 'It is common ground that there is a general principle that there can only be a particular social group if the group exists independently of the persecution'.

<sup>29</sup> Heald JA, sitting in the Canadian Federal Court of Appeal on a claim for MPSG because of a fear of compulsory sterilisation under the PRC's 'One Child Policy', said: 'This leads me to a fundamental objection to acceptance of the group of parents with more than one child who are faced with forced sterilisation as a "particular social group". This group ... is defined *solely* by the fact that its members face a particular form of persecutory treatment. To put it another way, the finding of membership in a particular social group is dictated by the finding of persecution. This logic completely reverses the statutory definition of Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and not vice versa) and voids the enumerated grounds of content ... While some may believe that the definition of Convention refugee should embrace all persons who have a reasonable fear of persecution, this is not the definition which Parliament has seen fit to enact'; *Chan* (1993) 3 FC 675 at 692–693, cited by McHugh J in *Applicant A & Anor v MIEA & Anor*, 190 CLR 225

<sup>30</sup> *Applicant A & Anor v MIEA & Anor* (1997) CLR 225, McHugh J at 263. In the same case, Dawson J at 242 said, 'There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution. A group thus defined does not have anything in common save fear of persecution'.

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the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.<sup>31</sup>

### 3.4 COMMON ELEMENT

A group must have a common unifying element, and a form that makes it reasonable to consider that individuals can belong to it as members, to constitute a PSG for Convention purposes.<sup>32</sup> As stated by the Full Federal Court in *Ram*,

When the linked ideas expressed by the definition of a refugee come to be applied to less clear examples, it remains important to keep steadily in mind the essential unity of the conception. A crowd is not a social group, and numerous individuals with similar characteristics do not make up a social group—certainly not one of a kind which is properly described as having a ‘membership’. There must be a common unifying element binding the members before there is a social group of that kind.<sup>33</sup>

The need for that characteristic to be immutable, as proposed by jurisprudence in some countries,<sup>34</sup> has been rejected by the High Court.

I see no ground for holding that a characteristic must be ‘innate or unchangeable’ before it can distinguish a social group. If a characteristic distinguishes a social group from society at large and attracts persecution to the members of the group that is so distinguished, I see no reason why a well founded fear of that persecution might not support an application for refugee status.<sup>35</sup>

Self-identification as a MPSG,<sup>36</sup> or voluntary participation in the PSG,<sup>37</sup> or being a member of a PSG that affirms its group identity in a concerted way,<sup>38</sup> have also not been considered essential by the courts.

The characteristic that unites the collection of individuals must, however, as noted earlier, be something other than persecution or the fear of persecution.

### 3.5 COGNISIBILITY

Implicit in the notion of MPSG is the idea that people in the relevant country perceive the individuals as a social group. The common element or characteristic that unites a group of individuals must therefore also distinguish them from the rest of society to an extent that they become a cognisable group within that society.

The word ‘social’ is an essential part of the definition and cannot be ignored as mere surplusage. At the very least, a particular social group connotes a cognisable group in a society, and cognisable to the extent that there may be a well founded fear of persecution by reason of membership of such a group.<sup>39</sup>

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<sup>31</sup> *Applicant A & Anor v MIEA & Anor* (1997) CLR 225, McHugh J at 263. See also *Morato v MILGEA* (1992) 39 FCR 401 at 23.

<sup>32</sup> The question of what unites or unifies the group could be phrased in terms such as ‘on what *common* basis, if any, is it possible for individuals to *belong* to the alleged group as its *members*?’

<sup>33</sup> *Ram v MIEA* (1995) 57 FCR 565 at 569. In *Applicant A & Anor v MIEA & Anor* (1997) CLR 225, McHugh J notes: ‘Only in the “particular social group” category is the notion of “membership” expressly mentioned. The use of that term in conjunction with “particular social group” connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them’.

<sup>34</sup> See footnote 23 above.

<sup>35</sup> Brennan J in *Applicant A & Anor v MIEA & Anor* (1997) CLR 225

<sup>36</sup> Kirby J at 296 in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225

<sup>37</sup> Dawson J at 241 in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225

<sup>38</sup> Brennan CJ at 236 and Kirby J at 301 in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225

<sup>39</sup> Black J in *Morato v MILGEA* (1992) 39 FCR 401 at 20 ([www.austlii.edu.au](http://www.austlii.edu.au))

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As noted by the Full Federal Court in *Zamora*,

... that characteristic [that unites the collection of individuals] must set the group apart, as a social group, from the rest of the community ... [and] ... there must be recognition within the society that the collection of individuals is a group that is set apart ...<sup>40</sup>

That recognition need not be a result of some common public activity or face by the group. However, the public should be aware of the characteristics which unite and identify the group and for which they are being persecuted.<sup>41</sup>

Indeed, in most if not all cases, the existence of a PSG will depend ultimately on external perceptions of the group, in the sense that the group has a reality which is apparent and meaningful to others in that society. There will be times where groups do not in fact possess a common element or characteristic, but are widely perceived to, and are persecuted for that reason: for example, witches in the society of their day.<sup>42</sup>

The question of whether a PSG needs to be cognisable in the whole of the society, a large part of it, or simply the eyes of the persecutor—who may be only an individual or a small group or section of the society—is a matter that is open to dispute, and is considered later in the context of the possibility of a family being a PSG for the purposes of the Convention. In that context, Australia's courts have taken the view that it is not necessary that a particular family be well known—that is, notorious—in society for them to constitute a PSG. Rather, it can be sufficient that they are cognisable to the persecutor.<sup>43</sup>

### 3.6 CONVENTION NEXUS

Merely being a MSPSG is not sufficient to meet the Convention definition of a refugee.<sup>44</sup> As with the other four Convention grounds, the asylum applicant must have a well-founded fear of persecution 'for reasons of' membership of a PSG; that is, the applicant is persecuted because he or she belongs to that group, and not on some other basis.<sup>45</sup>

As noted by the Full Federal Court,

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 fitting use of language to say that it is 'for reasons of' his membership of that group.<sup>46</sup>

Persecutors of a MSPSG may of course have a number of reasons for their actions, some of which may be non-Convention in nature, for example, personal or criminal reasons. Neither the

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<sup>40</sup> *MIMA v Zamora* (1998) 51 ALD 1 at 6–7. In *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 240–41, Dawson J stated: 'A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.' In *Morato v MILGEA* (1992) 39 FCR 401 at 431–32, Lockhart J stated: '... the words "social group" signify ... a group that has some real common element ... This emphasises the need for some common or binding element of persons to constitute them as a recognisable or cognisable group.'

<sup>41</sup> McHugh J, in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 264

<sup>42</sup> McHugh J in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 264. According to McHugh, witches 'were a particular social group in the society of their day, notwithstanding that the attributes that identified them as a group were often based on the fantasies of others and a general community belief in witchcraft'. According to Burchett J in *Ram v MIEA & Anor* (1995) 130 ALR 314 at 11 ([www.austlii.edu.au](http://www.austlii.edu.au)), 'A social group may be identified, in a particular case, by the perceptions of its persecutors rather than by the reality. The words "persecuted for reasons of" look to their motives and attitudes, and a victim may be persecuted for reasons of [eg membership of a PSG] to which they think he belongs, even if in truth they are mistaken'.

<sup>43</sup> See, for example, *MIMA v Sarrazola* (2001) FCA 263 (21 March 2001)

<sup>44</sup> See also the UNHCR Handbook para 79.

<sup>45</sup> *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 242, citing Burchett J in *Ram v MIEA*

<sup>46</sup> *Ram v MIEA* (1995) 57 FCR 565, at 569; see also McHugh J in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225

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Convention text nor preparatory material to the Convention provide a clear indication of the level and nature of the causal connection envisaged by the drafters. In the absence of clear guidance, Australian courts have generally taken the view that provided one of the reasons for the persecution feared is a Convention reason, that will suffice.<sup>47</sup>

To insist that persecution must arise solely for a Convention reason would artificially narrow the scope of the Convention's coverage and be an inadequate response to the possible varieties of and excuses for the oppression of target groups.<sup>48</sup> However, neither the Convention itself nor State practice provides clear guidance as to the correct approach to be taken in applying the 'for reasons of' phrase. That being so, and given that States have a margin of appreciation in implementing their Convention obligations, there is a range of approaches that States could legitimately take in relation to this subject.

The Australian Parliament, for example, has recently passed legislation which provides that the Convention ground, whether MPSG or any of the other four grounds, must be the essential and significant reason for the persecution.<sup>49</sup>

#### 4. EXAMPLES OF POTENTIAL PARTICULAR SOCIAL GROUPS

In principle, the possible variety of PSGs is great.<sup>50</sup> Australian courts have, for example, indicated that, a family,<sup>51</sup> women,<sup>52</sup> children born in contravention of China's one-child policy,<sup>53</sup> occupational groups,<sup>54</sup> homosexuals,<sup>55</sup> conscientious objectors,<sup>56</sup> draft evaders and deserters,<sup>57</sup> people suffering illnesses,<sup>58</sup> able-bodied Afghan males,<sup>59</sup> and even people possessing or lacking

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<sup>47</sup> See, for example, *Khawar v MIMA* (1999) FCA 1529, *Chen Shi Hai v MIMA* (2000) HCA 19, *Sarrazola v MIMA* (1999) FCA 101. However, Madgwick J in *Sarrazola v MIMA* (No 3) (2000) FCA 919 at 46 ([www.austlii.edu.au](http://www.austlii.edu.au)) has referred to a Convention reason being an 'essential element in the persecution'. In *MIMA v Mohammed* (1999) FCA 576 at 43–4, a case involving whether circumstances that are self-engineered can bring a person within the category of refugee *sur place*, the court also appeared to allow for consideration of what motive might be the operative or dominant cause of any fear of persecution, at least in the context of assessing the significance of the 'deliberate act' of the applicant.

<sup>48</sup> *Jahazi v MIEA* (1995) 61 FCR 293 at 299

<sup>49</sup> Under the new legislation, a Convention ground must be the essential or significant reason for the persecution, and the persecution must involve serious harm to the person and systematic and discriminatory conduct. A non-exhaustive list of the type and level of harm that will meet the serious harm test is provided, and includes: a threat to the person's life or liberty; or significant physical harassment of the person; or significant physical ill-treatment of the person; or significant economic hardship that threatens the person's capacity to subsist; or denial of access to basic services, where the denial threatens the person's capacity to subsist; or denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist. See *Migration Legislation Amendment Act (No 6) 2001*, s91R. It is noted that, according to a rule proposed in December 2000 by the US Immigration and Naturalisation Service, 'In cases involving a persecutor with mixed motivations, the applicant must establish that the characteristic [a Convention reason] is central to the persecutor's motivation to act against the applicant': Asylum and Withholding Definitions, proposed rules, 8 CFR Part 208, Federal Register, vol 65, no 236, Thursday 7 December 2000, pp 76597–98

<sup>50</sup> Note that since this paper was originally published, the High Court handed down its judgment in *MIMA v Khawar* [2002] HCA 14. The majority of the High Court held that the size of the group does not necessarily stand in the way of a finding of a PSG [that is, therefore even very large groups may at times be found to be PSGs for the purpose of the Refugees Convention]; see Gleeson CJ para 33; McHugh & Gummow JJ para 82; cf Kirby J paras 126, 129. Accordingly it was open to the Tribunal, on the material before it in that case, to conclude that women in Pakistan are a particular social group; see Gleeson CJ para 32.

<sup>51</sup> *MIMA v Sarrazola* (2001) FCA 263 (21 March 2001); *Chan v MIEA* (1989) 169 CLR 379

<sup>52</sup> *MIMA v Khawar* (2000) FCA 1130 at 31 & 123; see also discussion in section 4.2

<sup>53</sup> *Chen Shi Hai v MIMA*, High Court of Australia, [2000] HCA 19, 13 April 2000. Gleeson CJ, Gaudron, Gummow, & Hayne JJ at para 22–23.

<sup>54</sup> In *MIMA v Zamora* (1998) 85 FCR 458 the court gave the example of human rights workers in some countries as occupations which might constitute a PSG. In *Ram v MIEA* (1995) 57 FCR 565, the court indicated that certain professional groups in Cambodia at the time of Pol Pot may have constituted a PSG. In *Nouredine v MIMA* (1999) FCA 1130 the court found that beauty workers seen by religious extremists as purveyors of immorality and therefore to be eliminated constituted a PSG.

<sup>55</sup> *MIMA v Guo Ping Gui* (1999) FCA 1496

<sup>56</sup> *Mehenni v MIMA* (1999) FCA 789

<sup>57</sup> *MIMA v Israelian* (1999) FCA 649

<sup>58</sup> *Lo v MIEA* (1995) 61 FCR 221; *Kuthyar v MIMA* (1999) FCA 1757

<sup>59</sup> *Applicant Z v MIMA* (2001) FCA 881; for a different view see *Mahmoodi v MIMA* [2001] FCA 1090 (6 August 2001)

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wealth,<sup>60</sup> may, depending on the facts of each case including relevant country information and the time of the decision, constitute a PSG for Convention purposes.<sup>61</sup>

Whether these or any other collection of individuals is indeed a PSG, and the individual concerned is a member of that PSG and persecuted for that reason, must remain questions of fact and law to be determined on a case by case basis in each and every instance.

Australian case law and policy in relation to three commonly proposed PSGs—families, women and homosexuals—is briefly reviewed below. This review serves not only to illustrate the approach to PSG that is currently being taken and some of the issues that may arise, but the difficulty that is often experienced in separating discussion of PSG from the related Convention concepts of ‘persecution’ and ‘for reasons of’. Indeed, as noted by Burchett J in *Ram*,

There is a unity of concept about the whole definition of a refugee contained in the Convention, so far as it relates to membership of a particular social group, which should always be kept firmly in mind. That concept flows through the separate elements of the definition ... There is thus a common thread which links the expressions ‘persecuted’, ‘for reasons of’, and ‘membership of a particular social group’.<sup>62</sup>

It may also be noted at the outset that in Australia, when an asylum applicant is found after a full merits review of their case not to engage protection obligations under the Convention, the opportunity exists under s417 of the *Migration Act 1958* for the Minister of Immigration and Multicultural Affairs to intervene in the public interest and provide an alternative means of stay. This may occur, for example, where special humanitarian considerations are involved, or where other international obligations are engaged.

#### 4.1 FAMILIES

Australian courts have for some time accepted the possibility that a family may constitute a PSG.<sup>63</sup> Recently, in *Sarrazola*, the Federal Court held that

... membership of a family is a characteristic which distinguishes members of that family from society at large ..., family members possess a common unifying element which binds them together as a particular social group.<sup>64</sup>

Similarly, in *C and S v MIMA*, the court concluded:

That which binds together the members of a family is not the suffering of persecution but a relationship of blood and marriage; membership of a family is something that exists independently of any persecution the members may suffer. Moreover, in almost every society, familial links are recognised and families are identifiable.<sup>65</sup>

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<sup>60</sup> *Ram v MIEA* (1995) 57 FCR 565, R.D. Nicholson at 570

<sup>61</sup> Examples of circumstances in which Australian courts have considered that the specific applicant was not a MPSG include acquiring wealth through corrupt means in Sri Lanka (*Ratnayake v MIEA & Anor* unreported, Federal Court of Australia, Goldberg J, 6 May 1997 at 20); turning Queen’s evidence in Bolivia (*Morato v MILGEEA* (1992) 39 FCR 401 at 416–17); being targeted for extortion by the NPA in the Philippines (*Cabarrubias & Anor v MIMA* unreported, Federal Court of Australia, Madgwick J, 4 May 1998 at 8); and suffering schizophrenia in Russia (*Denissenko v MIEA* unreported, Federal Court of Australia, Foster J 29 May 1996).

<sup>62</sup> *Ram v MIEA* (1995) FCR 565 at 568

<sup>63</sup> According to Dawson J at 396 in *Chan v MIEA* (1989) 169 CLR 379, ‘There is no room for doubt that if (Mr Chan) did fear persecution, it was for a Convention reason being because of either membership of a particular social group or political opinion. Perhaps both reasons were present because...such treatment as was suffered by (Mr Chan) was because his family was perceived to be anti-revolutionary and because (Mr Chan) was perceived to be of the same persuasion. But it would have been sufficient to constitute a Convention reason that (Mr Chan) was a member of a particular social group, namely, his family, irrespective of his personal political opinions.’ Similarly, in *Applicant A v MIEA* (1997) 190 CLR 225 at 240–41 Dawson J said, ‘For instance, the appellants in this case are each members of at least one recognised particular social group—a family, consisting of them and their son’.

<sup>64</sup> *Sarrazola v MIMA* (1999) FCA 101 at 36

<sup>65</sup> *C and S v MIMA* (1999) FCA 1430 at 33

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According to recent court decisions, there is no obstacle to recognising the usual family as a PSG; that is, there is no need for a family to be well known in the society as a whole or a large part of it to be a PSG.<sup>66</sup> Arguments used to support this view have included the recognition afforded the family as the 'natural and fundamental group unit of society' in the Universal Declaration of Human Rights, and the anti-discriminatory intentions of the Refugees Convention.

However, it could also be argued that an element of notoriety in the society as a whole—however earned or imputed—rather than mere cognisability in the eyes of a persecutor, may be more consistent with the intention of the Convention's drafters to limit the scope of the definition of a refugee.<sup>67</sup> A family is such a common demographic unit that it is difficult to conceive that the drafters, if they had family as a social group in mind at all, would not have had uppermost in their minds only particular families, for example, members of the aristocracy or property owning classes. From this view, there is concern that the notion of PSG could extend, without any prospect of differentiation, to a wide range of other mere demographic categories, for example married couples, adolescents and retirees.

The case of *Sarrazola* also highlights another issue in considering family as a PSG, namely, whether when one family member is harmed for a non-Convention reason (in that case in a criminal act of retribution for failure to repay a debt), the characteristics of family can lead to the other family members being recognised as refugees for reasons of their MPSG.<sup>68</sup>

In *Sarrazola* the court held that family membership was sufficient in itself to justify the claim, rejecting the view that the family could not be a PSG unless linked to a broader group recognised by the Convention definition. However, where cases involving similar derivative claims have arisen in other jurisdictions, they have led to inconsistent results.<sup>69</sup> In addition, if the approach taken in

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<sup>66</sup> In *Sarrazola v MIMA* (No 3) (2000) FCA 919 ([www.austlii.edu.au](http://www.austlii.edu.au)), Madgwick J held (at 38) that there was no foundation for the view that a family could not be a PSG unless it was well known in the society in question. In support he refers in 33–4 to the recognition in the Universal Declaration of Human Rights that the family is the 'natural and fundamental group unit of society [which] is entitled to protection by society and the State', and to the view that the general intention of the Refugees Convention was anti-discriminatory. Lord Hoffman's views in *R v Immigration Appeal Tribunal, Ex parte Shah* (1999) 2 WLR 1015 at 1032 about the open-ended nature of possible PSGs in this regard are cited approvingly (see earlier footnote). In addition, commenting on discrimination by 'society', he states at 35 that: 'It is not necessary that the whole of a society or any large part of it should so discriminate in order to be able to say ... that "society" may so discriminate. Most societies contain people who manage to keep their heads when others are losing theirs, and ex hypothesi it is only those in the society who know of a group who will be able to discriminate against members of it. To pursue the same example, if it is only a criminal's next door neighbour who knows of his or her conviction and who, on that account, maltreats his or her children, that is nevertheless within any sensible notion of discrimination by "society"'. In *MIMA v Sarrazola* (2001) FCA 263 (21 March 2001), the Full Federal Court (Merkel J at 37–8) also took the view that it is not necessary that a particular family be well known (ie notorious) in society for them to constitute a PSG for the purposes of the Convention. Rather, any family could be a PSG. As put by Merkel J at 38: 'If the latter question [whether a particular family is well known as such, rather than whether the family unit considered to be a social group is publicly recognised as being set apart as such] were the relevant question it is difficult to perceive how any particular family could be viewed as a social group other than a family that had, fortuitously or otherwise, gained fame or notoriety, or a family which had a special or institutionalised position in society, such as the Royal family. I do not accept that the application of the Convention in relation to a family as a social group is so limited. In particular, I do not accept that only the fundamental familial rights and freedoms of members of well known families are to be assured under the Convention, rather than the fundamental familial rights and freedoms of members of a family unit as such'. However, see also following footnote.

<sup>67</sup> It may be noted that in *Mahuroof v MIMA* (unreported, Federal Court of Australia, Branson J, 13 March 1998), the Court applied the reasoning in *Applicant A* to hold that the applicant's family was not a PSG in the circumstances as there 'was nothing before the [Refugee Review] Tribunal which suggested that the applicant's family is perceived in Sri Lanka as a cognisable group within society' (at p 9). Similar reasoning was applied by O'Connor J in *Aliparo v MIMA* (unreported, Federal Court of Australia, 12 February 1999). However, as indicated in the views of Lord Hoffman and Merkel J in the previous footnote, there are difficulties with an approach to PSG that requires an element of notoriety. Such an approach may lead to arbitrary distinctions being made with discriminatory effects.

<sup>68</sup> In *Sarrazola*, one family member had been killed because of debts relating to drug dealing. The criminals then sought recovery of the debt from the family. The claim of the applicant, who was one of the family members, was based on the family connection to the person who had been killed: that is, for the Convention reason of being a MPSG, namely 'family'. The Full Federal Court ruled that family membership was sufficient in itself to justify the claim, rejecting the view that the family could not be a PSG unless linked to a broader group recognised by the Convention definition. The case is being appealed by the Minister to the High Court.

<sup>69</sup> The issue of derivative claims is still before the courts in Canada, for example, although the weight of authority in Federal Court decisions appears to oppose such claims. For example, in the case of *Serrano, Roberto v M.C.I.* (F.C.T.D, no IMM-2787–98), Sharlow J, 27 April 1999, the principal claimant feared persecution from drug runners because he would not permit his truck to be used for such purposes. The court held that this was not a Convention reason, and therefore his wife and children could not make a derivative claim on the basis of their MPSG. It concluded that family connection is not 'an attribute requiring Convention protection, in the absence of an underlying Convention ground for the claimed persecution'. However, a different view was held in *Velasquez, Liliana Erika Jaramillo v M.C.I.* (F.C.T.D, no IMM-4378–93), Noel J, 21 December 1994, in which a woman's husband had been murdered and an attempt made on her life, but for unknown reasons. She was initially refused refugee status on the grounds that she could not show her claim was based on a

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*Sarrazola* is maintained it can lead to the apparent anomaly of derivative claims being allowed when primary claims would be denied.<sup>70</sup>

Certainly, care needs to be exercised to allow for the possibility of legitimate claims based on family membership. Equally, however, care needs to be taken to give due weight to the essential reason for the persecution, and to identify the relevant group to assess against PSG criteria—in this case, for example, arguably those persons from whom the drug dealers could potentially recoup their money rather than family *per se*.

As noted earlier, the Australian Parliament has recently passed legislation that provides that a Convention ground must be the essential and significant reason for the persecution. To specifically address the issue of derivative claims of the type in *Sarrazola*, it has also passed legislation whereby certain matters must be disregarded in determining whether an applicant has a well-founded fear for reasons of MPSG that consists of the applicant's family.<sup>71</sup> The new legislative provisions do not prevent a family *per se* being a PSG for the purpose of establishing a Convention reason for persecution. However, they prevent the family being used as a vehicle to bring within the scope of the Convention persecution motivated for non-Convention reasons.

## 4.2 WOMEN

In October 1999, ExCom noted with appreciation:

... special efforts by States to incorporate gender perspectives into asylum policies, regulations and practices; [it also] encourage[d] States, UNHCR and other concerned actors to promote wider acceptance, and inclusion in their protection criteria of the notion that persecution may be gender-related or effected through sexual violence; [and] further encourage[d] UNHCR and other concerted actors to develop, promote and implement guidelines, codes of conduct and training programmes on gender-related refugee issues, in order to supplement the mainstreaming of a gender perspective and enhance accountability for the implementation of gender policies.<sup>72</sup>

Australia is one of a number of States<sup>73</sup> that have supported this approach, and has established guidelines in this regard for its adjudicators. The Minister for Immigration and Multicultural

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Convention reason. In overturning this decision, the court said, 'whether or not the husband was murdered for a Convention related reason is irrelevant. What is relevant is whether the actions directed against the claimant are linked to one of the Convention grounds'. In that case persecution on the basis of the claimant's familial relationship to her spouse was found to be within the particular social group ground. Cited in Daley & Kelley 2000 pp 156–7, 169. In *Fabian Martinez Quijano v Secretary of State for the Home Department* (1996) EWCA 2210 (18 December 1996) at 16 ([www.bailii.org](http://www.bailii.org)), involving family members being persecuted for reason of one family member having refused to join the mafia, the UK Court of Appeal (Thorpe J) held that, '... the persecution arises not because the appellant is a member of the Martinez family but because of his stepfather's no doubt laudable refusal to do business with the cartel. The persecution has that plain origin and the cartel's subsequent decision to take punitive action against an individual related by marriage is fortuitous and incidental as would have been a decision to take punitive action against the stepfather's partners and their employees had the business been of that dimension.'

<sup>70</sup> According to one view, however, any anomaly may by itself be insufficient to reject the approach taken in *Sarrazola*. As noted by Laws J in *Ex Parte de Mel*, cited at para 7 in *Fabian Martinez Quijano v Secretary of State for the Home Department* (1996) EWCA 2210 (18 December 1996) at 16 ([www.bailii.org](http://www.bailii.org)), 'The original evil which gives rise to persecution against an individual is one thing; if it is then transferred so that a family member is persecuted, on the face of it that will come within the Convention'. A similar view was taken by Madgwick J in *Sarrazola v MIMA* (No 3) (2000) FCA 919 (23 August 2000) ([www.austlii.edu.au](http://www.austlii.edu.au)) at 31 when he said, 'The postulation by the Refugee Review Tribunal and in *Martinez* of "absurdity" if a member of the family of a person first harmed should fall within the purview of the Convention although that person might not, with respect overlooks what is regrettably a matter of common experience. The sorts of irrational, discriminatory prejudices that result in persecution of social groups (including ethnic, religious and racial groups) not infrequently begin with antipathy towards one member of the group for non-group reasons. It then becomes transmuted into antipathy towards group members for their group affiliation or identification ... The only absurdity is that variants of this scenario are depressingly common'.

<sup>71</sup> Under the new legislation, the matters that must be disregarded are: any fear of persecution or any persecution that any other family member (whether alive or dead) has ever experienced where that fear or persecution is not for a reason mentioned in Article 1A(2) of the Convention; and any fear of persecution or any persecution that the applicant has ever experienced or any other family member (whether dead or alive) has ever experienced where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in the previous point had never existed (s.91S *Migration Act 1958*)

<sup>72</sup> ExCom Conclusion No 87 (XLX) 1999, para (n)

<sup>73</sup> Others include Canada and the United States: UNHCR Position Paper on 'Gender-Related Persecution, January 2000, p 2.

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Affairs issued Gender Guidelines in 1996 for decision makers considering refugee and humanitarian visa applications, as part of Australia's commitment to ensuring that bona fide refugees are given every opportunity to present their cases in a sensitive and fair process. Departmental decision makers are trained in the use of the guidelines.

In addition, Australian courts, like their counterparts elsewhere,<sup>74</sup> have accepted that women in a particular society, or a subset of women in a particular society, may be found on the facts of the case and country information to be a PSG.<sup>75</sup>

However, this sensitivity to gender-related or gender-effected persecution does not mean that women necessarily are or should be found to be a PSG,<sup>76</sup> or that a woman applicant who is found to be a MPSG comprising women has been persecuted because of her membership of that group. Indeed, as suggested earlier, these are matters of fact and law to be determined on a case by case basis.<sup>77</sup>

In this area as in others, it is important to avoid the tendency to define a PSG by the persecution feared, which as noted previously, results in a reversal of the 'for reasons of' requirement in the Convention definition of a refugee. PSGs defined in terms of 'women subject to female genital mutilation' and 'women with abusive partners' fall into this category.<sup>78</sup>

Care must also be exercised in identifying the relevant PSG. For example, in the case of domestic violence, either 'gender' or 'women in a domestic relationship' could be seen as forming the basis

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<sup>74</sup> For example, in the UK the case of *R v Immigration Appeal Tribunal; ex parte Shah* [1999] 2 AC 629, and in the US the case of *Fatin v INS* (1993) 12 F 3d 1233, have respectively held that women in Pakistan and Iran can constitute PSGs for the purpose of the Convention. In Canada, according to Daley & Kelley 2000 pp 154–55, since *Canada (Attorney-General) v Ward* there has been a broad recognition that women who fear persecution on the basis of their gender constitute a PSG. However, they note that as interpreted by case law, the PSG has not included a group of women per se, perhaps because it is considered too broad. Rather, the tendency has been to define the PSG of women who fear gender-based persecution in terms of the persecution itself, eg 'women subject to domestic violence', 'women forced into marriage without their consent', and 'women who have been subjected to exploitation resulting in the violation of the person and who, in consequence of the exploitation have been tried, convicted and sentenced to imprisonment'.

<sup>75</sup> In *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 236, Brennan CJ of the High Court refers to the view taken by the Canadian court in *Canada (Attorney-General) v Ward*, where it was accepted that a group defined by an innate or unchangeable characteristic would come within the category of a PSG and that this included individuals who might fear persecution on the basis of gender. In *Salad v MIMA* (1999) FCA 987, the Federal Court indicated that it was prepared to recognise 'women in Somalia' as a PSG. However, in that case the court said that the material concerning the difficulties women faced in Somalia did not support the contention that women are persecuted in Somalia because they are women, and such a finding was not essential to the resolution of the case. By contrast, in *MIMA v Cali* (2000) FCA 1026, (3 August 2000) at 45, the Court said: '... in this case, there was clear evidence upon which the Tribunal was entitled to rely that as a young Somali woman the respondent had a well founded fear of rape. There was also evidence upon which the Tribunal was entitled to rely that women were singled out as targets of sexual violence. There was reference to the fact that the same danger of sexual violence did not apply to males. The evidence cited by the Tribunal that 'women are systematically discriminated against' alone, or, at least, together with the nature of rape as a gender-based persecution, provided the basis upon which the Tribunal was entitled to find that the respondent had a well founded fear of rape for the reason that she was a young Somali woman.' In *MIMA v Khawar* (2000) FCA 1130 (23 August 2000) Hill J concluded, 'I see no reason why the fact that the class of women will constitute half the population, more or less, means that the class of women could not be a particular social group'.

<sup>76</sup> As is apparent from the cases discussed above, this issue has not been resolved either way under Australian law. Overall, while the cases have countenanced the possibility that women may constitute a PSG, there is as yet no clear authority on the point.

<sup>77</sup> This is particularly so in view of the limited nature of the definition of a refugee in the Convention, and the case by case approach to refugee status determination adopted in Australia and elsewhere. It is noted that, in describing its proposed rule providing guidance, *inter alia*, on MPSG and gender-based asylum claims, the US Department of Justice (Immigration and Naturalisation Service) states: 'The proposed rule does not specify how a claim of persecution based on domestic violence should be fashioned—in particular, it does not set forth what the precise characteristics of the particular social group might be. The Department has taken this approach in part because it recognises that the way in which a victim of domestic violence who believes she has been persecuted may characterise the particular social group of which she is a member likely will vary depending upon the social context in her country. The Department also recognises that whether domestic violence can be so characterised in a given case will turn on difficult and subtle evaluations of particular facts. Given these realities, it seems ill-advised to try to establish a universal model for persecution claims based on domestic violence. The Department has instead decided to propose a rule that will allow for case-by-case adjudication of claims based on domestic violence or other serious harm inflicted by individual non-state actors', Federal Register, vol 65, No 236, Thursday December 7 2000, 'Proposed Rule', p 76589.

<sup>78</sup> In *Canada (Minister of Employment and Immigration) v Mayers* (1993) 1 FC 154, the Canadian Court of Appeal accepted that Trinidadian women subject to wife abuse were a PSG. According to McHugh J of the High Court, this decision 'must surely be wrong even if the definition of refugee is given a very liberal interpretation ... it does not follow that the applicant was abused because of her membership of that group' (emphasis in original). *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at fn 120. In a comment on the approach taken by the House of Lords in *Islam v Secretary of State for the Home Department* (1999) 2 AC 629, a case involving two women from Pakistan who had suffered violence from their husbands and were accused of adultery, an act which attracted severe penalties under Pakistan law, Hill J dissenting in *MIMA v Khawar* (2000) FCA 1130 at 62 said: 'To delineate on the facts of *Islam* the social group as ... women whose husbands had (perhaps falsely) labelled them as adulterous is to define the group by reference to the persecution which was inflicted. The only thing in common these women had as a group was their persecution. There was no other common thread. I can, with respect, see no difference, at least in a case such as the present, between the circularity involved in defining the group by reference to persecution and the circularity involved in defining the group by reference to discrimination. For it was the discrimination which gave rise to the persecution'.

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of the appropriate group, with potentially different implications for consideration of refugee claims.

States clearly have obligations to protect women's human rights on the same footing as men. However, cases involving domestic violence for non-Convention reasons can be contentious because they raise fundamental questions about the expectations that may be placed on States in responding to matters traditionally perceived as involving private harm, and how growth in these expectations should be reflected when interpreting Convention obligations.

In the evolving norms of international human rights law, private human rights abuses are increasingly viewed as attributable to the State under certain circumstances. However, while these human rights developments have informed some interpretations of the Refugees Convention, differences of view still remain about the degree to which private human rights abuses should be recognised for the purposes of the Convention definition of a refugee.<sup>79</sup>

The manner in which interpretation of Convention obligations can evolve in this area may be observed in recent court decisions in Australia. In *Milosevska*<sup>80</sup> for example, the Federal Court held that, by itself, the domestic abuse of women does not provide a sufficient basis for refugee status; that is, the Convention is not engaged where the harm or threat of harm is a result of a personal relationship with another person.<sup>81</sup> In *Ndege*, the Court further held that mere unwillingness or inability of the State to do anything to prevent domestic violence was not persecution where the individual violence feared was not motivated for a Convention reason.<sup>82</sup> More recently in *Khawar*, however, the Court took the view that the motive of the individual who commits the domestic abuse can become irrelevant in circumstances where a State is unwilling to protect women from such abuse for a Convention reason.<sup>83</sup>

Even were this view accepted without qualification,<sup>84</sup> considerable care is still required in related decision making.<sup>85</sup> As noted above, there is a risk of inverting the Convention nexus in defining

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<sup>79</sup> It may also be noted that not every state failure to protect will itself amount to a violation of human rights. Nor may the Convention be the most appropriate vehicle for consideration of such cases.

<sup>80</sup> *Milosevska v MIMA* [1999] FCA 1414 (13 October 1999)

<sup>81</sup> A similar approach was taken in *Basa v MIMA* (1998) FCA 830.

<sup>82</sup> *MIMA v Ndege* (1999) FCA 783. On the facts of the case, involving a Tanzanian woman, there was no evidence that state inaction was motivated for a Convention reason.

<sup>83</sup> *Khawar v MIMA* (1999) FCA 1529. This approach was supported by the majority in the Full Federal Court in *MIMA v Khawar* (2000) FCA 1130 and the High Court in *MIMA v Khawar* [2002] HCA 14. The case is currently subject to an appeal to the High Court by the Minister for Immigration & Multicultural Affairs. It may be noted that the Full Court considered that for non-Convention based private acts to found Convention persecution, the state must be implicated in the required discriminatory element of the persecution. The majority (at 160 of the reasons of Lindgren J) indicated that one-off failures by police officers to respond to a request for help, among other things, would not suffice to establish the required Convention link between the state and the privately motivated harm. In other words, 'real' state inability to protect would probably lack the necessary discriminatory element of persecution. In *Khawar*, the court drew on the approach taken by the House of Lords in *Islam v Secretary of State for the Home Department* (1999) 2 AC 629, a case involving two women from Pakistan who had suffered violence from their husbands and were accused of adultery. In that case, Lord Hoffman stated at 653: 'First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the state to do anything to protect them. There is nothing personal about this. The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the Convention'. At 654 he continues: 'In the case of Mrs Islam, the legal and social conditions which according to the evidence existed in Pakistan and which left her unprotected against violence by men were discriminatory against women. For the purposes of the Convention, this discrimination was the critical element in the persecution. In my opinion, this means that she feared persecution because she was a woman. There was no need to construct a more restricted social group simply for the purpose of satisfying the causal connection which the Convention requires'. Lords Hope and Hutton agreed with Lord Hoffman, but considered the PSG should be taken as, respectively, women in a society which discriminated against women, and women suspected of adultery.

<sup>84</sup> The implications of the view of the majority of the Full Federal Court in *Khawar* appear potentially substantial. For example, if the Court's logic is followed, even state failure to protect a person for a Convention reason against a natural disaster could amount to Convention persecution, provided the group of which the person was a member exists independently of the claimed persecution.

<sup>85</sup> It is noted that, in outlining its proposed rule for gender-based asylum claims in December 2000, the US Immigration and Naturalisation Service said, 'domestic violence is not a private matter ... [C]ertain forms of domestic violence may constitute persecution, despite the fact that they occur within familial or intimate relationships'; US Department of Justice (Immigration & Naturalisation Service) News Release, 12 July 2000, [www.ins.usdoj.gov](http://www.ins.usdoj.gov). Importantly, as noted earlier, the proposed rule does not carve out any special eligibility categories for gender-related and domestic violence claims. Instead, it articulates broadly applicable principles to guide decision makers in applying the refugee definition, and addresses matters which could impose unwarranted barriers to

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women living in a particular country, or a subset of them, as a PSG by reference to discriminatory attitudes or actions taken against them by the State. In addition, there remains the need to actually establish that nexus; that is, that the claimed failure to protect in a particular case is for reasons of that person's MPSPG. Defining the PSG too widely—for example women in Pakistan—or paradoxically too narrowly,<sup>86</sup> may take the group outside the concept of a PSG and increase the difficulty in establishing that the persecutory act is for reasons of membership of that group.

Finally, in regard to State failure to protect, there is a difference, however fine it may be at times, between a State which is complicit in or tolerant of harm perpetrated by its citizens, and a State which is neither of these, but is inactive or incapable of responding when specific instances of that harm occur. Something more is required in the behaviour of the State to effect the link between privately motivated harm, failure of State protection and Convention obligations. According to Lindgren J in *Khawar*,

[I]t seems right to say that the fact that the police have failed to protect a woman from her husband's violence will not necessarily provide the bridge between the state and privately motivated harassment. Firstly, the failure may be atypical. Secondly, it may be due to the attitude or ineptitude of a particular police officer. Thirdly, it may be due to systemic inefficiency. Fourthly, the police may be reluctant, for good or bad reason, to become involved in a particular domestic dispute. Unfortunate as the woman's position would be, these various explanations (and perhaps others) would serve to displace any suggestion that she was a refugee as defined. Something more is required. In my view, that 'something more' would be satisfied at least by a sustained or systemic absence of state protection for members of a particular social group attributable to a perception of them by the state as not deserving equal protection under the law with other members of the society, whatever the origin or explanation of that discriminatory perception might be.<sup>87</sup>

### 4.3 HOMOSEXUALS

In Australia, homosexuals may be found to constitute a PSG for Convention purposes.<sup>88</sup> However, as for other potential PSGs, whether homosexuals are a PSG in a particular country, and whether a particular applicant is persecuted for reasons of his or her membership of that group are questions of fact and law to be determined in each individual case.

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claims based on domestic violence. For example, it says that although evidence that the persecutor seeks to act against other individuals who share the applicant's protected characteristic is relevant and may be considered, it is not a required element.

<sup>86</sup> In *Applicant A & Anor v MIEA & Anor*, 190 CLR 225, McHugh J notes that, 'If the definition of a group has to be hedged with qualifications to relate it to an alleged persecutory act, the proper conclusion may be that the reason for the act was not membership of the group but the conduct of the individual. Prisoners, for example, are arguably a particular social group. If they are routinely beaten because they are prisoners, they may well qualify for refugee status. But narrow the group to prisoners who refuse to obey prison regulations and the case for an applicant becomes so much harder of proof. The applicant will have difficulty in proving the existence of "a particular social group" and in proving that the persecution (bashings) are "for reasons of ... membership" of that group rather than for his or her refusal to obey the regulations.'

<sup>87</sup> *MIMA v Khawar* (2000) FCA 1130 at 160. According to Hill J in the same case at 10, 'It would, in my mind, be an incorrect use of the word "persecution" to apply it to a failure or lack of interest by the police to come to the aid of a person who has been beaten at least where the law provides, if enforced, adequate protection and there is no government policy that police ignore calls for help. There is, and it is not a matter of which we can be proud, a lack of enthusiasm in the authorities in Australia to come to the aid of women who are victims of domestic violence, but it would not be suggested that the State is, or for that matter the police are, persecuting those women in Australia. Persecution involves the doing of a deliberate act, rather than inaction. The decision of the High Court in *Chen* might, at first blush, suggest otherwise. There ... the persecution held to exist consisted of the denial by the State of access to food, education and health beyond a basic level. Denial of basic human needs is, however, positive action, not inaction. State complicity in the ill-treatment may likewise be distinguished from mere inertia.'

<sup>88</sup> For example, in *Guo Ping Gui v MIMA* (Hely J, unreported 11 December 1998), the Federal Court found that the applicant had a well-founded fear of persecution for reason of MPSPG constituted by homosexuals in Shanghai, where they were the subject of selective police harassment. The Minister's appeal to the Full Federal Court on this case was successful, but on grounds unrelated to the question of whether homosexuals can constitute a PSG.

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Australian courts have found that that ‘the mere possession of some homosexual feelings may not necessarily be enough’ to constitute MPSG.<sup>89</sup> The Federal Court has also rejected the view that the mere existence of criminal laws penalising homosexual acts will necessarily amount to persecution; there needs to be evidence that such laws are routinely enforced.<sup>90</sup>

In addition, the Federal Court<sup>91</sup> appears to have left it open for decision makers to consider whether a homosexual applicant could avoid a risk of harm by being discreet in the practice of his or her sexuality, where such discretion could be expected of the applicant and was reasonable in that it was consistent with a homosexual lifestyle.<sup>92</sup> In cases where notions of what is culturally acceptable and unacceptable public behaviour apply to heterosexuals and homosexuals alike, questions may also legitimately arise as to the real reason for the persecutory act.

## 5. CONCLUDING COMMENTS

- The term MPSG must be approached in a manner that is consistent not only with the Convention’s founders’ intention to assure fundamental human rights without discrimination, but also their concern to place limits on the definition of a refugee and State obligations, and to respect State sovereignty.

A degree of tension can at times exist between these themes, particularly when views about human rights, the line between matters of private and public concern, and the related expectations of State authorities, are evolving and contentious, both within and between countries.

However, it is inconsistent with the founders’ general concern to define State obligations with some precision, or at least to avoid unlimited and unforeseen obligations, for MPSG to have been conceived as infinitely open-ended.

- Based on Australian jurisprudence to date, what will in essence distinguish MPSGs from other individuals and groups are a common binding attribute other than persecution, and a societal perception that the PSG is a group that stands apart from broader society. A suitable analytical framework for applying MPSG in refugee status determinations would involve the following elements:
  - a case by case approach;
  - identification of the PSG on a common sense basis;

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<sup>89</sup> In *F v MIMA* (Federal Court of Australia, unreported, 9 July 1999) Burchett J recognised that homosexuals may be described as a social group. However, he states at 12 that if ‘a [PSG] were defined by reference to sexual feelings or some other personal characteristic of its members which had not been expressed in any significant way, it would generally be difficult to see membership of that group as a focus for persecution’.

<sup>90</sup> *MMM v MIMA* (Madgwick J, unreported, 22 December 1998) at p 7. Madgwick J noted that homosexuals could constitute a PSG, so that if the law was routinely enforced it may amount to persecution (at 7).

<sup>91</sup> *MIMA v Guan* (2000) FCA 1033 (2 August 2000) ([www.austlii.edu.au](http://www.austlii.edu.au)), Moore J at 22–24, interpreting the judgment of Ryan J in *Applicant LSLs v MIMA* (2000) FCA 211. In *Applicant LSLs*, Ryan J at 29 stated that: ‘It is within the permissible limits to ask whether there was evidence to justify the [Refugee Review] Tribunal’s determination that the applicant could avoid persecution by being “discreet”, consistently with the practice of a homosexual lifestyle of the extent under the consideration of the Tribunal’.

<sup>92</sup> In *Omar v MIMA* (2000) FCA 1430, a case involving the expression of political opinions but similar underlying principles, the Full Federal Court indicated that the proper question for decision makers is what the applicant will do—and what the consequences of that will be—and not what the applicant should or could do. The court took the view that notions of reasonableness have a role to play in this assessment. In some cases it may be appropriate to proceed upon the footing that a person will in fact, on return, take reasonable steps to avoid harm. However, in other cases it might well involve a breach of non-refoulement obligations to make this assumption. Much will depend on the circumstances of the particular case. See also *Farajvand v MIMA* (2001) FCA 795 (in which the court found that if the applicant, a member of an evangelical Christian faith, kept a low profile and worshiped quietly or cautiously, he would not be participating in an important dimension of his faith); *Liu v MIMA* (2001) FCA 257 (where the court held that the Tribunal should have asked itself whether the applicant could expect to face persecution for the practice of his Christian religious beliefs in the way which he wished to practice them if returned to the PRC and in the future); and *Wang v MIMA* (2000) FCA 1599 (where the court considered that an assumption that a person with a strongly held religious belief should act reasonably, and compromise that belief to avoid persecution, would be contrary to the humanitarian objects of the Convention).

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- evidence that the group exists independently of the claimed persecution (importantly, the persecution or fear of it must be driven by the applicant’s MPSG, and not the reverse);
  - a common unifying element and a form that makes it reasonable to speak of ‘membership’ (although this unifying element need not necessarily be something innate or unchangeable, or based on self-identification or voluntary actions or associations);
  - cognisability, in the sense that the common element which unites a group of individuals must also set them apart in the eyes of others in the society of origin (although the question of whether a PSG needs to be cognisable in the whole of the society, a large part of it, or simply the eyes of the persecutor—who may be only an individual or a small group or section of the society—is open to dispute); and
  - a Convention nexus, in the sense that the applicant is persecuted because he or she belongs to that group, and not for other reasons (where a number of reasons exist for the persecution, it is open for a State to hold that the Convention reason must be the essential and significant reason).
- Whether any collection of individuals is indeed a PSG, and the individual concerned is a member of that PSG and persecuted for that reason, must remain questions of fact and law to be determined on a case by case basis.
  - It is possible, depending on the circumstances of the particular case, that a family, some women or homosexuals may constitute a PSG. However, consideration of cases involving these groups illustrates some of the difficulties that may arise with this Convention ground, including the problems often experienced in separating discussion of PSG from the related Convention concepts of ‘persecution’ and ‘for reasons of’.

For example, in regard to families, care needs to be taken to ensure that the particular family is both a PSG and the essential and significant reason for the harm feared.

Acceptance of certain claims—for example, where harm to one family member for criminal activity leads to refugee claims by other family members on the basis of the PSG of family—leads to the anomaly of such claims being allowed when primary claims would be denied. It is open for States to not provide protection in these circumstances.

- Women in a particular society, or a subset of women in a particular society, may be found on the facts of the case and country information to be a PSG.

However, sensitivity to gender-related persecution does not mean that women necessarily are or should be found to be a PSG, or that a woman applicant who is found to be a MPSG comprising women has been persecuted because of her membership of that group. These are matters of fact and law to be determined on a case by case basis.

States must protect women’s human rights on the same footing as men. However, cases involving domestic violence for non-Convention reasons require a careful analysis of the nature and extent of State obligations—both of the country of origin and the country of refuge—to protect applicants in these circumstances.

A display of inactivity or inability by a State to respond to particular instances of abuse for a non-Convention reason is not necessarily a persecutory act. Something more than this is required of the State’s behaviour or motivation to enable the individual concerned to meet the criteria for a Convention refugee.

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- Whether homosexuals are a PSG in a particular country, and whether a particular applicant is persecuted for reasons of his or her membership of that group, are questions of fact and law to be determined in each case.

Australia's courts appear to have left it open for decision makers to consider whether a homosexual applicant could avoid a risk of harm by being discreet in the practice of his or her sexuality, where such discretion could be expected of the applicant and was reasonable in that it was consistent with a homosexual lifestyle.