IMAGINING OTHERNESS: REFUGEE CLAIMS ON THE BASIS OF SEXUALITY IN CANADA AND AUSTRALIA

JENNI MILLBANK*

[In refugee determinations based upon sexuality, Western decision-makers must come to terms with the other *other, a lesbian or gay man from a different culture. They must translate that experience of sexuality and culture not just into the international and national framework of refugee law but into something* intelligible to themselves*. This process is one that requires empathy and imagination. This paper is based upon a comparative analysis of 331 decisions concerning sexuality from the refugee tribunals in Australia and Canada, covering six years from January 1994 to April 2000. The decisions examined are potent evidence of the public/private divide in the Western refugee-receiving nations of Canada and Australia. What is and what is not protected conduct in the decisions effectively decrees what is and is not proper for lesbians and gay men to do, both here and 'there'. The result of this projected sense of the public/private divide is to trap applicants in a tightly woven paradox: if they are too public they are transgressive, repellent and in danger of being rejected as deserving of the abuse they have experienced. If they are too private, they run the risk that their claims will not qualify as persecution and will be regarded as merely private and/or readily avoided.]*

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> [Let the Americans keep their] sodomy, bestiality, stupid and foolish ways to themselves. … Let the gays be gays in the United States and Europe, … But they shall be sad people here.
>
> Robert Mugabe, President of Zimbabwe, 1995[1]

> She … wished to remain in Australia [to] 'put land and water' between herself and her problems.
>
> Evidence of a lesbian applicant from Venezuela, cited in the RRT, 1999[2]

* BA, LLB (Syd), LLM (UBC); Senior Lecturer in Law, The University of Sydney. This paper is based on research devised and undertaken with Dr Catherine Dauvergne and supported by a grant from the University of Sydney Faculty of Law Legal Scholarship Support Fund. My deepest thanks to Catherine for her inspiration as a collaborator and colleague, and for her comments on this tentative first paper from our joint research. In our next paper from this research we will focus upon questions of identity and evidence. Thanks also to Arlie Loughnan for her meticulous research assistance and case analysis.

1 Quoted in James Roberts, 'Mugabe's Ill-Fitting Suit of Moral Outrage', *Independent* (London), 27 August 1995, 12.

2 Refugee Review Tribunal ('RRT') Reference No *N98/21316* (Unreported, P Cristoffanini, 26 February 1999).

I INTRODUCTION

This article locates a discussion of sexuality, otherness and the public/private divide in the context of refugee case law from Australia and Canada.[3] In refugee determinations based upon sexuality, Western decision-makers have to come to terms with the *other* other: a lesbian or gay man from a different culture. They must translate that experience of sexuality and culture not just into the international and national framework of refugee law but into something intelligible to themselves. This process is one that requires empathy and imagination.

Sexuality is the basis of identity upon which the gay or lesbian applicant is eligible for protection, and sexual expression is often an aspect of the applicant's claims of persecution. The decision-makers' understanding of what (homo)sexuality is and how it is and ought to be expressed is therefore vital in the decision making process. This understanding in turn is premised upon deeply embedded assumptions about the public/private divide.[4]

In Part II, I explore the inability of decision-makers to 'hear' the experience or stories of lesbian and gay asylum-seekers. Lesbian and gay experience is erased or rewritten in the decision making process: it forms an unreadable blank, onto which decision-makers project their own sense of reality, of self and other, of acceptable conduct, of public and private. The main body of this paper explores the differential impact of the shifting public/private divide upon women and men in their asylum claims. Part III focuses upon how lesbian sexuality is constructed as rightfully private and often therefore not requiring protection, as future persecution is unlikely or past persecution is characterised as 'merely personal'. Part IV explores how lesbian, and in particular, gay male sexual expression may be characterised as 'too public' and thereby undeserving of protection.

Let me begin by way of a story drawn from the case law, which often has the haphazard quality of anecdotes.[5] A gay man in China, Mr Gui, embraced and kissed his male partner, Wang Cheng, in a park. They were picked up by the

[3] The case set represents all available decisions on the grounds of sexuality from January 1994 to April 2000 from Australia (accessible from the Australasian Legal Information Institute ('AustLII') <http://www.austlii.edu.au>) and from Canada (accessible from Quicklaw <http://www.qlsys.ca/>). The tribunal decisions are unreported unless otherwise indicated. Canada and Australia both use administrative tribunal processes to determine refugee status using the same definition, but there are some important differences also. In Australia the RRT sits with a single member and conducts a full merits review as a form of appeal from initial decisions of the delegate of the Minister for Immigration and Multicultural Affairs. In Canada the Immigration and Refugee Board ('IRB') affords a first instance hearing and usually sits with two members, assisted by a Refugee Hearing Officer who presents evidence and questions the applicant. For an overview of these processes, see Audrey Macklin, 'Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims' (1998) 13 *Georgetown Immigration Law Journal* 25, 30–3.

[4] See generally Susan Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (1997). In relation to sexuality, see Nancy Duncan, 'Renegotiating Gender and Sexuality in Public and Private Spaces' in Nancy Duncan (ed), *Bodyspace* (1996) 127. On the defining influence of liberalism in refugee jurisprudence, see Catherine Dauvergne, 'Amorality and Humanitarianism in Immigration Law' (1999) 37 *Osgoode Hall Law Journal* 597.

[5] There is not much of a precedent system in Australian and Canadian refugee law as cases are predominantly decided at tribunal level: see discussion in above n 3. Tribunal decisions are not binding on later tribunals, although appellate decisions from higher courts are. There is therefore much variation in the application of the refugee definition to different circumstances.

police and he was kicked and bashed. Mr Gui was detained for three months and subsequently harassed by the police. When released from detention he learnt that his partner had died in the interim, apparently in a car accident. In 1998 an Australian man with the power to make a decision as to whether Mr Gui was a refugee concluded that what happened in the park was not persecution. This was because Mr Gui was 'caught in a public place with his partner kissing and cuddling which is unacceptable according to the cultural norms prevailing in China and it was this behaviour which brought him to the notice of the authorities'.[6]

Mr Gui was not persecuted because he was gay, the decision-maker held — he was punished for his conduct in a public place. This analysis was overturned on initial appeal to the Federal Court of Australia[7] but was ultimately upheld unanimously in the Full Federal Court.[8] Leave to appeal to the High Court of Australia was denied.[9]

There are many gaps in this narrative, and its conclusion suggests a monumental failure on the part of the decision-maker(s); a failure of empathy, or in more strictly legal language, a failure to 'see the facts'.[10] There are many ways of expressing these objections. For instance, it seems obvious that Mr Gui was behaving in a manner that identified him as gay. The police therefore bashed and harassed him as a gay man. It is always a combination of outward manifestations of identity (behaviour, appearance etc) that 'precipitate' persecution in the sense that these outward manifestations are required for the persecutor to know that the victim is a member of the despised group. This is not usually taken, at least in refugee law, at the appellate level, to mean that the persecution is legitimate.

Being gay is unacceptable according to the prevailing cultural norms of many societies, so much so that persecution on the basis of sexuality is relatively common[11] and is now a well-accepted basis for a refugee claim on the *Convention Relating to the Status of Refugees* ground of being a member of a 'particular social group'.[12] The 'unacceptable' nature of the identity and its

6 RRT Reference No *N97/14768* (Unreported, P Thomson, 29 April 1998).

7 *Gui v Minister for Immigration and Multicultural Affairs* [1998] FCA 1592 (Unreported, Hely J, 11 December 1998).

8 *Minister for Immigration and Multicultural Affairs v Gui* [1999] FCA 1496 (Unreported, Heerey, Carr and Tamberlin JJ, 29 October 1999) [28].

9 *Gui v Minister for Immigration and Multicultural Affairs* (2000) 21(11) Leg Rep SL3. The special leave application hearing in the High Court focused upon Mr Gui's delay in bringing his claim, rather than the Full Court's interpretation of persecution.

10 As Scheppele says:

> The experience of justice is intimately connected with one's perceptions of 'fact,' just as it is connected with one's beliefs and values. Beliefs and values do not exist in a world of pure abstraction, but rather always operate with and on specific assumptions about and perceptions of the state of the world.

Kim Lane Scheppele, 'Foreword: Telling Stories' (1989) 87 *Michigan Law Review* 2073, 2081.

11 For overviews see, eg, Rachel Rosenbloom (ed), *Unspoken Rules: Sexual Orientation and Women's Human Rights* (1996); Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity* (2001) Amnesty International On-line <www.amnesty.org> at 1 April 2002.

12 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, art 1A(2) (entered into force 22 April 1954) ('*Convention*') as amended by the *Protocol*

expression are surely the reason that the persecution was for a *Convention* reason rather than the reverse.[13]

Perhaps most striking of all within the internal logic of the decision is the silence around the police violence. They did not simply arrest and detain Mr Gui for breach of the general criminal law or transgression of cultural norms; they bashed him. They were not enforcing the law; they were breaking it. Moreover, Mr Gui was detained for three months for this 'offence', presumably without trial.

The strongest sense that I have from this decision is: '*he had it coming*'. Why? Because he was being gay in public. He was being gay in a *sexual way* in public. The decision-makers held that this was offensive. (Expressly offensive to Chinese norms; implicitly offensive to the norms of Australian decision-makers.) Why? Because the decision-makers could not see cuddling and kissing as anything other than sex in public. The hegemonic nature of heterosexuality renders cuddling and kissing not just non-sexual but indeed almost invisible when done by heterosexual people.[14] This is the opposite when done by a gay or lesbian couple: it is glaringly visible and sexualised. The words cuddling and kissing are in quotation marks in the decisions and the behaviour is treated as though it were, in fact, sex. The decision-makers accepted that sex in private was not an option for Mr Gui and his partner because of neighbourhood surveillance. Nonetheless having romantic physical contact in a park was clearly not an alternative the decision-makers could countenance.[15]

The inability to make sense of a culture where sex in private is not possible for gay men, combined with an understanding of gay sexuality which viewed any affection in public between gay men as sex in public meant that the decision was inevitable. Thinking in a heterosexual Australian paradigm, sex in public is

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

13 Kristen Walker responded to the Full Federal Court decision succinctly:

> The Court did not consider whether the Chinese cultural norms to which the RRT referred were discriminatory. Nor did it refer to the discriminatory nature of prosecutions for public expressions of sexuality … It is submitted, on the contrary, that the element of discrimination in the area of public sexual expression ought to be taken into account by decision-makers. If a refugee can demonstrate discriminatory application of the law, prosecution and punishment for public sexual expression should be seen as persecution on account of membership in a particular social group.

Kristen Walker, 'Sexuality and Refugee Status in Australia' (2000) 12 *International Journal of Refugee Law* 175, 198 (citations omitted).

14 For a discussion see, eg, Gill Valentine, '(Re)negotiating the "Heterosexual Street": Lesbian Productions of Space' in Nancy Duncan (ed), *Bodyspace* (1996) 146; Wayne Myslik, 'Renegotiating the Social/Sexual Identities of Places: Gay Communities as Safe Havens or Sites of Resistance?' in Nancy Duncan (ed), *Bodyspace* (1996) 156.

15 I wonder, are they in fact thinking, '*I* wouldn't have sex in public'. This led me to think about the times I have had sex in public, and why. For me it was mostly as a teenager in cars and parks. This use of public space was not a result of my lesbianism; rather I was young and simply had nowhere else to go. A lot of young people in Australia and other Western nations have sex in cars and parks and other public or semi-public places because their homes are occupied by parents. A lot of Western decision-makers, regardless of their sexuality, were once young and presumably had similar experiences. So why can they not empathise? Perhaps they are not thinking, '*I* wouldn't have sex in public'. Perhaps they are thinking '*I* would be offended if *I saw* gay men having sex in public'. Perhaps their feeling of the alien-ness of gay men is so strong that they cannot even begin to connect it to their own experience and therefore think only of what it would be like to *see* the men, rather than *be* the men.

wrong and is prohibited in a neutral and equal way. Therefore it deserves to be punished. Because the decision-makers were unable to think about who does it, where and why, and were unable to find a meaning for that experience — other than their own projected meaning — it simply did not make sense to them.

The complex role of public sex and the public/private divide will be considered in some detail in this paper, but I wanted to start with this story because it seems such an obviously wrong decision to me and because it so deeply encapsulates the question of otherness. Reading the decisions involving Mr Gui, I think that it is not the law that needs to be changed and challenged, it is human imagination. To Member Thomson and Justices Heerey, Carr and Tamberlin, I would like to say: go home, go to sleep and each of you, just for one night, dream a dream of being a gay man in Shanghai in love with a boy you cannot take home.[16]

II Empathy and Imagination

This research is based upon 331 decisions from the refugee tribunals in Australia and Canada covering just over six years from January 1994 to April 2000.[17] In all but six cases the applicants made their claims upon the ground of homosexuality.[18] Six of the cases concerned applicants who were transgender or transsexual.[19] Although this status was at times conflated with homosexuality, we regarded these claims as distinct.

One hundred and twenty-seven of the decisions studied were Canadian and 204 were Australian. Lesbian claimants were dramatically under-represented, with only 18 of the Canadian claims and 42 of the Australian claims brought by women. In Canada, lesbian claimants had a 66 per cent success rate (12 of the 18 granted refugee status) while gay men had a 52 per cent success rate. In Australia

16 Gail Mason reminds us that

> [v]iolent events belong to those who experience them. The hurt and pain entailed can only be fully comprehended by the individual who is violated. In reproducing and representing violence academics are ever only visitors to the violent experiences of others. We tread a fine line between the need to maintain the integrity of these experiences and our desire to employ them so as to resist the social conditions that make them possible in the first place.

Gail Mason, 'Recognition and Reformulation: Difference, Sexuality and Violence' (2001) 13 *Current Issues in Criminal Justice* 251, 251.

17 See discussion in above n 3.

18 I acknowledge that this category of identity is a constructed and partial one, but nonetheless agree with Pierre De Vos that '[c]onsolidating around our homosexual identities does not mean we have to accept the rigid identity imposed upon us': Pierre De Vos, 'On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution' (1996) 12 *South African Journal on Human Rights* 265, 286–7.

19 Five of these cases were decided in Canada; in four of them the applicant had changed from male to female: see IRB Reference No *V93-01711* (Unreported, L Daggett and E Nee, 4 July 1994); IRB Reference No *T94-07129* (Unreported, Z Sachedina and G MacPherson, 14 August 1995); IRB Reference No *T97-03025* (Unreported, V Bubrin and M Antemia, 6 April 1998); IRB Reference No *T98-08222* (Unreported, B Milliner and J Bousfield, 17 June 1999). The first two of the four claims were successful. In the fifth case a combined claim was made by an applicant, who had changed from female to male, and his mother: IRB Reference No *T94-07963* (Unreported, J Dembo, 31 March 1999). This claim was successful. The Australian case concerned an applicant who had changed from male to female: RRT Reference No *N96/12268* (Unreported, J Toohey, 24 March 1997). The claim was unsuccessful.

lesbian claimants had a 7 per cent success rate (with only three of the 42 granted refugee status), while gay men had a 26 per cent success rate.

Considering all claims, 35 per cent of decisions were favourable to the applicant. In Australia only 22 per cent of claims overall were successful, while in Canada the figure was 54 per cent. These figures give a sense of the results, but must be read with caution. Direct comparisons cannot be drawn between the two countries because the Canadian Immigration and Refugee Board ('IRB') is a first instance decision-maker, while the Australian Refugee Review Tribunal ('RRT') hears full merits appeals from a first instance decision, and the rate of favourable decisions in cases concerning sexuality at the first instance level in Australia is unknown.

Such conclusive comparisons cannot be drawn within each country's cases — for instance, comparing success rates in sexuality cases with rates in claims on other grounds. Both tribunals do not publish all of their decisions (and the Canadian IRB does not have to publish reasons for positive decisions if there is no appeal) but internal guidelines recommend publication for certain kinds of cases. Cases which are interesting or novel are more likely to be published (in Canada this expressly includes cases using the Canadian Gender Guidelines[20]) and our figures are drawn only from the published cases. The tribunal statistics break down success only by country of origin, not by ground of claim.

The legal definition of a refugee in Australia and Canada is a standard one, drawn from the *Convention*[21] and adopted into domestic law.[22] Article 1A(2) of the *Convention* defines a refugee as any person who

> owing to 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 or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Since the mid 1990s, it has been accepted in many Western refugee-receiving countries that lesbians and gay men may belong to a 'particular social group' and so they are eligible claimants if they can demonstrate a well-founded fear of persecution based upon that membership.[23] The elements of decisions are thus

20 See discussion, below n 83, and accompanying text.

21 *Convention*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

22 See, eg, *Migration Act 1958* (Cth) s 36; *Immigration Act*, RSC 1985, cI-2, s 6.

23 The first decisions on applicants claiming on the ground of sexuality were made in 1994 in both Canada and Australia. In 1995 the United Nations High Commission for Refugees ('UNHCR') accepted that lesbians and gay men can constitute members of a 'particular social group' and be eligible for protection under the terms of the *Convention*: Amnesty International, above n 11, 49; see also UNHCR, *Protecting Refugees: Questions and Answers* (2001) <www.unhcr.ch> at 1 April 2002. Since then a number of European nations, such as Austria, Denmark, Germany, the Netherlands, Finland and Sweden have accepted lesbian and gay asylum seekers as members of a 'particular social group'. Amnesty notes that by 2001 at least 18 countries had granted asylum on the grounds of sexuality-related persecution: Amnesty International, above n 11, 49. Kristen Walker provides a thorough overview of the jurisprudence in Australia, Canada, the United Kingdom, New Zealand and the United States of America on sexuality and particular social groups: see Walker, 'Sexuality and Refugee Status in Australia', above n 13, 179–85. See also Erik Ramanathan, 'Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based

deceptively simple: is the person lesbian or gay? Are they, or will they be, in danger of persecution? This in turn often relies upon evidence of past discrimination against the applicant, leading to the questions: was it bad enough to constitute persecution? Was it for a *Convention* reason (ie was it *because* they were lesbian or gay)? Was it a product of state action or state inaction such that there is no likelihood of state protection?

As Mr Gui's story suggests, our analysis of the cases in this research found that decision-makers were often unable to see that abuse of lesbians and gay men *was* bad enough to constitute persecution and they often denied that the abuse was *because* of the claimant's sexual identity.

Kristen Walker has argued powerfully that traditional scholarship on sexuality and refugee status 'foregrounds the law and backgrounds lives and cultures.'[24] As a lawyer, it is easy to explore failures in the logic of case reasoning and to argue about the 'wrongness' of the application of legal standards and their results. In reading these cases, however, it is clear that in refugee law, law is not so much at issue. Rather it is the decision-makers' (in)ability to understand and make sense of the applicants' experiences.[25]

Robin West has argued that empathy and knowledge of the subjectivity of others is 'not rationally acquired, and it cannot be rationally calculated, quantified, aggregated, or compared. It is knowledge that moves us rather than informs us. We make room for this knowledge in our heart, not in our head.'[26]

This section illustrates some of the overt difficulties that decision-makers had in recognising or connecting with the 'foreign' experience of lesbian and gay applicants. Later sections examine how this failure to see the other, and an imposition of the self by the decision-maker, have combined with the public/private divide to impact profoundly — and negatively — upon the claims of lesbian and gay applicants.

The case law is replete with false analogies to 'our' country and to heterosexual behaviour and sexuality, suggesting a deep-seated difficulty with relating to and understanding lesbian and gay identity and self-expression in the

Asylum Jurisprudence' (1996) 11 *Georgetown Immigration Law Journal* 1, covering the development of case law from Australia, the UK, Canada and the USA to 1996. On difficulties in the American interpretation of persecution, see Alan Bennett, 'The "Cure" That Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution' (1999) 29 *Golden Gate University Law Review* 279. On the early Australian case law see, eg, Jenni Millbank, 'Fear of Persecution or Just a Queer Feeling? Refugee Status and Sexual Orientation in Australia' (1995) 20 *Alternative Law Journal* 261.

24 Kristen Walker, 'The Importance of Being Out: Sexuality and Refugee Status' (1996) 18 *Sydney Law Review* 568, 568. In this early article, Walker attempts to subvert this tradition by telling stories from a number of Australian refugee cases brought by Chinese gay men, interlacing these stories with a discussion of same-sex love in China through history, inset with text boxes with notes on terminology, poems and scraps of historical documents relating to homosexuality in China.

25 This is, of course, also true of refugee claims made on other grounds: see, eg, Ilene Durst, 'Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative' (2000) 53 *Rutgers Law Review* 127.

26 Robin West, *Narrative, Authority, and Law* (1993) 262.

applicant's country of origin.[27] For example, in a 1998 Australian case, the RRT stated:

> As a matter of interest, I note that homosexuals face problems in Australia, which is generally regarded by publications such as *Spartacus* [a gay travel guide] as liberal territory for homosexuals, and in most other countries. Regrettably, in Australia (as in China), overtly homosexual behaviour in public is stared at, there are some gay bashings, family conservative values are little reconciled to relatives 'coming out', the division between gay 'cruising' and gay prostitution is blurred and lends itself to real, and trumped-up charges by homophobic policemen, of prostitution, and there are suicides among unrecognised, frustrated homosexuals.[28]

In and of itself this statement is mildly disturbing. However it must be noted that it was made in a case where a lesbian couple had been overheard having sex in their hotel room, were dragged from the room, detained, interrogated and beaten by police. One partner was sexually assaulted by police with an electric prod. Whether one chooses to use words such as 'regrettable' in such a case, it is clear that these women's experiences were not ones readily paralleled in Australia.

In a 1999 Australian case, the RRT stated: 'It is possible that displays of sexual behaviour in public could attract disapproval or even police action but this is common in other countries, including Australia.'[29]

That case concerned a Chinese lesbian couple where one partner's family had sought and received police assistance in having her forcibly separated from her partner and returned to them. This is not something I would have supposed 'common' in Australia and the callousness of comparing such an extreme experience with a disapproving glance on an Australian street demonstrates a terrible failure of empathy. It also highlights an important theme I draw on later: simply by *being* (in that case, by cohabiting), the lesbian couple are construed as *being sexual* and their conduct is rendered as *public*. In both examples discussed above, the false analogy connects women in private in China with public sexual conduct in Australia.

The citation of statistics on homophobic violence in the receiving country, or blasé references to it being 'a problem here too', are relatively common features in the case law and demonstrate a terrible misunderstanding of the experience of

[27] There were some cases where the use of comparison and analogy was more respectful. When decision-makers compared sexuality with religion or political views, it was often done in a positive way, as they appeared to reach by analogy for something they *could* understand. For example, when the Federal Court rejected (in obiter) the opinion in a RRT case that the applicant could evade persecution by marrying and having a secret gay life, the judge reasoned by analogy that one could not ask a person persecuted for political views (strangely he chose fascism) to marry a communist in order to conceal that view and avoid persecution: *Bhattachan v Minister for Immigration and Multicultural Affairs* [1999] FCA 547 (Unreported, Hill J, 27 April 1999) [9]. See also RRT Reference Nos *N98/24186 and N98/24187* (Unreported, L Hardy, 28 January 2000) where a gay couple in Bangladesh faced enormous pressure to marry other people. The RRT held that their relationship was 'like a marriage' and compared sexuality with religion and political opinion in order to explain that it must be expressed as a fundamental human right.

[28] RRT Reference No *N99/27818* (Unreported, D Kelleghan, 29 June 1999).

[29] RRT Reference No *V98/09498* (Unreported, J Wood, 30 March 1999).

homophobic violence within a culture of official tolerance, encouragement or impunity.[30]

In a particularly egregious example from Canada in 1997, the IRB responded to a gay Mexican man's claims of police harassment and extortion:

> the necessity to pay an occasional bribe to a police officer to avoid being taken to the police station, whether it be for a traffic violation, or because you are not dressed properly or because you are found in a gay bar, is not so substantially prejudicial as to constitute persecution.[31]

The Australian RRT also did not see police conduct such as the deliberate targeting of cruising areas and gay venues in order to extort money from lesbians and gay men as persecution. The fact that police were using a combination of their own official position of power, threats of violence and, at times, criminal sanctions against gay sex or public sex, to target and exploit a vulnerable group did not appear to be visible to the RRT as a form of persecution. Nor did it suggest to it that lesbians and gay men were therefore unable to seek police protection when victimised by others and that this raised the issue of the absence of state protection. In a 1998 Australian case concerning a gay man from Bangladesh, the RRT accepted evidence that gay men were 'mistreated' by police, and were particularly vulnerable to extortion but concluded that if this were to happen to the applicant it 'would not be for reasons of his homosexuality, but because … his family is well-off and prominent and thus an appropriate target for extortion.'[32]

However a well-off, prominent, straight man would not be an 'appropriate' target for blackmail by the police as he would have nothing to fear from them in the first place. It is the applicant's sexuality that makes him a target — and perhaps the use of the word 'appropriate' here is telling: the RRT implies through its use that the applicant ought to pay the money and be glad of having escaped so lightly.[33]

30 See, eg, IRB Reference No *M95-08923* (Unreported, H Panagakos and L Pergat, 3 November 1999) stating that there was evidence of discrimination in Turkey just '[a]s in Canada': at [16]; IRB Reference No *V96-00745* (Unreported, Z Sachedina and M-A Lalonde, 23 October 1997) stating that 'even in Canada, incidents of "gay bashing" unfortunately occur' [28]. See also RRT Reference No *N99/27818* (Unreported, D Kelleghan, 29 June 1999); RRT Reference No *BV 93/00242* (Unreported, J Glaros, 10 June 1994); RRT Reference No *V 94/02607* (Unreported, T Harper, 4 April 1995).

31 IRB Reference No *V96-00745* (Unreported, Z Sachedina and M-A Lalonde, 23 October 1997) [30].

32 RRT Reference No *N98/20994* (Unreported, K Rosser, 4 May 1998). See also Australian government advice (from the Department of Foreign Affairs and Trade ('DFAT')) cited in a 1997 RRT case that military harassment and extortion of gay men was 'generally not motivated primarily by hatred of gays as such but rather by the more venal desire to extort money from the individual through blackmail': RRT Reference No *N95/10132* (Unreported, M Griffin, 16 September 1997).

33 This decision was upheld on appeal where Madgwick J (re)interpreted the RRT's reasoning and concluded that

> the Tribunal evidently took the view that any police homophobia would not go beyond the private shortcomings of individual police officers and would not amount to a matter of official sanction or toleration of it, nor did it bespeak serious official inability to prevent it. … No police force is without rogues.

MMM v Minister for Immigration and Multicultural Affairs (1998) 90 FCR 324, 332. This case was followed in RRT Reference No *V97/06971* (Unreported, N Ford, 1 February 1999). Kristen

Another example of the use of false comparators occurred in the same 1998 Australian claim by a Bangladeshi gay man, mentioned above. There was significant evidence of the tremendous pressure to marry within his culture and the applicant argued that he could not live a gay life (no matter how secretly) without being found out if he did not marry. The RRT responded:

> Such an expectation certainly has the potential to adversely affect homosexual people. However, it also has the potential to affect other people who do not wish to marry at all, or who do not wish to marry at a particular time, or a particular person.[34]

This finding was upheld on appeal to the Federal Court.[35] There is no understanding here that a gay person, for whom such a relationship strikes at the core of their identity and sexuality, would be *particularly* affected by forced marriage and affected in a qualitatively different way to 'other people' — heterosexual people.[36]

There were many other instances where it appeared that the RRT could not really understand the claims of the applicant. Kim Lane Scheppele has noted in the context of US domestic law that

> [t]o be credible, witnesses' narratives need to be close enough to culturally available stories to be recognizable as something that *could* happen but possessed of enough distinguishing information to be recognizable as the narrative of a *distinct* event.[37]

Many scholars and litigators have proposed storytelling as a method of response to forums that are ignorant of or hostile to 'outsiders'[38] such as gay men and lesbians.[39] By telling personal stories, the hope is that stereotypes and

Walker points out that, among other things, this analysis misses the point that those 'rogues' have a target in part because of harsh criminal sanctions against gay sex in that country: Walker, 'Sexuality and Refugee Status in Australia', above n 13, 200.

34 RRT Reference No *N98/20994* (Unreported, K Rosser, 4 May 1998). This remark was repeated verbatim by another RRT member in a later case concerning a gay man from Pakistan: RRT Reference No *V97/06971* (Unreported, N Ford, 1 February 1999).

35 *MMM v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 324 (Madgwick J).

36 *Contra* a 1997 RRT case: 'to be forced to marry against one's will and to be forced to deny one's sexual identity is to be forced to deny a fundamental part of one's nature': RRT Reference No *N96/11136* (Unreported, K Rosser, 27 October 1997) — extraordinarily, this decision is by the same member as the 1998 decision, RRT Reference No *N98/20994* (Unreported, K Rosser, 4 May 1998), apparently stating the reverse. See also RRT Reference Nos *N98/24186 and N98/24187* (Unreported, L Hardy, 28 January 2000) where the RRT held that pressure on a man in a long-term gay relationship to marry can be persecution:

> The tribunal accepts if an exclusive, intimate, consensual and adult relationship, whether heterosexual or homosexual, faces a real chance of being shattered by the state, or society in general, or even by some small but ultimately highly effective sector of it, for reasons linked to the *Convention*, such as malignancy towards the group to which the partners in that relationship belong, then they face a real chance of *Convention*-related persecution.

37 Kim Lane Scheppele, 'Manners of Imagining the Real' (1994) 19 *Law and Social Inquiry* 995, 1006 (emphasis in original).

38 See, eg, Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2326–41; Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701.

39 See, eg, Marc Fajer, 'Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men' (1992) 46 *University of Miami Law Review* 511, 516–38; Marc Fajer, 'Authority, Credibility and Pre-Understanding: A Defense

stock stories will be countered, and a space created in which lesbians and gay men can truly be seen and heard.[40]

Richard Delgado has proposed, somewhat optimistically, that

> [s]tories humanize us. They emphasize our differences in ways that can ultimately bring us closer together. They allow us to see how the world looks from behind someone else's spectacles. … Hearing stories invites hearers to participate, challenging their assumptions, jarring their complacency … lowering their defenses.[41]

The refugee forum is unique in legal settings in that it relies heavily upon personal stories. Stories are the basis of a claim and the foundation of virtually all of the applicant's evidence. Hearings are often composed almost entirely of a personal narrative by the applicant of her or his experiences.[42] Yet, as this article will demonstrate, despite such an intimate, narrative forum there has been a resounding failure, particularly in the Australian jurisdiction, to receive such personal stories.

Our research found that the RRT was consistently harsher to applicants than the IRB, both in the reasoning and discourse employed in the decisions and in the trend of outcomes, which had a far lower success rate for both lesbian and gay applicants.[43] While there were many contrasts between the countries (a wide variety of theories could be explored for these differences)[44] the one I wish to touch upon first is the narrative format.[45]

of Outsider Narratives in Legal Scholarship' (1994) 82 *Georgetown Law Journal* 1845; Walker, 'The Importance of Being Out', above n 24, 568–9.

40 Catharine MacKinnon has said:

> Case law has always started with stories called the facts. It is the sense that the facts have not felt real enough, that something has gone missing in them or was struggling to break through them, that has called law's embrace of reality into question and impelled the specific movement back toward the world that has taken the form of narrative.

Catherine MacKinnon, 'Law's Stories as Reality and Politics' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (1996) 232, 232. However, MacKinnon also cautions that 'the form itself is no guarantee of a view from the outside or the bottom. Stories break stereotypes, but stereotypes are also stories, and stories can be full of them': at 235.

41 Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' in David Ray Papke (ed), *Narrative and the Legal Discourse: A Reader in Storytelling and the Law* (1991) 312. Indeed some claim rather rashly that this has already been achieved. For example, Jeffrey Weeks states:

> Counter-discourses, oppositional knowledges, grassroots politics and self-activity have undermined traditional political forms, and begun to define new agendas. There has been an accumulation of new social and cultural capital, where new voices, new collective subjectivities have put forward their claims through a variety of social and political practices …

Jeffrey Weeks, 'The Sexual Citizen' in Mike Featherstone (ed), *Love and Eroticism* (1999) 35, 47 (citations omitted).

42 Yet the cases are rendered very impersonal in many ways. For example, much identifying information is removed for the applicant's safety, so the person in question is not named. The Canadian cases are released under the applicant's initials and a case number and the Australian cases (except appeals) use only a case number. (For consistency and simplicity I have not used the initials in the citations of the Canadian IRB cases.)

43 Although recall that the success figures cannot be directly compared. As the Australian decisions are part of an appeal process, one would need to factor in the number of lesbian and gay applicants in Australia who were also successful before the Minister's delegate. These figures are not available.

44 For example, the different countries of origin of the applicants, the number of tribunal members (two in Canada versus one in Australia, and a positive decision to the applicant mandated in

The telling of the story of each applicant was starkly contrasted in the Australian and Canadian decisions. The Canadian decisions are brief, usually averaging only three or four pages in length. On occasion the reasons are a transcript of an orally delivered decision, spoken in plain language, with colloquial and personal touches — such as the Board member welcoming the applicant or wishing them luck at the conclusion of a positive decision.[46] References to the guiding legal framework or to country information are presented in footnotes. The text of decisions is composed of a narrative of the applicant's experiences and a brief analysis of those experiences to determine whether they meet the refugee definition. To a reader, therefore, the Canadian decisions, while still stylised legal documents, are not excessively legalistic and do hold some sense of the personal story of each applicant.

The Australian decisions are lengthier: on average double the length of the Canadian decisions. They are more formal and legalistic, but their most striking feature is that they are excessively repetitive. Each decision opens with a 'boilerplate' of the international and national definitions of refugee, a uniform recitation of nearly 2000 words which only alters over the passage of years as new decisions are handed down by the High Court. This formula is then followed by the applicant's claims and evidence, a recitation of 'independent'[47] country evidence,[48] a discussion of the evidence (often repeating slabs of text from the preceding section) and the decision-maker's conclusions. In many cases concerning applicants from the same country, the entire section on country evidence was reproduced in full from one decision to the next over a period of

Canada if there is a difference of view between the members), the different utilisation of Gender Guidelines (see below n 83, and accompanying text) and the different collation and availability of country information (which is given to the applicants in Canada but not in Australia).

45 For a discussion of the role of narrative in law, see generally Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (1996).

46 See, eg, IRB Reference No *A98-00268* (Unreported, P Showler, 8 August 1998) [19].

47 The RRT in particular placed a lot of weight upon communications and cables from DFAT as to country conditions. As a government department with a vested interest in maintaining trade links, and perhaps some interest in supporting government immigration policy (currently extremely hostile to onshore claims), it is hard for an observer to accept that this evidence was 'independent' in the sense in which the word is usually meant. Such communications were almost universally damaging to the applicant's case. This use of country information will be discussed in more detail in later articles drawn from this research.

48 This is a usually a summary of DFAT cables, foreign and local journalistic reports and may also include reports from human rights agencies such as Amnesty International. The quality of information varies tremendously, and in some cases has included extracts from such dubious sources as tourist travel guides and internet sex sites. See, eg, a 1998 case which treats a gay sex/cruising internet site's reference to gay bars and cruising spots (<http://www.ogusa.com/see/china.html> at 1 April 2002) as authority for the statement that Shanghai has a 'visible gay community' — although the decision did *not* go on to record that the author of the quoted report went on to warn that it is illegal to take a same-sex partner back to a hotel room and recommend that, if caught, one pay whatever bribe is asked: RRT Reference No *N97/14768* (Unreported, P Thomson, 29 April 1998). The information on bars was repeated at greater length, with the warnings included but under-emphasised, in a 1999 case. As this asylum application was made by a lesbian, the utility of the evidence (concerning where gay men may find sex) is even more thoroughly dubious: RRT Reference No *N99/27818* (Unreported, D Kelleghan, 29 June 1999). The IRB on occasion also used inappropriate and arguably irrelevant information. See, for example, a 1999 case concerning a gay man from Eritrea where the IRB held that as there was so little country information on gay men in Eritrea it would reason by analogy using the government response to heterosexual women who experienced domestic violence: IRB Reference No *V97-03935* (Unreported, R Vanderkooy, 29 July 1999) [13]–[14].

months or even years. For instance, over a dozen decisions concerning applicants from China used virtually identical country information over a period of four years from 1996 to 1999[49] (by which time one government cable relied upon as a source of country information in one case was 10 years old[50]). The extent of repetition and reproduction extends to typographical and grammatical errors — evidence that the 'cut and paste' function has been used by decision-makers who are perhaps not even (or not closely) reading the material they are relying upon to establish the 'truth' about country conditions in the applicant's country of origin.

Richard Delgado has argued that

> [s]tories and counterstories, to be effective, must be or must appear to be noncoercive. They invite the reader to suspend judgment, listen for their point or message, and then decide what measure of truth they contain. They are insinuative, not frontal; they offer a respite from the linear, coercive discourse that characterizes much legal writing.[51]

This possibility seems to be particularly excluded by the Australian format of decision writing, which is indeed linear and predetermined. The country information appears as a closed circuit, repeated over and over. This process is damaging to the applicant and her or his ability to be heard on a number of levels. In terms of the construction of evidence it tends to transform opinion — such as an off-the-cuff remark in a travel guide or brief response from a diplomatic cable — into documented fact. Through the process of telling and retelling, quite flimsy or generalised assertions as to a country situation (for example, there are 'many' gay bars or venues[52] or 'there is no queer bashing'[53]) become established and embedded institutional knowledge. Moreover, while such knowledge may be updated by later information in the same vein, its closed and generalised form renders it difficult or impossible to reimagine differently. It cannot receive contradictory versions of the facts, such as information that it was fairly safe in Shanghai in 1995 but not in 1998, or safe for gay men but unsafe for lesbians, or safe for gay men and lesbians in general but not for this particular lesbian in this particular neighbourhood.

49 The country information in RRT Reference No *V96/04281* (Unreported, J Billings, 27 June 1996) is identical to that in RRT Reference No *V96/04813* (Unreported, A Smith, 29 May 1997) and similar to that in RRT Reference No *N95/07313* (Unreported, L Hardy, 27 June 1997). Then the information is updated somewhat and appears in: RRT Reference No *N98/21178* (Unreported, G Klintworth, 4 December 1998); RRT Reference No *N97/19671* (Unreported, D Kelleghan, 25 January 1999); RRT Reference No *N97/19241* (Unreported, L Herron, 9 February 1999); RRT Reference No *N98/25578* (Unreported, M O'Brien, 2 March 1999); RRT Reference No *N98/23196* (Unreported, S McIllhatton, 4 March 1999); RRT Reference No *N97/20090* (Unreported, G Short, 8 March 1999); RRT Reference No *N97/20446* (Unreported, S Zelinka, 11 March 1999); RRT Reference No *V98/09564* (Unreported, J Vrachnas, 4 May 1999); RRT Reference Nos *N98/25853 and N98/25980* (Unreported, P Cristoffanini, 11 May 1999).

50 RRT Reference No *N97/19241* (Unreported, L Herron, 9 February 1999).

51 Delgado, above n 41, 290–1.

52 See, eg, RRT Reference No *N98/24702* (Unreported, R Layton, 16 February 2000); RRT Reference No *N97/19983* (Unreported, M O'Brien, 12 May 1999).

53 RRT Reference No *N97/15062* (Unreported, G Short, 17 November 1997).

This process of inserting pre-written text about 'the situation' in a country also seems to dull the decision-maker to the lived reality of the experience of the applicant by telling and retelling a story that is generic. It is depersonalised and almost mythical in form: gays in X city are well-established as they have several bars, or, while they may be raided by police from time to time, the authorities are tolerant as long as bribes are paid. The generic story does not include an applicant's individual experience and usually denies the possibility of that experience. So, the decision-makers reason: you say you were bashed and sexually assaulted by the police, but the country evidence (insert massive block of text) demonstrates that the authorities in your country are quite tolerant as long as you are discreet. Therefore it is not possible that this happened to you. Or if it did in the past, it won't happen again now.

The personal narrative of the applicant is stacked up against the monolithic narrative of 'the country', the individual claim versus the (independent) evidence, and the applicant is simply not heard or not believed.

Ruthann Robson has written of storytelling:

> we may believe that telling our lesbian/queer stories has inspired empathy, but what we have gotten is pity. … Even more bleak is the possibility that empathy is unachievable. … [T]o the extent our lesbian/queer narratives are not capable of being mapped onto pre-existing narratives, they are unintelligible.[54]

This unintelligibility means that gay and lesbian experience, even if believed, may be unreadable by decision-makers. It thus forms a kind of mysterious blank — like the maps of the early colonial eras, with the edges of continents like Australia disappearing into nothingness where the map makers had not yet travelled.[55] It is this enforced blank of lesbian and gay experience that is then written upon, as the decision-makers impose a series of preconceived notions of self. Chief among these, and the major focus of this paper, are the deeply gendered and Western notions of the public and the private.

The public/private divide is strongly apparent in the case law and is strikingly, although not exclusively, gendered in its impact. Although refugee case law and jurisprudence in this area focuses upon 'homosexuality' as a generic concept, there are stark gender differences in the experiences of lesbians and gay men and the subsequent translation of these experiences into legal categories. Women's experiences of persecution based on their sexuality are inextricably tied to the social meaning of gender and to women's location in the private sphere. As a general observation, lesbians tend to fail in the case law because their experiences are *too private* and gay men fair badly because their experiences are *too public*.

[54] Ruthann Robson, 'Beginning from (My) Experience: The Paradoxes of Lesbian/Queer Narrativities' (1997) 48 *Hastings Law Journal* 1387, 1415.

[55] Indeed the unexplored and unknown areas were often represented as monstrous: see, eg, William Eisler, *The Furthest Shore* (1995).

III PRIVATE ABUSES AND PRIVATE SELVES

In the following discussion it is important to remember that lesbians were vastly under-represented in the available case law on sexuality compared to gay men. In our case selection, only 14 per cent of the Canadian claims and 21 per cent of the Australian claims were brought by women. Making an onshore claim to refugee status requires the resources and ability to leave the country where the persecution took place and enter (legally or illegally) the receiving country. Women are simply less likely than men to have access to such resources.

As stated above, lesbian claimants in Canada had a slightly greater rate of success than gay men, with a success rate of 66 per cent (12 of 18 cases) compared with a 52 per cent success rate for cases involving gay men in Canada.[56] However, lesbians were starkly unsuccessful in Australia with a success rate of only 7 per cent compared with a success rate of 26 per cent for cases concerning gay men. This disparity in part reflects the fact that the claimants' countries of origin are very different in the two jurisdictions. Around half of lesbian claimants in Australia were from China,[57] the Philippines[58] and other countries[59] not generally accepted by Australian decision-makers as persecutory regimes in refugee claims on other grounds.[60] However, a close reading of the reasoning processes in the cases reveals that the disparity between the approaches of the two tribunals is a fundamental one, and reflects a very different approach to the 'private-ness' of women's experiences of persecution.

Anti-lesbian violence is still a markedly under-explored area in both domestic and international jurisprudence. Domestic Australian literature on hate crimes has documented that lesbians face significantly more 'private' violence than gay men — they are more likely to be harassed and assaulted at home or at work rather than on the streets, and more likely to be attacked by men known to them, such as neighbours or former partners.[61] Lesbians are also more likely to face sexual or sexualised forms of assault. In this way, when compared with

56 Recall that these figures cannot be read uncritically as comparative. The Canadian IRB does not have to publish reasons for positive decisions but internal guidelines recommend publication for certain kinds of cases. Cases which are interesting or novel, such as cases using the Canadian Gender Guidelines (see below n 83 and accompanying text), are more likely to be published — so there may be an over-representation of lesbian applicants in the available decisions.

57 Twelve of the 42 applicants were from China. All 12 were unsuccessful, while the overall success rate of applicants from China before the RRT from 1993–2001 was 6.9 per cent: see Refugee Review Tribunal, *Monthly Statistics, June 2001* (2001) <http://www.rrt.gov.au/stats.html> at 1 April 2002.

58 Eleven of the 42 applicants were from the Philippines. All 11 were unsuccessful, while the overall success rate of applicants from the Philippines before the RRT from 1993–2001 was 0.2%: ibid.

59 For example, Thailand.

60 In comparison, the Canadian cases included no women from China, the Philippines or Thailand. They were from Argentina (one successful), Chile (three successful), Colombia (one successful, one unsuccessful), Iran (one unsuccessful), Mexico (two successful, one unsuccessful), Russia (two successful, one unsuccessful), Trinidad (one unsuccessful), Ukraine (one unsuccessful) and Venezuela (one successful).

61 See, eg, Gail Mason, 'Heterosexed Violence: Typicality and Ambiguity' in Gail Mason and Stephen Tomsen (eds), *Homophobic Violence* (1997) 15, 23. See also Anna Chapman and Gail Mason, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction' (1999) 21 *Sydney Law Review* 525.

homophobic violence against gay men, violence against lesbians demonstrates some similarities to violence experienced by heterosexual women.[62]

Much feminist refugee literature has explored the difficulties that women (who are presumably heterosexual)[63] experience in asylum claims.[64] The domestic or semi-private nature of much persecution of women, the use of sexual assault as a method of persecution, and the difficulty of establishing a state nexus (in situations of, for example, state indifference to domestic violence or rape) have been continuing themes in refugee claims by women in general. These factors also appear to be present in asylum claims by lesbians.

The persecution of lesbians was often 'domestic' in the sense that it was at the hands of family members, former male partners, or current female partners' families, in contrast to the gay men's cases where the agent of persecution was more often a state actor such as a police officer or other official. In one instance, when the family of a lesbian applicant's partner had gone to the police and the police had intervened in an attempt to separate the couple, an Australian RRT member stated blithely: 'Refugee protection is not offered to those who suffer disapproval and who have upset family arrangements.'[65]

James Wilets states that

> [t]he public/private distinction in both domestic and international law has important implications for analyzing human rights abuses against lesbians and women generally. In many cultures, the principal instrument of societal control over women is the family. To the extent women lack legal status outside of their role within the family, they do not enjoy the legal protections accorded to men. Thus, a lesbian may be beaten or killed by a family member for her

62 Gail Mason suggests that lesbians are still far more likely than heterosexual women to experience violence from strangers, and recommends that similarities ought not to be over-stressed as it is possible that 'scenarios of violence that are the most common for heterosexual women may be the least common for lesbian women, and vice versa': see Mason, 'Recognition and Reformulation', above n 16, 259. For a fuller analysis of the experience and meaning of violence against lesbians, see Gail Mason, *The Spectacle of Violence: Homophobia, Gender and Knowledge* (2002).

63 Gail Mason notes that 'the vast majority of feminist literature on violence has paid little overt or direct attention to lesbian experience as an object of study' and although lesbians have appeared, 'much empirical and theoretical commentary has little to say about how lesbian experiences or perceptions of violence might differ from those of heterosexual women': Mason, 'Recognition and Reformulation', above n 16, 259.

64 See, eg, James Wilets, 'Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective' (1997) 60 *Albany Law Review* 989; Krista Daley and Ninette Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence' (2000) 12 *International Journal of Refugee Law* 148; Macklin, above n 3; Deborah Anker, 'Refugee Status and Violence against Women in the "Domestic" Sphere: The Non-State Actor Question' (2001) 15 *Georgetown Immigration Law Journal* 391; Deborah Anker, Lauren Gilbert and Nancy Kelly, 'Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees under United States Asylum Law' (1997) 11 *Georgetown Immigration Law Journal* 709; Pamela Goldberg, 'Where in the World Is There Safety for Me? Women Fleeing Gender-Based Persecution' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (1995) 345. See also Elisa Mason, 'The Protection Concerns of Refugee Women: A Bibliography' (1999) 9 *Texas Journal of Women and the Law* 95.

65 RRT Reference No *V98/09498* (Unreported, J Wood, 30 March 1999). Gay men did on occasion face such reasoning too, for instance where they alleged family ostracism or pressure to marry. See, eg, *MMM v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 324, 327–8 (Madgwick J).

> orientation/identity, yet this domestic violence may not be the concern of law enforcement officials.[66]

There was a strong trend, particularly in the Australian cases, to characterise the persecution of lesbians as 'domestic' or 'personal' and thus not for a *Convention* reason.[67] For example, in a 1999 Australian case a woman from Colombia who had been resident in Venezuela feared persecution because she had been having a lesbian relationship with a woman from a prominent and powerful family in Venezuela. Members of the family had threatened to kill her as a result. In a stunning piece of logic, the decision-maker wrote that

> [t]he Tribunal explained to the applicant that her evidence did not indicate that this family was after her for reason of her sexual orientation but because they were not happy about her having a relationship with a member of their family and, as such, her problem appeared to be of a personal nature. The Tribunal explained to her that, it appeared from her evidence, that the family in question was not harming lesbians in general and were only interested in her because she was having a relationship with a member of their family. … The Tribunal therefore finds that the applicant's fears stem from a personal problem and not for reason of membership of a particular social group, or any other *Convention* reason.[68]

Yet the motivation for attack was clearly for a *Convention* reason in that it was not just 'a relationship' to which the family responded with threats and violence, but a *lesbian* relationship.

Likewise in a 1999 Australian case, a lesbian from Bolivia had been subject to violence, harassment and sexual assault by several men in her neighbourhood as a result of a male relative telling people that she was a lesbian, 'because he hoped that if they all insulted and attacked her, she would change.'[69] The RRT held that it was

> a purely private matter and is not … for reasons of the Applicant's membership of a particular social group of homosexuals. There is no evidence to suggest that the Applicant's relative, or people acting on his behalf, ever tried to harm the Applicant's partner, for reason of her sexual orientation, or that other homosexuals were threatened or harmed by him or his associates. … The Tribunal accepts that although Bolivian society, and many other societies or

66 Wilets, above n 64, 994 (citations omitted). See also Thomas Spijkerboer, *Gender and Refugee Status* (2000).

67 In the context of racist speech and violence in the USA, Mari Matsuda has argued that 'insiders' or 'non-target groups' consistently fail to see any pervasive pattern or institutional or state responsibility when confronted with violence against 'outsiders'. She notes how insiders work hard to refashion narratives of violence to make them into an exception, a joke or a one-off incident: Mari Matsuda, above n 38, 2326–31.

68 RRT Reference No *N98/21316* (Unreported, P Cristoffanini, 26 February 1999). See also a 1999 Australian case where a lesbian from Colombia had experienced harassment and discrimination from a variety of sources but was predominantly fearful of a violent female ex-partner. During the relationship she approached the police over her partner's violence and they refused to help, saying that they 'had bigger problems to solve than to help lesbians'. The RRT suggested that 'it was not her sexual orientation which had motivated the harassment and violence from her girlfriend but rather that it arose out of their personal relationship and the ending of that relationship': RRT Reference No *N97/19649* (Unreported, S McIllhatton, 22 April 1999). Here also the absence of state protection for lesbians subject to violence was completely ignored.

69 RRT Reference No *N98/23425* (Unreported, M O'Brien, 28 April 1999).

> communities generally disapprove of homosexuality, the Applicant's relative's motivation to 'cure' her of her homosexuality is directed solely at the Applicant, a family relation.[70]

This logic is boggling in the extreme, requiring the applicant to demonstrate that the persecutor has no personal motive or relationship with her, and to evidence the impersonality of the persecution only by the fact that the attacker also chose random or unknown victims from the persecuted class in addition to herself.

The cases we examined included a very high number where the persecution involved sexual assault. In 32 per cent of the lesbian cases sexual violence was a factor,[71] compared to 16 per cent of the gay men cases.[72] Audrey Macklin noted a distinct trend of sexual violence being characterised as personal or private (based 'solely on sexual attraction'[73]) in earlier claims for refugee status by women for a variety of *Convention* reasons.[74] In the cases in our study the tribunals did view sexual violence as gendered in the sense that it was something that happened to 'women', but members were often unable to see the sexuality component in that violence, in that it was directed specifically at lesbians as a sexualised attack on their sexual and social nonconformity.

For instance, in a 1996 Australian case a lesbian from the Philippines was subjected to 'sexual abuse and a violent attack' which the RRT accepted was directed at her because she was a lesbian.[75] She argued that the Philippine authorities were unable or unwilling to protect lesbians. However the entire analysis of state protection focused upon the accessibility of sexual assault and domestic violence services and governmental responses to violence against *women*, with absolutely no consideration that the applicant's position was any different from that of heterosexual women.[76]

[70] Ibid. See also a 1999 case concerning an applicant from China where the applicant's husband battered her and attacked her with a knife on discovering that she was in a lesbian relationship:

> On her evidence her husband was only violent towards her and not towards other homosexuals. I consider that it was pique and jealousy towards her as an individual that motivated his abuse of her. In stating this, I accept that the unfamiliarity of being supplanted by a female rather than the normal male lover would have caused him to resent the situation more. However, I am not satisfied that the applicant would not have been abused by him if she had been in a heterosexual extra-marital relationship.

RRT Reference No *N99/27818* (Unreported, D Kelleghan, 29 June 1999).

[71] Fifty-five per cent of Canadian lesbian cases and 21 per cent of Australian lesbian cases.

[72] Thirty-nine per cent of Canadian gay men cases and 6 per cent of Australian gay men cases.

[73] *Klawitter v Immigration and Naturalization Service*, 970 F 2d 149, 152 (6th Cir, 1992).

[74] See Macklin, above n 3, 39. She adds that the US Gender Consideration Guidelines now state that the 'appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm': at 40. The US Gender Consideration Guidelines can be found at: 'Immigration and Naturalization Service Gender Guidelines: Considerations for Asylum Officers Adjudicating Asylum Claims from Women' (1995) 7 *International Journal of Refugee Law* 700.

[75] RRT Reference No *N95/08186* (Unreported, J Gibbons, 23 April 1996). See also RRT Reference No *N96/11578* (Unreported, P McIntosh, 7 July 1997), concerning a lesbian from Fiji subjected to violence by her husband.

[76] See also a 1999 case citing only evidence relating to heterosexual women and domestic violence: 'If the husband did attempt to make hostile contact with them, I am sure that they could gain access to adequate protection from the authorities': RRT Reference No *N99/27818* (Unreported, D Kelleghan, 29 June 1999). This decision also used completely inapplicable material about 'homosexuals' (in fact men) when making decisions about lesbians. For instance, information

The inaction of police or inaccessibility of state protection was not thoroughly or thoughtfully canvassed in many cases. In the Bolivian case mentioned above, the RRT blithely concluded:

> The tribunal finds that the evidence does not suggest that the Applicant's approach to the police failed for reason of her sexual orientation. There is no credible independent evidence to suggest that laws against rape are enforced differentially if the victim was a homosexual woman as distinct from heterosexual women.[77]

The examples above are drawn from Australian cases. Such reasoning was generally (although not entirely) absent from Canadian decisions.[78] A strong contrast is offered by a 1995 Canadian case in which a male relative of the applicant's partner coerced her into sex by threatening to expose their relationship to other police officers (he being a police officer himself). The IRB had no trouble in determining — despite the fact that he was not threatening lesbians in general, but solely targeting his niece's lover — that she was subject to persecution as a lesbian. Moreover the IRB found that he had abused his position of power in such a manner that it constituted direct abuse by an agent of the state.[79] In contrast to the Australian cases the 'private' aspect of this persecution was not seen to vitiate its public aspects.

The Canadian IRB was also much more alert to the interrelationship of sexuality with gender norms.[80] In a 1996 case concerning a lesbian from Venezuela, the IRB stated that '[s]uch a woman is not only challenging the social norm of heterosexuality, she is also transgressing the social mores regarding the role of women in society'[81] and concluded that 'this claim is based on membership in two particular social groups, women and homosexuals, the two indivisible elements of being a lesbian woman.'[82]

Both Canada and Australia have developed refugee Gender Guidelines which, among other things, specifically mention sexual assault, and attempt to make decision-makers sensitive to considerations of gender and the private nature of much violence directed at women.[83]

that gay men had a number of bars or cruising spots in a city was used to deduce that lesbians were not oppressed in that place. See also RRT Reference No *N97/18897* (Unreported, D Kelleghan, 13 November 1998).

77 RRT Reference No *N98/23425* (Unreported, M O'Brien, 28 April 1999).

78 See, eg, *L J v Canada* [1996] FCJ 1042 (Unreported, Federal Court of Canada, Simpson J, 26 July 1996).

79 IRB Reference No *A94-00766* (Unreported, A Macklin and J Macpherson, 26 January 1995).

80 Nonetheless there were still Canadian cases where homophobia was strongly apparent. For example, in a 1999 IRB case the Board member questioned the applicant about who 'takes the man's role in the relationship': see IRB Reference No *T97-01916* (Unreported, L Colle, 8 January 1999) [20].

81 IRB Reference No *T94-06354* (Unreported, J Ramirez and M Mouammar, 27 September 1996) [25].

82 Ibid [30]. See also IRB Reference No *A98-00268* (Unreported, P Showler, 8 August 1998) where the decision-maker based a finding of persecution on the applicant's complex identity of Tatar (ethnicity), woman and lesbian, resulting in a finding of persecution based on this combination.

83 For a copy of the Canadian guidelines see Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (1996) <http://www.irb.gc.ca/legal/guidline/women/index_e.stm> at 1 April 2002 ('Canadian Gender Guidelines'). The Australian Guidelines are not readily available (they do not appear, for

The Australian 'Guidelines on Gender Issues For Decision Makers' were developed by the Department of Immigration and Multicultural Affairs ('DIMA') in 1996 for use by Departmental Officers at the first point of determination. The Canadian 'Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution' was developed for the IRB in 1993 and was last updated in 1999. Unlike the Canadian Gender Guidelines, which are a part of the IRB process, the Australian guidelines are not binding on the review process by the RRT or the courts. In a comparative article in 1998, Audrey Macklin stated that, nonetheless, 'one can reasonably assume that members of the Australian Tribunal would be familiar with them and may find their contents persuasive.'[84]

This assumption seems entirely reasonable, and it was therefore surprising to find no reference to the Australian Gender Guidelines in any of the 42 lesbian claims decided by the RRT in our study. In an electronic search of the 24 000 decisions on the AustLII RRT electronic database (in which a casual search of 'gender' elicits over 500 claims) only four cases *in total* refer to the Australian Guidelines on Gender.[85]

The stark contrast between the results and reasoning of the Australian and Canadian tribunals suggest that the Gender Guidelines have had a significant impact, both in their use and their omission.[86]

Feminist literature on refugee law has noted that women are disadvantaged by their location in the private sphere in various ways. As women are less likely to occupy public space, men therefore constitute the bulk of claimants on grounds such as political opinion and religion.[87] Men occupy such arenas to the exclusion of women and women are more likely to be attached to a male partner's claim on such grounds.[88] In the sexuality claims we examined, gay men were also more likely to occupy public space than lesbians. However, this was not necessarily advantageous, as both gay men and lesbians were construed in the case law as not belonging to the public and so their presence there was often treated as a transgression meriting punishment.

instance, on the RRT or DIMA web pages). They are, however, reproduced in DIMA, 'Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers' (1997) Special Issue *International Journal of Refugee Law* 195 ('Australian Gender Guidelines'). See Macklin, above n 3, for an overview and comparison of the Australian and Canadian guidelines, as well as the American Gender Consideration Guidelines. Thomas Spijkerboer critiques the Australian, Canadian and American guidelines in *Gender and Refugee Status*, above n 66, 172–82. Copies of proposed and operational Gender Guidelines for Australia, Canada, the European Union, the Netherlands, South Africa, Sweden, the UK and the USA are available on the website of the Hastings College Center for Gender and Refugee Studies <http://www.uchastings.edu/cgrs/law/law.html> at 1 April 2002.

84 Macklin, above n 3, 32.

85 As at 1 April 2002.

86 This is not to suggest that the Canadian Guidelines or the IRB are above criticism: see, eg, Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (1998) 88–129.

87 See, eg, John Linarelli, 'Violence against Women and the Asylum Process' (1997) 60 *Albany Law Review* 977.

88 Noted in the Australian Gender Guidelines, above n 83, 198. See also Thomas Spijkerboer, *Women and Refugee Protection: Beyond the Public/Private Distinction* (1994) 60.

IV PUBLIC SEX AND PUBLIC SELVES

As noted earlier, the presence of lesbians and gay men in public space was readily construed as being in and of itself a sexual display. In some cases, public expressions of sexual *identity* were in issue, and in others public expressions of *sexuality* — that is, actual sex, such as sex in parks or public toilets — were in issue.[89] These are quite distinct matters but were often fused together with many decisions seguing from one to the other, or indeed treating the two as the same thing. This section suggests that the conflation of the two is initially confusing, but ultimately very revealing.

Public (anonymous) sex is generally associated with gay men rather than lesbians. I am not suggesting that lesbians can or will never express themselves in this way, just that currently they do not. There may be many reasons why men engage in public sex while women do not.[90] One reason may be that men simply 'own' and use public space in a manner that women cannot. As long as public spaces — such as parks and toilet blocks — present a significant danger to women's safety, there is little possibility that such spaces could be used to express lesbian desire. It is unlikely that any woman would wander through the most deserted avenues of the most deserted parks in her city looking for sex with women, because what she would fear would be sexual assault at the hands of men. This is not to suggest that such spaces are safe for gay men — who face the danger of gay bashing as well as undercover police operatives — but the cultural constructions of masculinity render both the likelihood and fear of this occurrence less pervasive.

The existence of public sex as an expression of gay male sexuality has often been used to deride and vilify gay men — as promiscuous, predatory, unable to form lasting relationships or relate 'normally', ie monogamously, in a sexual sense.[91] The religious Right in a number of countries has utilised imagery of anonymous promiscuity to attack gay men (and by extension lesbians), and to argue that lesbians and gay men are not 'deserving' of rights, particularly (but

89 Stephen Murray has argued:

> Most of what has been called 'public sex' either is foreplay that isn't labeled 'public sex' if it involves two sexes (eg, holding hands, kissing), or is 'public' in a formal but not substantive sense (the sections of beaches and parks that are not frequented except by males seeking male sex partners).

Stephen Murray, 'Self Size and Observable Size' in William Leap (ed), *Public Sex/Gay Space* (1999) 157, 160.

90 In my view, one reason is that women simply do not experience sexual desire in as brisk and functional a manner as men can. In his groundbreaking study of sex in public toilets in the USA in 1966, Laud Humphreys estimated that of the approximately 50 oral sex encounters between men that he witnessed, most lasted from 10 seconds to a maximum of five minutes, with many around one minute in duration: see Laud Humphreys, *Tearoom Trade* (1970) 75.

91 In his discussion of sodomy statute challenges in the USA and the UK, Larry Catá Backer concludes that gay men are 'mythological figures of disgust' in judicial discourse and that the archetypes (which he lists as the predator, pied piper, whore of Babylon and defiler of public space) have been so powerfully inscribed and reinscribed that individual narratives are absorbed by the weight of this mass of meta-narrative, and are incapable of impact as a counter-story: Larry Catá Backer, 'Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts' (1996) 71 *Tulane Law Review* 529, 531.

not only) relationship rights.[92] As a consequence, gay and lesbian activists have tended to stress a 'good' image of longstanding relationships among virtuous taxpayers[93] (and in the US have expended notable energy and funds on marriage campaigns). This defensive posture has led to a sweeping under the carpet of the fact that many gay men *do* have anonymous sex on beats[94] and (where available) gay sex-on-premises venues (such as saunas), and has stifled open discussion of what cultural meaning this self-expression may have.[95] This discussion is unavoidable when examining refugee cases involving gay men, as public sex occupies a pivotal position. It also has important implications for all aspects of gay and lesbian self-expression in public space.

The gendered nature of this issue does not prevent it being relevant to lesbians — public self-expression of sexuality and identity, although it may take different forms, is as relevant to lesbians as it is to gay men. Conversely, and perversely, the blindness to gender in many decisions meant that lesbians were treated as identical to gay men, including in the arena of public sex, despite their very apparent differences of experience. Notably, country information about homosexuality, in fact solely about gay men, was utilised in the decisions as though it were universal.[96] For example, in a 1998 case, the RRT suggested that

[92] In Australia see, eg, the contentions of Satirios Sarantakos, that findings of 'promiscuity', 'loose sexual standards' and 'cross sex identity' in same-sex relationships have

> implications for the community response to the well-framed claim of interest groups for legalising homosexual couples and allowing them to marry and adopt children. … [I]t is unlikely to expect that our community will award legal recognition to dyadic relationships that are based on promiscuity, that are morally and socially unacceptable …

Satirios Sarantakos, 'Sex and Power in Same-Sex Couples' (1998) 33 *Australian Journal of Social Issues* 17, 33. The Australian Family Association ('AFA') has consistently argued that gay men and lesbians are excessively promiscuous (including with animals such as labradors, cows and horses), are sexually deviant and diseased, are a danger to children as paedophiles and parents and ought to be deprived of their civil rights (and preferably converted to heterosexuality): see, eg, Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Inquiry into the Provisions of the Sex Discrimination Amendment (No 1) 2000* (2000) AFA Submission No 60. For a discussion of the situation in Canada, see Didi Herman, *Rights of Passage: Struggles for Lesbian & Gay Equality* (1994); and in America, see Didi Herman, *The Antigay Agenda: Orthodox Vision and the Christian Right* (1997).

[93] For critiques see, eg, Shane Phelan, *Sexual Strangers: Gays, Lesbians and Dilemmas of Citizenship* (2001); Susan Boyd, 'Best Friends or Spouses? Privatization and the Recognition of Lesbian Relationships in *M v H*' (1996) *13 Revue Canadienne De Droit Familial* 321; Diane Richardson, 'Sexuality and Citizenship' (1998) 32 *Sociology* 83; Carl Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (1998) 200.

[94] This term refers to any public or semi-public space frequented by men seeking sex with men, typically parks, and includes public toilets (which are referred to as 'cottages' in the UK and 'tearooms' in the USA).

[95] I note that in the West, many men who have sex with men in such environments may not experience or identify themselves as gay. However, I do not think we can necessarily assume that men who use beats in other countries will be similar. In Australia, for example, heterosexually-identifying men may be more likely than gay-identifying men to use beats because they do not want to be seen in gay clubs or sex-on-premises venues, whereas in Somalia beats may be the *only* venues available to both gay and non-gay-identifying men looking for sex with men. Moreover, the men I am discussing here do self-identify as gay, having made a refugee claim on that basis, so I use gay sex rather than male–male sex in this context.

[96] See, eg, RRT Reference No *N99/27818* (Unreported, D Kelleghan, 29 June 1999). Also note that the *Spartacus International Gay Guide*, referred to as a source of country information in several Australian decisions concerning lesbians, is in fact a guidebook targeted exclusively at gay men. For instance, although it contains many codes for nightclubs and other venues (denoting older crowd, leather etc) and includes a code for '[g]ay and lesbian mixed crowd' (GLM), all other codes refer implicitly to gay men and the 1995/96 edition of the guide did not even list a code

> [i]ndependent evidence shows that Beruit possesses a fair degree of gay activity despite the formal laws against homosexual acts. Homosexual guides such as *Spartacus* 98/99 … and CrusingForSex.com on the Internet point to gay cruising areas, beaches and nightclubs in Beruit. This points to a greater degree of tolerance than that purportedly found by the applicant in her village.[97]

CrusingForSex.com is an Internet site, supported by several pornographic advertisers, with listings exclusively for male–male sex venues around the world. As at 1 April 2002 it listed a single pornographic theatre in Lebanon. This sole venue (which I do not think suggests a 'fair degree', nor 'tolerance', of 'gay activity'), like the 'gay cruising areas' and 'beaches' listed in *Spartacus*,[98] would not be accessible to a lesbian — who in any case, would not find any other women there.

So although lesbians do not (generally) have public sex, and certainly not with gay men, information for men on where to cruise for sex with men was used by decision-makers to establish universal un-gendered claims that there was a 'thriving' or 'visible' 'gay scene'. These claims about public space were completely irrelevant to lesbians in those locales, yet worked to discredit their stories and disadvantage their applications.

Further, several of the cases suggest that the disgust and disapprobation to which gay men are subject regarding public sex would be visited upon lesbians, who were public or semi-public, to an equal or greater degree. Our study suggests that the expectation that women occupy the private sphere produces a greater readiness to view lesbian sexual or affectionate conduct as public and offensive — even if it is private — and punish it accordingly.

A notable case of a Chinese lesbian couple from Shanghai claiming asylum in Australia in 1998, mentioned earlier, illustrates this point. The couple had been together for some time and one partner was divorced while the other was still married. The married woman had been subjected to violence by her husband and the women decided to stay in a hotel, as they had been shunned by their families and wanted to be together. They booked in to the hotel together and on the second night of their stay were in bed having sex when two security staff entered the room. The couple were taken to a local branch of the Public Security Bureau ('PSB') where they were separately interrogated, asked to name other homosexuals and one of the women was beaten and assaulted with electric shocks.[99] The PSB told the women that there had been complaints (from occupants of the next room) of noise coming from their room and accused them of 'behaving like hoodlums … because their relationship destroyed public

indicating lesbian venues: see Bruno Gmunder, *Spartacus International Gay Guide* (24th ed, 1995) ('*Spartacus*').

97 RRT Reference No *N97/18897* (Unreported, D Kelleghan, 13 November 1998).

98 The 1995/96 edition of the guide lists one pornographic cinema, two saunas, a beach and seven cruising locales. Importantly, the decision-maker conveniently omits the information that all of these sites are coded as: 'At your own risk. Dangerous place with risk of personal attack and police activity': see Gmunder, above n 96, 557.

99 The applicant's claims of physical assault were not accepted in RRT Reference No *N97/17155* (Unreported, P White, 23 September 1998), but when her partner's case was reheard in 1999, the partner's claims of more severe assault *were* believed: RRT Reference No *N99/27818* (Unreported, D Kelleghan, 29 June 1999).

order.'[100] Although the PSB repeatedly tried to extract confessions from them, neither woman admitted to the relationship, nor signed any confession of homosexuality. When released, one woman was struck on the face and told: 'Don't let us see you doing the same thing again.'[101]

The RRT held that this incident did not constitute persecution, nor did the applicant have a well-founded fear. It stated:

> the difficulty that occurred after her lover made sufficient noise in their hotel room to disturb the occupants of other rooms and hotel staff was the *cause of her problem* with authorities. The Tribunal is satisfied that her detention over night by local police was precipitated by behaviour on the part of her lover which disturbed others enough to cause them to seek the intervention of authorities … The claims the Tribunal accepts in relation to her detention are consistent with country information that indicates that the Chinese authorities, from the highest level, accept same-sex relationships that do not provoke public attention.[102]

The RRT seemed oblivious to the idea that a non-lesbian couple might not have been treated quite so harshly — arrest, interrogation, overnight detention and assault — if they had 'disturbed the peace' in a hotel by having loud sex. The decision-maker was so focused on defending the rightness and formal neutrality of the punishment that the excessive, discriminatory and unlawful nature of that retribution was completely ignored.

The RRT asserted that there was 'an unwillingness by the authorities at all levels to act against homosexual people except to the extent that there is a breach of the peace' and continued that it was 'not unreasonable' for the women to 'be discreet in order to avoid any sort of attention.'[103] It concluded that it is 'not unreasonable' for the applicants to refrain 'from overt sexual activity in public'.[104] In this case, a hotel room — which in any other area of legal analysis would certainly be characterised as private — has become public, and the women were treated by the RRT as if they were in fact having sex in public.

When one partner's case was reheard in 1999 following an appeal, her evidence of physical and sexual abuse by the police during detention was accepted, whereas it had been doubted in the earlier hearing. However, the RRT again affirmed that this persecution was not related to a *Convention* ground, suggesting that the police were simply enforcing public order in a neutral manner. The contortions in this logic are so extreme that it is worth quoting:

> Since homosexuality is not a crime in China I do not accept that the two women would have been charged for being homosexuals, as they seemed to indicate. I accept that they could have been charged for 'hooliganism' or 'disturbing the social order'. However, it is eminently reasonable to consider the possibility that such a charge could have been pressed simply because of complaints from other people about the loud noise they were making, or because a conservative person suspected one or other or both of them of being prostitutes (they were

100 RRT Reference No *N97/17155* (Unreported, P White, 23 September 1998).
101 Ibid.
102 Ibid (emphasis added).
103 Ibid.
104 Ibid.

> apparent strangers caught having sex). In either case they could have been charged with hooliganism. It is clear that being seen naked together caused them to be labelled lesbians (perhaps pejoratively) but, homosexuality not being illegal, I am not satisfied that this was the reason they were taken to the police station.[105]

Here the fact that the women were not charged *with* homosexuality is held to evince that they were not charged *because of* their homosexuality and a variety of other reasons are invented to explain why, apart from lesbianism, two naked women in bed together might be arrested and detained. The loud noise was the noise of two women having sex, the sex with 'apparent strangers' was sex between two women and yet the RRT found that this horrific incident has nothing whatever to do with the women being lesbians.[106]

Gail Mason argues that 'homosexuality in women is understood, and responded to, within the social constructs of what it means to be a woman and how women are expected to behave.'[107] This case example shows that, as women are expected to be private and passive in their sexuality, this expectation is doubly enforced of lesbians who were portrayed by decision-makers as offensive and transgressive when *their own* private space was intruded upon by others. The previous section explored how difficult it is for lesbian claimants to satisfy the 'public' components necessary to bring a refugee claim, while this section suggests that even if they were able to do so it is possible that new and different forms of disapprobation would rain down upon them for transgressing the private/public divide.

Ruthann Robson has argued that 'the possibility is bleak that an individual narrative can remain sexual and yet adequately confront the narratives of sexual depravity and criminality entrenched in [the USA's] current jurisprudence.'[108] It seems that this possibility is also bleak in Canadian and particularly Australian refugee jurisprudence. Decision-makers had particular difficulty in 'seeing' persecution when it arose in a situation of public sex or other form of public sexual expression. Some decisions denied that the right to self-expression for gay men extends 'that far' and often expressly affirmed the criminality of such conduct in 'our' country. Larry Catá Backer notes that in the UK and in many states of the USA, the decriminalisation of gay sex was accompanied by the preservation (or tightening) of other criminal laws on soliciting, public decency and public sex.[109] This is also generally true of Australian states, demonstrating

105 RRT Reference No *N99/27818* (Unreported, D Kelleghan, 29 June 1999).

106 See also a 1999 case where police came around to try to drag the applicant's girlfriend back to her family on the basis of family complaint. The applicant stood up to police and was arrested and detained. The RRT suggested that she must have been provocative:

> Her own description of her first encounter with the police which resulted in her two week detention suggests that she confronted them as much as they challenged her. That is, the Tribunal is unable to conclude that she was simply a victim and did not contribute to being taken into custody. It notes that she was not ground down by this treatment but attempted to sue the local police.

RRT Reference No *V98/09498* (Unreported, J Wood, 30 March 1999).

107 Mason, 'Heterosexed Violence', above n 61, 23.

108 Robson, above n 54, 1423.

109 Backer, above n 91, 556–65. For a detailed discussion of the development of English law on this issue see Leslie Moran, *The Homosexual(ity) of Law* (1996).

a continued maintenance and policing of the public/private divide, particularly concerning gay sexuality.[110]

Male claimants in our study, as mentioned above, had both a much larger number of total claims and a higher rate of overall success in their claims than did women. In general, it was easier for gay men to make out the public aspects of their cases — for instance coming to the notice of the police and being persecuted directly or being refused assistance by them. However, there was a constant theme in the cases regarding gay men being 'too' public, either through public sex or other forms of self-expression. At times, discussions of sex and other forms of self-expression were blurred in the reasoning (and in the decision-makers' minds, I would argue), a factor which emphatically underlines the important role that public sex plays in an articulation of what 'right' there is to be gay or lesbian in refugee law and how the RRT saw itself as determining (and indeed policing) the boundaries of acceptable behaviour within that identity.

The tribunals did find in favour of gay men in some cases where persecution was connected in some way to public sex, but only where it fell short of actual sex in public. In doing so, the decision-makers went to some lengths to render the applicant's conduct a result of necessity rather than choice. When faced with beats as the only available gay venue in the applicant's locale, decision-makers were sometimes able to reconfigure public sex locales into something more akin to a social club or gay bar. These were thereby legitimated as the only avenues in which the applicant could express his sexuality or meet a partner. Through a series of links, public sex became connected to human rights and protected as integral to identity. However those links both serve to distance refugee law from public sex and to insert a series of hurdles which applicants must face in order to legitimate their claims. Ultimately this chain of reasoning connecting identity with 'necessary' expression leads to a restriction in applicants' rights to assert their public selves in any way.

In a 1996 Australian case concerning a gay man from Poland, the applicant had been twice attacked when walking along well-known beats (a mall and a river). On the first occasion he had been arrested, detained and bashed by police, and on the second occasion had been bashed by a group of drunken men who claimed to be off-duty police. The RRT noted that he 'gave frank evidence that his purpose in being there at the time was to make a sexual encounter' and reasoned that

> [w]hile the harm that he encountered on some such occasions is entirely reprehensible it remains the case that there is a reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection. Nevertheless, the Tribunal recognises that in some countries

[110] For instance, the last Australian state to decriminalise gay sex in 1997, Tasmania, only did so following an adverse report by the UN Human Rights Committee (*Report of the Human Rights Committee*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)) and the passage of a Commonwealth Act intended to override the Tasmanian laws: the *Human Rights (Sexual Conduct) Act 1994* (Cth). The Act legalised consensual adult sex in private, and there was much anxious debate at the time about what 'in private' meant. See Wayne Morgan, 'Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *Melbourne University Law Review* 740. For a discussion of the campaign for decriminalisation in other Australian states see Graham Willett, *Living Out Loud: A History of Gay and Lesbian Activism in Australia* (2000).

> virtually the only way in which homosexual persons may be able to give expression to their sexuality is by reconnoitring in public places where the risk of danger is heightened.[111]

In this case there was a lengthy and relatively thoughtful consideration of public sexual expression within a human rights framework. However, the RRT expressly held that public sex would not be protected. The member argued that 'neither heterosexuals nor homosexuals enjoy a right to behave indiscreetly. A range of laws and normative demands regulate the social and sexual behaviour of all citizens in relation, for example, to the public expression of sex.'[112]

The RRT reasoned that differential application of standards (such as public decency statutes) may be discriminatory, but would only attract human rights protection when it involved the exercise of a 'core right'. The RRT concluded:

> If persons' indication of their sexual orientation, even by subtle means, holds a risk of serious harm, then a likely outcome is that they will effectively be denied any expression of their sexuality, including in private. … [I]n order for consensual sex to take place in private there is ordinarily a need for the participants to acknowledge, in some prior public way, their sexual orientation.[113]

Public identification, including sexual expression short of actual sex, is permissible *only* in order to achieve sex in private. Public sex under this analysis remains indefensible, presumably even if it were to attract prosecution and perhaps even persecution (ie bashing, false imprisonment, etc, in addition to regular criminal sanctions).

Mr Gui, discussed in the Introduction, was in many ways the model citizen within such a framework, in that he was with a long-term partner, and in a park out of necessity rather than choice. He was not, for instance, having sex with various anonymous partners, or in a park because beats were his preferred sexual environment. In terms of stereotypical understandings of gay men as promiscuous and depraved, Mr Gui was a 'good' gay man. It is important to remember at this point that his experience was nevertheless not accepted as persecution and his claim was unsuccessful. Likewise in a 1999 Australian case, a gay Chinese couple gave evidence that they had twice been detained by police after being caught having sex in a park. They were beaten and suffered serious discrimination as a result of their arrests. The RRT concluded bluntly: 'The Tribunal finds that the treatment the applicants encountered was quite clearly as a result of them having been found having sex in public places and not for reason of their homosexuality per se.' It added 'it is quite likely that the applicants

111 RRT Reference No *V95/03527* (Unreported, G Brewer, 9 February 1996).

112 Ibid. See also a 1999 case where the RRT stated that '[o]vert public sexual activity of any sort, heterosexual or homosexual, has not been acceptable in China and the Tribunal does not find that it is a denial of a fundamental human right that such behaviour in public be regulated': RRT Reference No *V98/09111* (Unreported, J Wood, 22 February 1999).

113 RRT Reference No *V95/03527* (Unreported, G Brewer, 9 February 1996). See also a 1995 case which draws a distinction between public expression of identity in order to meet someone with whom to have private sexual contact and public sexual expression: RRT Reference No *V95/03188* (Unreported, R Hudson, 12 October 1995).

would have faced much more serious sanctions had they been involved in the same behaviour in Australia.'[114]

In many decisions, tribunals have held that gay and lesbian claimants could escape persecution by avoiding public notice through being 'discreet' (even, in an extreme case, the Australian RRT suggested, by marrying and leading a 'secret gay life'[115]). There has been much comment and critique of the so-called 'discretion requirement' in refugee jurisprudence on sexuality.[116] I will not elaborate at length upon it here, except to note that this discreetly phrased requirement of secrecy and suppression was a distinct and regrettable feature of Australian case law in strong contrast to the Canadian cases. In our research, 'discretion' arose as a theme in 33 per cent of Australian cases and was expressly *required* of the applicant by the RRT in 21 per cent of cases. In contrast, it arose as a theme in only 8 per cent of Canadian cases, although it was required in a significant number of the Canadian cases where it was raised (five of the 10). Thus it was expressly required in 4 per cent of Canadian cases.[117] The Australian RRT has continued to debate the issue in recent years, with some members imposing a requirement on applicants that they must avoid persecution by being 'discreet'[118] and reasoning that '[i]t is not an infringement of a fundamental

[114] RRT Reference Nos *N98/25853 and N98/25980* (Unreported, P Cristoffanini, 11 May 1999). Both men were young and one of them was under the NSW age of consent for male–male sex at the time of the incident. Nonetheless I suggest that the RRT would be hard-pressed to produce evidence of two young gay men in NSW facing 'more serious' sanctions than prosecution, job loss and officially sanctioned police bashing as a result of consensual sex.

[115] RRT Reference No *N97/14489* (Unreported, P Gutman, 23 July 1998). See also RRT Reference No *N98/23955* (Unreported, P Gutman, 24 September 1998) (both concerning claims from Nepal). This statement in *N97/14489* was strongly disapproved of in obiter on appeal: *Bhattachan v Minister for Immigration and Multicultural Affairs* [1999] FCA 547 (Unreported, Hill J, 27 April 1999) [8]–[9].

[116] See generally Walker, 'Sexuality and Refugee Status in Australia', above n 13, 203–7.

[117] The requirement of secrecy is much less a feature of Canadian decisions, which have tended to assume that being gay or lesbian means being openly so. See, eg, a 1996 Canadian case concerning an applicant from Singapore where the IRB stated that 'the claimant is a person who has now accepted that he is gay and who is fiercely proud of it' and concluded without further ado that he would therefore be at risk: IRB Reference No *U94-03926* (Unreported, L Chan and W Jackson, 29 May 1996) [36]. And in 1998, the Canadian IRB completely rejected the idea of requiring discretion and held that sexuality was comparable to religion: IRB Reference No *V96-03502* (Unreported, Z Sachedina and A Terrana, 7 August 1998). It is possible that the Canadian case law has focused more upon internal flight as an option for applicants to avoid persecution.

[118] See, eg, a 1998 RRT decision where the member rejected earlier analysis that such a requirement was discriminatory and unnecessary. Member Hudson stated (regarding a gay applicant from Sri Lanka) that there was an opportunity for the applicant to 'practise his sexuality safely provided he is discreet. That is to say, provided that he does not openly proclaim himself to be homosexual or parade his sexual preferences in public' and went on to state that earlier analysis (in a 1996 case, RRT Reference No *V95/03527* (Unreported, G Brewer, 9 February 1996), quoted below n 120) had not sufficiently distinguished between 'active concealment, or suppression, of one's sexuality and non-proclamation of it.' Member Hudson concluded that suppression may be an infringement of a fundamental human right but 'simply not to proclaim that sexuality openly' for 'safety's sake' is not: RRT Reference No *V98/08356* (Unreported, R Hudson, 28 October 1998). This decision was upheld on appeal: *'Applicant LSLS' v Minister for Immigration and Multicultural Affairs* [2000] FCA 211 (Unreported, Ryan J, 6 March 2000). A 1999 RRT case held that a gay Chinese man could avoid a risk of harm from the authorities by not frequenting gay meeting places and that this did not derogate from 'his fundamental right to express his sexuality': RRT Reference No *V98/09564* (Unreported, J Vrachnas, 4 May 1999).

human right if one is required, for safety's sake, simply not to proclaim that sexuality openly.'[119]

Other decision-makers have held that such a requirement is inherently discriminatory and treats gay and lesbian refugees on a different footing to other refugees.[120] It is noteworthy that the Australian RRT was occasionally explicit about the underlying premise entailed by such 'discretion' in a country such as China with neighbourhood and workplace surveillance: a discreet gay life equates to public anonymous gay sex.[121] In its own words, 'a homosexual in China who was content to find sexual expression in casual liaisons in public parks could possibly escape notice and thus avoid arrest.'[122]

119 The decision continues:

> Individuals of a variety of sexual orientations live side by side in a society like Ghana and practise their sexual orientations privately without feeling a need to proclaim these orientations to the general public. The public manifestation of homosexuality is not an essential ingredient of being homosexual. … The Applicant appears to be a man for whom discretion is not an unreasonable imposition.

RRT Reference No *N98/24718* (Unreported, S Russell, 19 March 1999). In more recent cases the RRT has found it is 'not an unreasonable imposition' for the applicant to be required to be 'discreet' as 'he has no particular mannerisms of dress or behaviour which mark him out in any way': see RRT Reference No *N98/22311* (Unreported, S Zelinka, 22 September 1998); this is repeated almost verbatim in RRT Reference No *N97/19504* (Unreported, S Zelinka, 28 September 1998) (both cases concerning gay men from Lebanon). However, note that in the Federal Court case *Minister for Immigration and Multicultural Affairs v Guan* [2000] FCA 1033 (Unreported, Moore J, 2 August 2000) [24], Moore J held that the RRT is not *required*, as a matter of law, to consider if the applicant could avoid harm through 'discretion'. In that case the RRT had not considered this point and had proceeded to find in favour of the applicant.

120 The requirement was rejected as early as 1996 where the RRT stated:

> there is no sustainable basis for importing into refugee law a requirement in relation to the core rights of homosexuals that is different from that which applies, say, to heterosexuals, or to persons holding religious convictions, or to persons of a particular race. Although it is arguable as to what actually constitutes core rights, there seems no doubt that they would include a right to openly acknowledge one's sexual identity and to behave in ways that do not amount effectively to the renunciation of that fundamental characteristic.

RRT Reference No *V95/03527* (Unreported, G Brewer, 9 February 1996). See also a 1997 case where the RRT stated that 'to require a person to hide or deny their sexuality in order to avoid adverse treatment is as unacceptable as requiring a person to deny their religious or political beliefs': RRT Reference No *N96/11136* (Unreported, K Rosser, 27 October 1997).

However in many cases, particularly regarding applicants who have had secret lives up to the point of departure, the RRT has found that future persecution is unlikely because of the past discretion. So rather than expressly imposing a requirement of future secrecy, it is simply assumed in the absence of other evidence: see, eg, RRT Reference No *V97/06802* (Unreported, J Wood, 30 September 1997); RRT Reference No *N98/23086* (Unreported, K Rosser, 8 July 1998); RRT Reference No *N94/04854* (Unreported, J Woodward, 21 July 1998); RRT Reference No *N95/09552* (Unreported, J Woodward, 4 September 1998).

121 This reasoning was also implicit in a number of cases concerning claims from Lebanon: RRT Reference No *N98/22311* (Unreported, S Zelinka, 22 September 1998); and Bangladesh: RRT Reference No *V97/06483* (Unreported, J Wood, 5 January 1998); RRT Reference No *N98/20994* (Unreported, K Rosser, 4 May 1998).

122 RRT Reference No *N93/00846* (Unreported, R Fordham, 8 March 1994). However in that case the RRT found that the applicant was in a relationship that was 'serious, monogamous and one of longstanding', making discretion difficult and added that 'the consequences and potential suffering must be looked at in terms of the meaning of the relationship as well as the denial of his right to sexual expression.' *Contra* RRT Reference Nos *N98/24186 and N98/24187* (Unreported, L Hardy, 28 January 2000) which concerned a gay couple from Bangladesh:

> The seemingly ironic expectation of being able to maintain anonymity in what is after all a public toilet, coupled with the equally ironic anticipation of meeting someone with common purpose in such places, would appear, from much of the evidence submitted by the Applicants, to have nothing to do with a lack of concern about being detected.

This evidence is sadly at odds with the experience of Mr Gui and the gay couple mentioned above who were arrested doing just that. It is strange that the RRT used the availability of public sex as a reason for denying refugee status (a discreet outlet is available), while simultaneously refusing to protect men who were persecuted for availing themselves of this option, because they had broken the law. These contradictions, indeed contortions, demonstrate that public space is at once viewed in the case law as the site of outraged public morals and as the site of gay invisibility through anonymity.

In a 1996 Australian case which rebutted the trite application of 'neutral' standards to public sex and critically reviewed earlier cases (involving decisions that gay men in China could avoid persecution by 'being discreet') the decision-maker stated:

> No-one appears to have properly addressed the question of context. It may be considered discreet for a heterosexual couple to copulate in the house of either partner or in their shared dwelling. It should not be assumed that the same is necessarily true for homosexuals in the PRC [People's Republic of China], given the possibility of attention paid over time by neighbours.
>
> It seems to have been assumed that sexual activity in public toilets cannot from any viewpoint be considered as 'discreet'. However, this again is a question of context. …
>
> As unsavoury as it might seem to a person accustomed to regarding his or her home the more private place, a toilet in a park might afford the one thing that a person fearing exposure can not count on in his own neighbourhood: anonymity. The very practice, as noted in the evidence relied upon by other decision-makers, does not appear to have been fully considered as evidence of fear; rather, along with public hand-holding, it appears largely to have been considered merely as homosexual conduct or homosexual behaviour. Ironically, it is reasonable to infer that many homosexuals who frequent the parks of Shanghai go there to pursue innate need, not commonly questioned in relation to heterosexuals, whilst endeavouring to protect their reputations at home.[123]

Although refreshingly alive to the question of context, this analysis is not without its difficulties. Here, beats are construed as private and their use is associated with fear and lack of choice. Once again, sexual expression is only protected if it is 'private'[124] although the site of the private has shifted to take context into account.[125] The lack of choice, an exercise of 'innate need',

[123] RRT Reference No *N96/10584* (Unreported, L Hardy, 15 March 1996). The lack of a precedent system is again made apparent when it is noted that later Australian cases ignore this analysis. For instance in a 1999 case a Chinese gay couple arrested having sex in a park and persecuted by the police and other authorities were held not to have been persecuted 'for reason of their homosexuality per se': RRT Reference Nos *N98/25853 and N98/25980* (Unreported, P Cristoffanini, 11 May 1999).

[124] Diane Richardson notes:

> There is an interesting tension in the use of the term 'private' to demarcate the boundaries of (homo)sexual citizenship. Whilst lesbians and gay men are banished from the public to the private realm they are, in many senses, simultaneously excluded from the private where this is conflated with 'the family'.

Richardson, above n 93, 90.

[125] In another 1996 Australian case concerning a gay man from China the Member stated:

produces gay men who have sex on beats as a defensible object of human rights law — in contrast to gay men or lesbians who engage in 'behaviour' which is a choice, like hand-holding in public.[126]

While I do think that expression of one's sexuality is fundamental, the term 'innate need' exemplifies a highly gendered construct of male sexuality, present in much legal discourse, as undeniable and uncontrollable. This stands in stark contrast to female sexuality, which is constructed as passive and readily suppressed. For instance, in one 1995 decision the Australian RRT essentially held that the lesbian applicant would face no hardship if forced to return to China and lead a celibate life.[127] In that case the applicant was lesbian-identified and had been turned out of home and ostracised by her family as a result. Her evidence was that she had been too afraid to try to begin a lesbian relationship in China. The RRT responded:

> Apart from disclosing her sexual preference to her parents she was discreet about her sexuality in the PRC and, if she continued to do so, the available information indicates that the applicant would not in the PRC, face a real chance of persecution on this ground. The applicant gave no evidence that she would pursue an overt relationship should she return. The Tribunal concludes, therefore, that if returned to China she could continue to follow her previous lifestyle without fear of persecutory consequences.[128]

In another case, a Chinese lesbian did have a relationship and her girlfriend had also left China for Australia where they lived together. The RRT reasoned that when the applicant was returned to China, she would therefore 'ironically' be less conspicuous, as she would be permanently separated from her partner (and implicitly, remain celibate as a result).[129] Women's innate needs are not apparently as pressing as men's, and while the construction of 'discretion' or 'private' sexual expression in the decisions may constrain men to lead a secret sexual life, for women it may mean no sexual life at all.

> A distinction should be drawn between a lifestyle involving anonymous, and perhaps casual, encounters following meetings in well-known public meeting places, on the one hand, and a lifestyle based on long-term cohabitation, or virtual cohabitation, on the other. It is possible to speak of the former situation as public though discreet, and to speak of the latter situation as private but not discreet.

RRT Reference No *V96/04281* (Unreported, J Billings, 27 June 1996). In that case the applicant stated that he did not want anonymous casual sex and, although single, hoped instead to settle down with a partner. His claim was successful.

126 Cf a 1999 Canadian case involving a gay Mexican man who

> does, from time to time, dress as a transvestite. … The panel is of the opinion that the claimant's profile is fairly high, that if he were to return to Mexico and continue to pursue the lifestyle that he feels he needs to live in order to preserve his human dignity, that he would no doubt come to the attention of the police and others …

IRB Reference No *T98-03951* (Unreported, H Wolman and M Okhovati, 24 June 1999) [11]–[12].

127 RRT Reference No *V95/02999* (Unreported, K Boland, 26 April 1995).

128 Ibid.

129 RRT Reference No *V97/06802* (Unreported, J Wood, 30 September 1997):

> It is ironic that it is this secrecy and the fact that the partner is in Australia which diminishes the Applicant's claim that she would be at risk of harm should she return to China. On her own evidence she is a quiet and discreet person, unlikely to act in a manner to provoke the authorities or public opinion against her and her long term partner lives in Australia.

Furthermore, as radical as the earlier quoted analysis of beats is in the context of refugee law — in that it seeks to protect, in certain circumstances, gay men who engage in public sex — it does not countenance the possibility that men may go to beats because they want to and they like it. Big cities with numerous gay bars, gay clubs, sex-on-premises venues and social groups still have beats. For some gay men, beats are a matter of choice, indeed a matter of preference.[130] I wonder if it is possible to articulate this expression of sexuality in a human rights framework if it involves choice? Is it possible to discuss public gay sex as an expression of *culture* as well as individual identity and sexuality[131] in a manner which is in any way intelligible to heterosexual people? And is it possible to do so in a manner which is feminist?

These questions are clearly for the future, in Australia at least, as the Federal Court has affirmed the position that the only protected public expressions of gay identity in Australian refugee jurisprudence are those required to get private sex: there is a right to a secret gay life.[132] It is a sad reflection that a line of reasoning originally seeking to connect public sexual expression with human rights by a series of links — and thereby to protect what would otherwise be viewed as criminal conduct — has in fact turned full circle and has been used to limit and circumscribe the most everyday expressions of gay and lesbian subjecthood, such as the much decried hand-holding.

Gail Mason has argued that

> [v]iolence cannot stop women from being lesbian; it cannot stop men from being gay. But it can, and does, stop people from openly expressing their sexuality. In this context the words of French feminist Monique Wittig are pertinent. She suggests that as soon as the lesbian 'appears' in a social context, every effort is exerted to make her 'disappear'. In this sense, heterosexed violence is most effective, not as an attempt to prohibit lesbian or gay sexuality, but as a form of regulation over its public expression.[133]

I believe that, by and large, the Australian RRT has colluded in this project, as it has deliberately sought to exercise control over, and to draw limits around, the public expression of gay and lesbian sexuality. The place of public sex has varied

130 See, eg, Gary Dowsett, *Practicing Desire: Homosexual Sex in the Era of AIDS* (1996) 146–8.

131 See, eg, William Leap (ed), *Public Sex/Gay Space* (1999).

132 See also a 1998 Australian RRT case affirming that '[t]he right to free expression of sexuality does not extend so far as a right to publicly proclaim one's sexuality' and that it is reasonable to avoid 'overt manifestations of homosexuality such as public embracing' which, while 'irksome and unjust', is not an infringement of human rights. However if 'a homosexual can only practise his sexuality by seeking out other homosexuals in places such as public parks or toilets where there is a serious risk that he will be beaten up by gangs or taken into custody by the police, then his basic rights are infringed': RRT Reference No *V96/05496* (Unreported, R Hudson, 15 January 1998). In another 1998 decision the RRT drew a 'vital distinction between religion and politics, which require public manifestations, and sexuality, which does not' in stating that there was no right to 'openly proclaim', 'parade' or 'flaunt' gay sexuality: RRT Reference No *V98/08356* (Unreported, R Hudson, 28 October 1998). On appeal the Federal Court (re)interpreted these offensive terms to deduce that the RRT had drawn an (unstated) distinction between making one's sexuality known for the purposes of finding a partner (which was protected conduct) and making one's sexuality known more widely — which it termed 'indiscriminate disclosure' (which was not protected conduct). The Court dismissed the appeal: *'Applicant LSLS' v Minister for Immigration and Multicultural Affairs* [2000] FCA 211 (Unreported, Ryan J, 6 March 2000) [18]–[24].

133 Mason, 'Heterosexed Violence', above n 61, 27 (citations omitted).

on this boundary, at times inscribed as public and at times as private, at times as a 'necessary evil' and at others as a neutrally created and punished crime, but at all times to signify that there is no unbounded 'right' to be gay or lesbian in any public sense.

In a paper on sexual citizenship in the UK, Diane Richardson has argued that

> [l]esbians and gay men are … seen as deserving of certain rights and protections in many Western countries; however the terms on which these 'rights and protections' are 'granted' are the terms of partial citizenship. Lesbians and gay men are entitled to certain rights of existence, but these are extremely circumscribed, being constructed largely on the condition that they remain in the private sphere and do not seek public recognition or membership in the political community. In this sense lesbians and gay men, though granted certain rights of citizenship, are not a legitimate social constituency.
>
> This is a model of citizenship based on a politics of tolerance and assimilation. Lesbians and gay men are granted the right to be tolerated as long as they stay within the boundaries of that tolerance, whose borders are maintained through a heterosexist public/private divide.[134]

This appears true of the RRT's utilisation of the public/private divide too. The RRT has denied the transformative political potential of gay and lesbian identity — that visibility is itself a part of transforming oppressive and discriminatory cultural attitudes just by *being*. Shane Phelan has argued, in the context of the US, that

> [v]isibility is no guarantee of either citizenship or equality. Visibility is, however, essential on one level. A group that is consistently present only as the opposite or the outside of the nation, that has no part in the national imaginary except as threat, cannot participate in citizenship …[135]

In some instances the official position of the applicant's country of origin is that homosexuality does not exist at all.[136] In many other countries, such as Zimbabwe, the government position is that homosexuality is a Western import and that there is no 'genuine' existence of homosexuality at a national level.[137] Such attitudes cannot change without visible lesbian and gay communities.[138] Yet when a Chinese gay applicant argued that his claim was also on the basis of political opinion, because every gay person is political just by being gay, the Australian RRT rejected the argument out of hand as frivolous and irrelevant.[139] By imposing a requirement of invisibility, Western decision-makers have

134 Richardson, above n 93, 89.

135 Phelan, above n 93, 6–7.

136 For example Nepal: see, eg, RRT Reference No *N97/14745* (Unreported, L Hardy, 14 July 1998) and Tanzania: see, eg, RRT Reference No *V96/05496* (Unreported, R Hudson, 15 January 1998).

137 See, eg, above n 1 and accompanying text.

138 Phil Hubbard argues that, '[i]n particular, it has been recognized that the transgression of public spaces may be a potent means for lesbians, gays and bisexuals to destabilize and undermine processes of homophobic oppression': Phil Hubbard, 'Sex Zones: Intimacy, Citizenship and Public Space' (2001) 4 *Sexualities* 51, 61.

139 RRT Reference No *N97/20090* (Unreported, G Short, 8 March 1999).

implicitly committed themselves to preserving (if not endorsing) the cultural status quo in the applicants' countries of origin.[140]

V CONCLUSION

The decisions examined in this study are potent evidence of the public/private divide in the Western refugee-receiving nations of Canada and Australia. What is, and what is not, protected conduct in the decisions effectively decrees what is, and what is not, proper for lesbians and gay men to do, both here and 'there'. The result of this projected sense of the public/private divide is to trap applicants in a tightly woven paradox. If they are too public (and for lesbians this is easily achieved as the expectation that they be private is doubly inscribed upon them as women), they are transgressive, repellent and in danger of being rejected as deserving of the abuse they have experienced. If they are too private, they risk their claims not qualifying as persecution: the persecution is characterised as merely private and/or readily avoided.

This paper has concerned itself with the questions of empathy and imagination, and concludes that it is these qualities, more than any legal norm, that require investigation and change in refugee law on sexuality. Their absence means that many decision-makers are unable to see the other, the applicant, and cannot receive stories from them in any real way. Decision-makers have imposed self onto other and projected their own sense of what the sexual, the public and the private are (and ought to be). To date this projection has had disastrous consequences for lesbian and gay asylum-seekers.

[140] *Contra* a 1998 Canadian case concerning a Russian lesbian:

> On a personal note, I would like to say that you have done extremely well here in Canada. You have discovered what it means to be free, in the sense of being who you are. And as you explained in your own testimony, the experience of such freedom would have made it even more difficult to go back to your former existence. I wish you well in Canada.

IRB Reference No *A98-00268* (Unreported, P Showler, 8 August 1998) [19].