

# Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' is no Longer an Option, will Equality be Forthcoming?

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## Abstract

This paper will analyse a recent decision of the Australian Refugee Review Tribunal in which a young gay Iranian man was denied refugee status on the basis that he could avoid persecution in Iran by 'acting more discreetly' and by leading a less 'public' sexual profile.

Contrasting this decision with a recent decision of the High Court of Australia in which the 'discretionary option' was explicitly rejected by a majority of the Court hearing the case of two gay Bangladeshi men, this paper will highlight that the reasoning used by the Tribunal misunderstands the nature of sexuality-based discrimination and offers a line of reasoning that is central to ensuring the types of inequalities and biases that are at the heart of sexuality-based discrimination and that perpetuate the inequalities which international human rights instruments seek to eradicate.

While applauding the High Court's rejection of the 'discretionary option' used by the Refugee Review Tribunal, this paper will argue that a much stronger understanding of the sex equality implications of the Tribunal's decisions in this regard is needed if lesbian and gay refugee claimants are to find real protection in Australia. Some have criticised the High Court's latest judgment on lesbian and gay refugees as 'interventionist', even 'radical'. These critics do so because they fail to recognise what homophobia is and what the demands of equality require of the Court in its interpretation of the Convention Relating to the Status of Refugees. Overall, it will be argued that, applying a sex equality analysis of anti-lesbian and anti-gay discrimination, it is clear that, while the High Court has now recognised the errors of discretion, it has yet to find the voice that true systemic equality demands.

## 1. Introduction

I'm gonna run

I'm gonna run

I'm gonna run to the city of refuge

—*I'm Gonna Run to the City of Refuge*, Blind Willie Johnson

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The experience of fleeing persecution, of seeking refuge is an age old one. It has pervaded religious mythology (Jewish Passover), popular culture (Nick Cave, *City of Refuge*) and philosophy (Derrida, *On Cosmopolitan and Forgiveness*). The legal discourse of refugee jurisprudence transforms a pre-existing asylum discourse into one about the refugee, the alien, the other. The process of seeking asylum itself constantly challenges the notion of legitimacy of the refugee. Refugee jurisprudence rests comfortably within liberal legal discourses of law as objective, law as impartial fact finder. Increasingly this notion of neutrality is being challenged. Self-reflexive analyses call into question legal decision-makers' subjectivity. In this paper I hope to address some of the underlying ideological and political concerns that inform dominant norms of refugee decision-making bodies, particularly within Australian contexts. The process of asylum seeking will be examined from the perspective of refugees applying for asylum based on persecution because of sexual orientation.

Australian courts now accept that persons fleeing persecution on the basis of sexual orientation are entitled to claim protection under the international 1951 Convention Relating to the Status of Refugees, assuming they can prove a risk of persecution if returned to their homeland.<sup>1</sup> The experiences of lesbians and gay men worldwide support such a finding. To varying degrees, lesbians and gay men have been and remain targeted for persecution because of their sexuality. While the extermination of homosexuals in Nazi Germany during World War Two stands out historically as but one example of the lengths to which states will go to silence the public expression of lesbian and gay sexual identities, more recent examples also reveal the extreme brutality to which gay men and lesbians remain subjected in many nations. In Iran and Saudi Arabia, for example, lesbians and gay men risk death by stoning or hanging; in Romania, imprisonment; in China, labour camps.<sup>2</sup>

Despite these facts, in Australia, numerous decisions of the Refugee Review Tribunal have threatened to unravel, perhaps even make

<sup>1</sup> See Convention Relating to the Status of Refugees (done at Geneva 28 July 1951) as amended by the Protocol Relating to the Status of Refugees (done at New York on 31 Jan. 1967). Hereafter, the 'Convention'. An overview of the case law in this regard is discussed below at n. 18.

<sup>2</sup> Equality for Gays and Lesbians Everywhere (EGALE), 'Recommendations to the Department of Immigration on Reforming and Enhancing Canada's Immigrations Laws and Policies', available at <http://www.egale.ca/legal>. See also, Amnesty International, *Breaking the Silence: Human Rights Violations Based on Sexual Orientation* (AI USA Report, Feb. 1994); Suzanne B Goldberg, 'Give me Liberty or Give me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men' 26 *Cornell International Law Journal* 605 (1993); B Gmunder, ed, *Spartacus International Gay Guide 1998-1999* (1998); A Hendriks et al. eds, *The Third Pink Book: A Global View of Lesbian and Gay Liberation and Oppression*; M Dutton, editor, *Streetlife China* (1998); F Dikotter, *Sex, Culture and Modernity in China* (1995). Refer also to the following websites for information on specific human rights abuses against lesbians and gay men in particular countries: Amnesty International (<http://www.amnesty.org>); Chinese Society for the Study of Sexual Minorities (<http://www.geocities.com/nanfeng/cssm.html>); International Lesbian and Gay Association Homepage (<http://www.ilga.org>).

a mockery of, the rights and protections guaranteed under the *Convention*. Specifically, while acknowledging that lesbians and gay men do face documented, undisputed suppression and discrimination in many nations because of their sexual orientation, the Tribunal has seen fit to rule that, unlike other targeted minorities, lesbians and gay men can avoid persecution because they have the 'option' of being 'discreet' about their sexual orientation. As such, the Tribunal has declared, they should not be offered refugee status in Australia.

On 9 December 2003, the High Court of Australia, in a 4 to 3 judgment, ruled that the use of this 'discretionary analysis' was not valid in law; thereby progressing to a considerable extent the right of lesbians and gay men to claim refugee status in Australia should they be able to prove fear of persecution in their homeland.<sup>3</sup> While there is considerable merit in the Court's analysis in this regard and the decisions of Kirby and Gummow JJ in particular are particularly scathing of the notion that it is acceptable for the Refugee Review Tribunal to demand, indeed expect, discretion from lesbians and gay men, this case will not, for the most part, be the focus of this paper — not because it is not a case worth applauding but because it does not adequately detail what anti-homophobic bias means socially. As a result, what could have been its true impact — equality — simply will not be. Specifically, by not detailing the links between homophobia and other forms of social prejudice, the Court leaves open the door for other 'justifications for exclusions' which allow lower courts and the Tribunal the 'option' of denying lesbians and gay men their right to a safe haven in Australia. Hence, while the case is certainly a progressive step in the right direction, more remains to be done to educate those responsible for the lives of those seeking asylum on the basis of sexuality, about what sexuality discrimination means, how it works and why ignoring its impact does little more than leave systemic bigotry in tact.

This paper will analyze what the High Court did not do in its most recent decision: the nature of anti-lesbian and anti-gay prejudice and argue that in many ways, homophobia amounts to practice of sex discrimination. To do so, I will focus on the case of a young gay Iranian man (hereafter referred to as Mr 'S') in his struggle to claim refugee status because of feared persecution.<sup>4</sup> In that case, the Refugee Review Tribunal

<sup>3</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S* [2003] HCA 71 (9 Dec. 2003). An excellent overview of the facts of the case and the legal reasoning of the lower courts can be found in Catherine Dauvergne and Jenni Millbank, 'Before the High Court: Applicants S396/2002 and S395/2002 — a gay refugee couple from Bangladesh' [2003] *Sydney Law Review* 6 (2003).

<sup>4</sup> Refugee Appeal Tribunal, Sydney: 24 Apr. 2001 (N01/37352), Tribunal Member: Ron Witton. Affirming decision of Minister for Immigration and Multicultural Affairs not to grant a protection visa. As required by section 431 of the *Migration Act 1958*, the young Iranian man in question must not be identified. For the remainder of this paper, the claimant will be referred to as 'Mr S'. The decision of the Tribunal was set aside by Lee J of the Federal Court of Australia (*W133/01A v. Minister for Immigration & Multicultural Affairs* [2002] FCA 395) on 5 Apr. 2002 and the matter remitted to the

found that, although the evidence regarding anti-gay and anti-lesbian persecution in Iran could not be doubted, Mr S should nevertheless be denied refugee status because he was able to avoid persecution by leading a more 'discreet', less 'public' lifestyle. To my mind, this analysis reveals a deep misunderstanding of the nature of anti-lesbian and anti-gay bias and is indicative of a much broader social myopia about the impact and meaning of both sex and sexuality-based discrimination. It will be argued that by not addressing this inherent bias/prejudice in its most recent same-sex refugee case, the High Court's attempt to address the misuse of what I will call the 'discretionary option' will fail to adequately protect lesbians and gay men from homophobic bias before those tribunal members who fail to understand the meaning and effect of homophobic stereotyping. Such an analysis is required if we are to stop the inequalities central to the types of social biases and inequalities that are at the heart of anti-lesbian and anti-gay discrimination and violence and that perpetuate the inequalities which international human rights instruments seek to eradicate.

Specifically, it will be argued that homophobia can be seen as a reaction to the actual or perceived violation of those gender norms and roles through which male dominance and compulsory heterosexuality remain intact. Anti-lesbian and anti-gay stereotypes and the harms that result from them aim to silence the public expression of non-heterosexual sexual identities and both foster and maintain 'appropriate' gender role behaviour. Lesbian and gay relationships have the potential to reject hierarchical concepts of gender. They therefore challenge the notion that social traits, such as dominance and submission, masculinity and femininity, equal and non-equal are innate, needed, compulsory. Because they do so, lesbians and gay men are seen as challenging patriarchy and the male supremacy derived from it and are consequently punished for failing to conform. Homophobia aims to ensure that women and men do not violate those gendered norms central to patriarchal power structures and that lesbians and gay men are suppressed, silenced, made invisible to the extent that their relationships and sexuality do so.

Given this, any decision that requires 'discretion', for which, read silence and invisibility, in order to avoid abuse does little more than prop up those inequalities that the Convention seeks to address and which are at the core of both homophobia and sexism. Indeed, to require 'discretion'

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Tribunal for redetermination. Lee J's reasons and some of the problems that arise from his Honour's analysis are discussed later in this paper. As the facts and reasoning central to the main issue in this paper are discussed primarily at the Appeal Tribunal, however, most of the discussion in this paper will focus on the Appeal Tribunal's analysis, rather than on the decision of Lee J to remit the matter for a re-hearing. As will also be demonstrated, Lee J fails to tackle the complexities of the meaning of 'discretion' within the context of lesbian and gay identity, thereby making his decision to remit the matter for a re-hearing less significant than it could/should have been. Attempts by the High Court to rectify this oversight in a different case will then be analysed.

as a means of avoiding disparate treatment on the basis of sexual orientation is effectively to require the muzzling of a central aspect of a person's identity. Its effect is to persecute lesbians and gay men through silencing, thereby inflicting a profound form of discrimination on them as sexual minorities. Its result is considerable harm to the person denied his or her right to live openly without fear of persecution, as well as the maintenance of those systemic biases and stereotypes that are the very antithesis of the protection offered under international refugee law. While the High Court recently went somewhat towards addressing this reality, by not directly detailing the effects of homophobia, by not applying a sex equality analysis to the case before it, the Court fell short of offering a more solid ground of protection to lesbians and gay men generally. This is made more evident by focussing on one particular case (in which I personally was involved, but which was not before the High Court) which draws out sex equality arguments to which I refer. By doing so, we are then able to critique some of the weaknesses in the High Court's attempt to end discrimination against lesbians and gay refugees via its analysis of the 'discretionary option' used by the Refugee Review Tribunal.

## 2. The Case of Mr S: 'Discretion' Enforced through State Sanctioned Persecution: Sexual Inequality in Action

Mr S is a citizen of Iran. He arrived in Broome, Australia, via boat, on 1 November 2000. On 25 January 2001 he lodged an application for a protection visa (class XA) with the Department of Immigration and Multicultural Affairs under the *Migration Act* 1958 ('the Act'). In that application, Mr S, aged 24, claimed that he risked persecution as a gay male should he be forced to return to Iran. On 27 February 2001 a delegate of the Minister for Immigration and Multicultural Affairs refused to grant a protection visa and on 1 March 2001, the Applicant applied for review of that decision.

In filing his application, Mr S presented the evidence before the Refugee Review Tribunal in which he admitted to knowing that he was a gay male from the age of 14. He described how difficult it was for gay men to meet each other in Iran other than in known parks, outlined meeting his partner in one of these parks at night and detailed being arrested by the police along with ten other men during one of these encounters. When arrested, he was blindfolded and taken to the police station where he was beaten with an electric cable by 3–4 people until he signed a statement swearing that he was not a gay man. Nine months after this incident, Mr S was caught by his parents having sex with another man in his mother's house. Accused by his parents of being 'unclean' ('najes'), they also threatened to

report him to the authorities. Despite contemplating suicide, Mr S was eventually smuggled out of Iran, explaining to the Tribunal that he could not return for fear of being stoned to death because of his homosexuality.<sup>5</sup>

The decision of the Refugee Review Tribunal was delivered on 24 April 2001. The Tribunal concluded that, although there was evidence that homosexuals were persecuted in Iran because of their homosexuality, and although the evidence presented by Mr S was both compelling and undoubtedly accurate,<sup>6</sup> refugee status should nonetheless be denied because, Mr S, unlike other refugees, could avoid persecution by leading a more 'discreet', less 'public', more 'private' lifestyle. This, the Tribunal concluded was not an unreasonable burden to place on the Applicant and, as such, he could not claim to fear persecution for the purposes of the *Convention*.

In making its finding that Mr S should not be granted refugee status, the Tribunal held that the Applicant did not have a well-founded fear of persecution in Iran for reasons of his membership or perceived membership in the particular social group, that being 'homosexuals'. The Tribunal explained:

Whilst the Tribunal accepts that homosexuals in Iran can be treated in a way which may amount to persecution, the Tribunal does not accept that this means every homosexual person in Iran necessarily has a well-founded fear of persecution. In particular, the Tribunal does not accept that the mere fact that homosexual conduct is illegal in Iran means that the applicant would have a well-founded fear of persecution if he were homosexual.

... The evidence indicates that ... *the risk of prosecution for homosexuality is minimal as long as homosexual activities are carried out discreetly*. There is nothing in the evidence before the Tribunal to indicate that a homosexual man in Iran is at risk of attracting the attention of the authorities merely for being homosexual. Indeed, the evidence suggests that homosexual activity, *as long as it is not overt and public*, is tolerated and not uncommon in Iran. The independent evidence further indicates that there are places in Iran where men meet other men for the purpose of initiating sexual contact ... (Emphasis added)

The applicant claims that he is at risk of being arrested if he returns to Iran because he is a homosexual. The Tribunal accepts the applicant's evidence that he was arrested and mistreated because of his homosexuality in the past when he was once detained by the Basiji. However, the applicant states he was released by the Basiji after he provided a written statement he was not a homosexual and on his own evidence he was not pursued further by the Basiji. The Tribunal notes

<sup>5</sup> The full Statutory Declaration of Mr S, dated 25 Jan., 2001 at Port Hedland, Western Australia is on file with the author.

<sup>6</sup> Specifically, the Tribunal held that it: '... accepts the independent evidence that homosexuality is specifically outlawed by the *Islamic Penal Code* which operates in Iran. The Tribunal further accepts that the penalties for homosexual activity specified in the Penal Code range from flogging to execution. This indicates that homosexuals in Iran may in theory face treatment amounting to persecution.' Case of Mr S, above n. 4 at 13.

that the independent evidence, which the Tribunal accepts, states the park where the Basiji detained him is well known as an area where homosexual men in Tehran regularly go to meet other homosexual men. The Tribunal notes there is no independent evidence that men who frequent this park are regularly detained by the Basiji. In the light of this, the Tribunal finds that his detention on that one occasion was a random event and that, on the evidence, there is not a real chance that it will recur.

The Tribunal has considered whether and how the applicant would be able to continue to live as a homosexual man if he returned to Iran. Given that the applicant had no difficulty meeting other homosexuals and being very sexually active prior to leaving Iran, the Tribunal is of the view that he would be able to resume this lifestyle if he returned to Iran.<sup>7</sup>

The criteria for a protection visa is that a decision maker, at the time of the decision, be satisfied that the applicant for the visa is a person whom Australia has protection obligations under those international refugee documents to which Australia is a party. In this regard, Article 1A(2) of the *Convention* defines a refugee as any person who:

... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or 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, unwilling to return to it.<sup>8</sup>

The purpose of the *Convention* is, broadly, to eliminate discrimination and inequality — both individual and systemic. This is best described in the 1999 House of Lords decision of *Ex Parte Shah*,<sup>9</sup> in which Lord Steyn, referring to the preambles to the *Convention*, noted its objectives as follows:

The relevance of the preambles is twofold. First, they expressly show that a premise of the *Convention* was that all human beings shall enjoy fundamental rights and freedoms. Secondly and more pertinently, they show that counteracting discrimination, which is referred to in the first preamble, was a fundamental purpose of the *Convention*. That is reinforced by the reference in the first preamble to the *Universal Declaration of Human Rights* of 1948 which proclaimed the principle of equality of all human beings and specifically provided that the entitlement to equality means equality 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status'.<sup>10</sup>

Similarly, Lord Hoffman explained that:

In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the convention. ...

<sup>7</sup> Ibid. at 13 and 14.

<sup>8</sup> Convention, above n. 1.

<sup>9</sup> [1999] 2 AC 629.

<sup>10</sup> Ibid. at 639.

The notion that the Convention is concerned with discrimination on grounds inconsistent with principles of human rights is reflected in the influential 1985 decision of the U.S. Board of Immigration Appeals in *re Acosta*, 19 I&N 211 where it was said that a social group for the purposes of the Convention was one distinguished by:

‘an immutable characteristic . . . [a characteristic] that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed.’

. . . It is because they are either immutable or part of an individual’s fundamental right to choose for himself that such discrimination on such grounds is contrary to principles of human rights.<sup>11</sup>

The issue of whether or not lesbians and gay men constitute an identifiable social group has been effectively dealt with and answered in the affirmative by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*.<sup>12</sup> Noting the human rights principles outlined above, the Court held that the particular social group category must be evaluated on the basis of the broad human rights principles underlying the Convention. Applying these principles, the Court identified three possible categories of particular social groups:

1. groups defined by an innate or unchangeable characteristic;
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association;
3. groups associated by a former voluntary status, unalterable due to its historical permanence.

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical influences, although it is also relevant to the anti-discrimination influences, in that one’s past is an immutable part of the person.<sup>13</sup>

<sup>11</sup> Ibid. at 651.

<sup>12</sup> [1993] 2 SCR 689. An earlier analysis is provided in *Re Inaudi* [1992] CRDD No 47 QI; (T91-04459) (Apr. 9 1992). An overview of the situation in Canada is found in Kathleen Lahey, *Are We Person’s Yet: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 138–143. Lahey notes that lesbian women are much less likely to apply for or receive refugee status than gay men because the extent of specific anti-lesbian harassment and persecution is less well known or documented as persecution against gay men. Set up by global patterns of sex discrimination, lesbian women are inevitably further disenfranchised and unlikely to be in a position turn to foreign states for protection. Lahey’s arguments are equally applicable within the Australian context, where no lesbian specific refugee cases have as yet been reported. Indeed, to the best of my knowledge, the only successful refugee claims arising from persecution on the basis of sexual orientation have been those claims made by gay men.

<sup>13</sup> Ibid. at 739.



Although the Court in *Ward* found sexual orientation to be immutable,<sup>14</sup> other tribunals and courts in other states have found that, whether it be immutable or a characteristic so fundamental to identity that the individual should not be forced to change or forsake the characteristic,<sup>15</sup> sexual orientation should be seen as a basis for finding a social group for the purposes of the *Convention*.<sup>16</sup> Australia has proven no exception in this regard.<sup>17</sup>

Of course, not every person who is gay or lesbian is entitled to refugee status in Australia. A person must also have a well-founded fear of persecution, with such a finding based on the facts before the adjudicator. In making such a determination, however, the Courts have consistently held that any such decision cannot exist in a vacuum. That is, in trying to determine if persecution exists in a particular case, the courts will take note of why it is that persecution, as a means of social control, occurs.

Broadly, persecution exists in order to punish members of a particular race, religion, nationality, social group or those holding a particular political opinion. In its ultimate form — death — persecution leads to the complete suppression of an individual. But it is not always necessary to go this far in order to suppress opposition. Silence can be enforced by lesser degrees of brutality or prohibition. The events that led to the massacre in Soweto, South Africa, for example, were a result of the efforts of the South African government to silence Black opposition by preventing

<sup>14</sup> For an analysis of some of the problems with this line of reasoning in so far as litigating lesbian and gay equality rights is concerned, see Carl Stychin, 'Essential Rights and Contested Identities: Sexual Orientation and Equality Rights in Canada' 8 *Canadian Journal of Law and Jurisprudence* 49 (1995).

<sup>15</sup> This is a view best expressed in the New Zealand case of *Re G7*, Refugee Status Appeals Authority, Refugee Appeal No. 1312/93, Auckland, 30 Aug. 1995, heard before Chairman RPG Haines and A Wang Heed (Member, UNHRC) at 25: 'We do not see these two tests as being necessarily irreconcilable in the context of sexual orientation. This is because sexual orientation is either an innate or unchangeable characteristic or a characteristic so fundamental to identity that it ought not to be required to be changed. As the social group argument will succeed under either head, little point would be served by preferring one to the other, particularly given that it may not ultimately be possible to prove one way or the other whether sexual orientation is in fact an immutable characteristic.'

<sup>16</sup> For comparative international cases on this point, in addition to the cases noted throughout this paper, see the case law summarised in Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1991); Stuart Grider, 'Sexual Orientation as Grounds for Asylum in the United States' 35 *Harvard International Law Journal* 1 (1994); Helene Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (1995); Michael Haran, 'Social Group For the Purposes of Asylum Claims' 9 *Immigration and Nationality Law and Practice* 66 (1995); Shannon Minter, 'Sodomy and Public Morality Offences Under US Immigration Law: Penalizing Lesbian and Gay Identity' 26 *Cornell International Law Journal* 771 (1993); Fullerton, n. 49.

<sup>17</sup> See *Morato v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 111 ALR 417 (FC: FC); *Minister for Immigration and Multicultural Affairs v. Gui* [1999] FCA 1496; *Minister for Immigration and Multicultural Affairs v. B* [2000] FCA 930; *Minister for Immigration and Multicultural Affairs v. Guan* [2000] FCA 1033; *MMM v. Minister for Immigration and Multicultural Affairs* [1988] 90 FCR 324. The High Court has also accepted that lesbians and gay men can constitute a particular social group in *Gui v. Minister for Immigration and Multicultural Affairs* (2000) S219/1999 High Court of Australia. An excellent overview of the plight of lesbians and gay male refugees in Australia is found in An excellent overview of the facts of the and the legal reasoning of the lower courts can be found in K Walker, 'Sexuality and Refugee Status in Australia' 12 *I.J.R.L.* 175 (2002).

a march in support of an end to apartheid. The government's actions constituted an attempt to muzzle dissent, to make it invisible, less of a threat to the institutionalized inequalities that supported the government and its power base. This then constitutes the essence of persecution on *Convention* grounds: the silencing of those who seek to question prevailing power norms. Its aim is to render those who dissent invisible in order to suppress the expression of a belief or characteristic that a persecutor seeks to quash. As described in *Matter of Acosta*,<sup>18</sup> a decision of the United States Board of Immigration Appeals:

'Persecution' as used in section 101(a)(42)(a) clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.<sup>19</sup>

### 3. The Nature of Anti-Lesbian and Anti-Gay Prejudice: What Happens and Why

This notion of suppressing those who challenge or threaten dominant power structures is particularly relevant within the context of anti-lesbian and anti-gay persecution. Indeed, an analysis of what homophobia is, what it does and why it exists reveals that the Tribunal's determination in the case of Mr S (that is, that discretion is a viable option for lesbians and gay men) is a line of reasoning that does little more than support the very inequalities and social biases that are at the very heart of anti-lesbian and anti-gay prejudice. Indeed, by asking that lesbian and gay refugees return from whence they came and essentially go into hiding when they do so, the Tribunal does what those aiming to suppress same-sex sexuality have aimed to do all along: make them invisible.

There are many ways to ensure the invisibility of those whose public face threatens the status quo. Violence against gay men and lesbians<sup>20</sup> is endemic throughout the world.<sup>21</sup> In the U.S., in 1994, 632 crimes against gay men and lesbians were reported for New York, 332 in LA, 324 in San Francisco, 243 in Boston, 106 in Denver and 96 in Detroit. Crimes

<sup>18</sup> (1985) 19 I&N 211.

<sup>19</sup> Ibid. at 222.

<sup>20</sup> This analysis will focus on gay men and lesbians who seek asylum in Australia under the grounds of fleeing persecution directed at them as members of a particular social group (homosexuals). This is taken to mean those who engage in same sex sexual relation(ship)s even if the subject does not identify as gay or lesbian. (Kristen L. Walker, 'Sexuality & Refugee Status in Australia', above n. 17 at 173 and 176).

I recognise that this term is not inclusive of all 'sexual minorities'. Transgendered people may also be subject to ongoing persecution because of their sexuality, however this is beyond the scope of this paper. I use the term gender to encompass the notion of a constructed social identity, distinct from biological difference. See Thomas Spijkerboer, *Gender & Refugee Status*, (Dartmouth Publishing Co Ltd: Burlington, USA, 2000) at 6.

<sup>21</sup> James D. Wilets, 'Conceptualising private violence against sexual minorities as gendered violence: An international and comparative law perspective', 60(3) *Albany Law Review* 1002 (1997).

against lesbians and gay men in the West are often underreported<sup>22</sup> and characterised by slow police response and inadequate penalties for offenders.<sup>23</sup> Random street violence targeting small groups or people on their own forms the experience of many gay westerners who are abused in public spaces. They may be 'chased or followed, pelted with objects, spat upon, have had their property vandalised' and/or be sexually assaulted.<sup>24</sup>

Many countries carry out systematic abuse of sexual minorities. Wilets, writing in 1997, found that Serbia and Romania provided the death penalty for homosexual 'offenders'.<sup>25</sup> Police persecution of sexual minorities is prevalent in Moscow, Yugoslavia, Ecuador and Argentina.<sup>26</sup> World surveys of homophobic violence note police raids and beatings are not uncommon in homosexual targeted violence.<sup>27</sup> Serbian and Bosnian-Serb militias, for example, carried out male rape and genital torture against gay men during the Bosnian war.<sup>28</sup>

Persecution may be expressly promoted by the state or implicitly sanctioned (for example in Russia, Mexico, Columbia, Ecuador and Peru) through state inaction in response to the perpetrators of homophobic violence.<sup>29</sup> Alternatively, subtle social control mechanisms operate to demarcate the lesbian or gay person as 'other'. Such 'omnipresent regimes' of disapproval signal, via looks, whispers, and stares, that to be gay is to be unwelcome in the public sphere.<sup>30</sup> 'Extra legal' persecution measures include the banning of gay and lesbian association, speech and use of the press, denial of registration for political and social groups, closing down of gay and lesbian meeting places, and raids on bars patronised by gay men and lesbians.<sup>31</sup>

Lest it be thought, as is often the case, that such offences are male specific, many countries view female homosexual practise as 'unnatural, abnormal, immoral, horrifying, criminal or worse'.<sup>32</sup> Some have criminal

<sup>22</sup> Wayne D. Myslick, 'The social/sexual identities of places', in Nancy Duncan (ed), *Body Space* (Routledge: London 1996), 156 at 161.

<sup>23</sup> Wilets, above n. 21 at 1002.

<sup>24</sup> Gail Mason, 'Recognition and Reformulation' 13(3) *Current Issues in Criminal Law, Journal of the Institute of Criminology* 251 at 251 (Mar. 2002).

<sup>25</sup> Wilets, above n. 21 at 1010.

<sup>26</sup> Amnesty International notes that police participated in social cleansing projects of transgendered sex workers in Ecuador. Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and ill-treatment on the basis of sexuality* (Amnesty International Publications: London, 2001) at 23, 24, 25

<sup>27</sup> Wilets, above n. 21 at 1010.

<sup>28</sup> Ibid.

<sup>29</sup> Julie Dorf and Gloria Careaga Perez, 'Discrimination & Tolerance of Difference: International Lesbian Human Rights', in Julie Peters & Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge: New York, 1995), 324 at 326.

<sup>30</sup> Gill Valentine '(Re)negotiating the "Heterosexual Street": Lesbian Production of Space,' in Nancy Duncan (ed.), *Body Space: Destabilizing geographies of gender and sexuality* (Routledge: London 1996) 146 at 149.

<sup>31</sup> Dorf & Careaga Perez document raids in Peru & Venezuela, above n. 29 at 327.

<sup>32</sup> Ibid, at 324.

statutes that permit violent persecution of lesbians. In western countries, lesbians are continually stigmatised and monitored for 'exceeding or subverting social limitations'<sup>33</sup> and lesbian women do not enjoy the same rights as heterosexual couples to family, social and economic benefits.<sup>34</sup> In addition, family members often carry out discrimination levelled at lesbians. In India, for example, human rights abuses carried out against lesbian women may be hidden under cultural expectations of women. Women may be socially ostracised, exiled and some may ultimately commit suicide.<sup>35</sup> In Nepal, two women carried out a marriage ceremony and were subsequently arrested to avoid their behaviour having 'a negative impact on society'.<sup>36</sup> Lesbian sex is criminalized in Fiji and Zimbabwe and subject to 'hooliganism' laws in China.<sup>37</sup> Involuntary psychiatric treatment is also a frequent form of persecution. In Russia, involuntary patients may be subjected to the administration of mind-altering drugs.<sup>38</sup> Lesbians may be excluded from jobs or certain civic privileges, such as holding a drivers licence. Chinese lesbians may be given aversion therapy and electric shock treatment.<sup>39</sup> Homosexuality in general may be viewed as a disease that can be 'cured' via psychiatric intervention.<sup>40</sup>

Gay men and lesbians in police custody are at a heightened risk of sexual violence. They may be subjected to persistent sexual harassment and sexual assault including rape. Detainees may also be falsely imprisoned and verbally and physically abused.<sup>41</sup> A person arrested on charges not related to sexuality may have their sexual identity exploited when being interrogated.<sup>42</sup> In prison, gay men and lesbians may also be subjected to torture and sexual assault.<sup>43</sup> Areas that are frequented by gay men and lesbians (such as parks and bars — the only public space where, in some countries, their sexual identity is generally 'tolerated') and anti-harassment protests may be frequently raided.<sup>44</sup>

In China, for example, gay men and lesbians are not permitted to live in same sex relationships. Institutionalised homophobia leads to fear of

<sup>33</sup> Ibid.

<sup>34</sup> Ibid, at 327.

<sup>35</sup> Ibid, at 329.

<sup>36</sup> Assistant Sub-Inspector Basuder Bhattu of Phatari, quoted in Walker, above, n. 17 at 175.

<sup>37</sup> Jenni Millbank, 'Fear of persecution or just a Queer Feeling?: Refugee Status and sexual orientation in Australia' 20(6) *Alt. L.J.* 261 at 265 (1995).

<sup>38</sup> Walker, above n. 17 at 207, notes that Ms Pitcherskaia, a Russian refugee who fled to the US, was involuntarily committed, shocked and given psychiatric drugs.

<sup>39</sup> Dorf & Careaga Perez, above n. 29 at 326.

<sup>40</sup> Amnesty International notes that police participated in social cleansing projects of transgendered sex workers in Ecuador. Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and ill-treatment on the basis of sexuality* (Amnesty International Publications: London, 2001) at 35.

<sup>41</sup> Ibid, at 21.

<sup>42</sup> Ibid at 23.

<sup>43</sup> Ibid at 30.

<sup>44</sup> For example, in Equator. Ibid at 28.

exposure and consequently gay men and lesbians have difficulty finding same sex partners.<sup>45</sup> China persecutes those suspected of homosexual activity under 'hooliganism' laws — laws for public order.<sup>46</sup> Long-term homosexual partners may also be targeted by the Chinese state and separated by being sent to different work camps.<sup>47</sup> In two cases, punishment has included such degrading acts as being forced to wear a board around one's neck in public and having the state declare a person's homosexuality on a public billboard.<sup>48</sup>

The Chinese regime locates homosexual behaviour as part of 'Western decadence' and as a threat to Chinese traditions. This type of labelling functions as more 'than repression of individuals who deviate from the heterosexual norm'. It serves to distance China from the 'decadence, perversity and sickness' of the West.<sup>49</sup> Those who are labelled lesbian or gay are subjected to an extreme form of 'othering'. They are seen as a threat to the regime's power and social fabric as a whole. Such practices aid in maintaining Chinese political order as differentiated and superior to the 'contaminated and corrupted'<sup>50</sup> West, where homosexuals are seen to reside.

To put all of the above in context, to better understand the nature of anti-lesbian and anti-gay persecution, and the role of silencing in the lives of lesbians and gay men, one needs to understand the role of homophobia in maintaining inequality on the basis of sex. At its core, anti-gay violence serves to reinforce those social biases and stereotypes that are central to sex discrimination and gender inequality. To talk of sex discrimination is to talk of gender and the inequalities that arise within a society in which gender differences are polarized and hierarchical — a society in which those who are 'male' get privilege and those who are not, do not. I refer here not to gender as biologically determined but rather gender differences as socially constructed and as defined by specific behaviours that ultimately result in the gender categories 'male' and 'female'. As MacKinnon explains:

Gender is an inequality, a social and political concept, a social status based on who is permitted to do what to whom. Male is a social and political concept, not a biological attribute, having nothing whatever to do with inheritance, pre-existence, nature, essence, inevitability, or body as such.<sup>51</sup>

<sup>45</sup> Kristen Walker, 'The Importance of Being Out: Sexuality and Refugee Status' 18 *Sydney Law Review* 568 at 573 (1996).

<sup>46</sup> Article 106 of *The Criminal Law Code* (China).

<sup>47</sup> Zhang Ainan (a pseudonym) (RRT ref N 93/00846), quoted in Walker, above n. 45 at 570.

<sup>48</sup> M.P. Lau & M.L. Ng 'Homosexuality in Chinese Culture', 13 *Culture, Medicine and Psychiatry* 465 at 479 (1989) and RRT Ref N93/00846, para 12, as quoted in Kristen Walker, above n. 45 at 572.

<sup>49</sup> Walker, above n. 45 at 588.

<sup>50</sup> Ibid.

<sup>51</sup> Catharine MacKinnon, *Toward A Feminist Theory of the State* (Boston: Harvard University Press, 1989) at 114. See also Lise Oostergaard, who explains that: 'Gender refers to the qualitative and

It is this social definition of male and female, with defining and rigidly enforced characteristics for each, that ultimately results in gender inequality. In order to reap the benefits awarded to those who are 'male' in our society, one must worship masculinity — that is, a socially constructed set of behaviours and ideas that ultimately define who belongs to the male gender class and that determine who gets and maintains the power commensurate with male gender privilege. Under this system, 'masculinity is seen as the authentic and natural exercise of male agency and femininity as the authentic and natural exercise of female agency.'<sup>52</sup> To subscribe to masculinity, and to benefit from the privilege afforded 'real' men (that is, the men society expects us to be), however, one must *also* support compulsory heterosexuality — an ideology and political institution that embodies those socially defined sets of behaviours and characteristics that ensure heterosexual male dominance and that result in sexual inequality.<sup>53</sup> In this sense then, gender (a system of social hierarchy, an inequality) and sexuality (through which the desire for gender is constantly reproduced) become inseparable. As MacKinnon again notes, within a system of gender polarity in which male equals dominance, female submission, 'the ruling norms of sexual attraction and expression are fused with gender identity and formation and affirmation, such that sexuality equals heterosexuality equals the sexuality of (male) dominance and (female) submission. ... Sexuality becomes, in this view, social and relational, constructing and constructed of power.'<sup>54</sup> Heterosexuality must thus be enforced, made compulsory because it is deemed necessary to ensure the survival of both masculinity and femininity, defined as male over female,

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interdependent character of women's and men's position in society. Gender relations are constituted in terms of the relations of power and dominance that structure the life chances of women and men. Thus gender divisions are not fixed biology, but constitute an aspect of the wider social division of labour and this, in turn, is rooted in the conditions of production and reproduction and reinforced by the cultural, religious and ideological systems prevailing in a society. The relations between men and women are socially constituted and not derived from biology. Therefore the term gender relations should distinguish such social relations between men and women from those characteristics which can be derived from biological differences. These relations are not necessarily nor obviously harmonious and non-conflicting. On the contrary, the socially constructed relations between the genders may be ones of opposition and conflict. But since such conflicts are not to be analysed as facts of biology and nature but as being socially determined, they may take very different forms under different circumstances. They often take the form of male dominance and female subordination. In short, the concept of gender makes it possible to distinguish the biologically founded, sexual differences between women and men from the culturally determined differences between the roles given to or by women and men respectively in a given society. The first are unchangeable, like a destiny. The latter are workable and may be changed by political and opinion-shaping influences.' Lise Oostergaard, *Gender and Development: A Practical Guide* (London: Routledge, 1992) at 6 and 7.

<sup>52</sup> Katharine Franke, 'The Central Mistake of Sex Discrimination: The Disaggregation of Sex From Gender,' 144 *U. Pa. L. Rev.* 1 at 4 (1995).

<sup>53</sup> See generally Adrienne Rich, 'Compulsory Heterosexuality and Lesbian Existence,' 5(4) *Signs: Journal of Women in Culture and Society* 63 (1980).

<sup>54</sup> Catharine MacKinnon, *Toward a Feminist Theory of the State*, above n. 51 at 131 and 151.

through which male dominance over women is ensured. Lesbians and gay men challenge this requirement because they deny the inevitability of heterosexuality. Sexuality constructs men as superior to women, ensuring that gender remains hierarchical, ensuring that heterosexuality remains the norm through which gender inequality is maintained, requiring that those who challenge those norms through which gender remains polarized are penalized for non-conformity. As MacKinnon notes:

Sexuality then is a form of power. Gender, as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into the sexes as we know them, by the social requirements of its dominant form, heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of sexual inequality.<sup>55</sup>

Once the extent to which heterosexuality, made compulsory, ensures the maintenance of gender as a system of dominance and submission, of sexual hierarchy, is recognised, the extent to which anti-gay stereotypes play into and undergird sex inequality can equally be acknowledged.<sup>56</sup> Together, sexuality and gender form the basis of institutionalized sexism. Sexuality, as constructed, represents the normative ideology of male superiority over women and the hostility directed at lesbians and gay men finds its source in this power structure, aimed as it is at preserving compulsory

<sup>55</sup> Ibid. at 118. Building on MacKinnon's thesis, Sheila Jeffreys argues that gender becomes a desire, felt as sexual excitement, through which heterosexuality (read: the sexual pairing of male dominance and female submission) is maintained: 'The desire for gender, often felt as a visceral excitement, is a crucial component of heterosexuality as a political institution . . . [It] is much more than just an annoyingly arbitrary and socially constructed classification system. Feminist theorists have shown how gender dynamically empowers heterosexuality, provides its most powerful pleasures through the sexuality of eroticised dominance and submission, and maintains the cruel power of men over women through turning it into just "sex." "Gender" is not an inert filing system but a vital force in constructing and maintaining heterosexuality as the scaffolding of male supremacy. The desire for gender is not just the desire to conform and fit in, though that has a powerful effect, but an excitement felt as sexuality in a male supremacist culture which eroticises male dominance and female submission . . .' Sheila Jeffreys, 'Heterosexuality and the Desire for Gender,' in Diane Richardson, *Theorising Heterosexuality* (Buckingham: Open University Press, 1996) 74 at 74–77.

<sup>56</sup> See Cass Sunstein, 'Homosexuality and the Constitution,' 70 *Ind. LJ* 1 at 21 (1994). Sunstein argues that: 'The evidence taken as a whole suggests that the prohibition on homosexual relations is best seen as an effort to insist on and rigidify so-called natural difference, in part by crisply separating gender roles . . . The definition of men as essentially active in social and sexual arenas, and of women as essentially passive in both places, helps undergird sex inequality.' This point is particularly well documented by George Chauncey whose work on the gay community in New York in the early 1900s does much to dispel the myth that gay oppression is disconnected from sexism. Indeed, Chauncey argues that it was not until women became more economically independent and socially empowered that the real animosity for things homosexual became socially ingrained and required. See George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World 1890–1940* (New York: Basic Books, 1994) at 111–117. See also Jonathan Ned Katz, *The Invention of Heterosexuality* (New York: Dutton, 1995) and Elizabeth Kennedy and Madeline Davis, *Boots of Leather, Slippers of Gold: The History of a Lesbian Community* (New York: Routledge, 1993). The themes and arguments covered in all these works are effectively summarised in Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation* (New York: Anchor Books, 1995).

heterosexuality. As 'Act-Up' member Robert Goss notes:

[g]ay and lesbian sexual identities form a counter-practice that deconstructs the rigid definition of masculinity and femininity and social constructions based on these definitions. They transgress many dualistic strategies that support heterosexist sexual identities. . . . Gay and lesbian power arrangements [thus] challenge the unequal production and distribution of heterosocial power in our society.<sup>57</sup>

Lesbian activist and writer Suzanne Pharr argues that homophobia works to maintain gender roles because it silences those men whose sexual identity and behaviour will, it is believed, 'bring down the entire system of male dominance and compulsory heterosexuality'.<sup>58</sup> This has led her to refer to homophobia as a 'weapon of sexism', responsible for propping up those gendered stereotypes that are central to sexism and all patriarchal

<sup>57</sup> Robert Goss, *Jesus Acted Up: A Gay and Lesbian Manifesto* (San Francisco: Harper Collins, 1993). As Marc Fajer notes, this notion that relationships need not be constructed upon hierarchical gender roles is, socially, a threat to male power. Enforced heterosexuality thus becomes the norm: '[g]ay couples, operating without gender-based definitions of their proper roles during marriage, often create new roles for themselves based on sharing and equality, rather than on gender stereotypes. Thus, many gay relationships operate on a more equal basis than most heterosexual marriages and might well serve as a model of equality for marriage. . . . The rejection of gender based roles in relationships is part of a greater challenge to gender norms implicit in openly gay lives; the strict dichotomy between male and female.'

Marc A. Fajer, 'Can Real Men Eat Quiche Together?: Storytelling, Gender-Role Stereotypes and Legal Protections for Lesbians and Gay Men,' 46 *U. Miami L. Rev.* 511 at 615 (1992). In other words, the condemnation of homosexuality serves a broader purpose — that being the prohibition against blurring the lines between masculinity and femininity so essential to the social construct of heterosexuality and the institutionalized practice of heterosexism that results. The primacy of gender norms can thus be seen in both homophobia and sex discrimination, each one feeding off the other to the benefit of those for whom the constructs male/female, masculine/feminine, heterosexual/homosexual, structured hierarchically, ensure male supremacy over all women and gay men.

<sup>58</sup> Suzanne Pharr, *Homophobia: A Weapon of Sexism* (Little Rock, AR: Chardon Press, 1988) at 19. Pharr is not, of course, alone in her assertion that sexism and homophobia are interconnected. Indeed, many lesbian and gay academics write of the role of gender in the lives of gay men and lesbians and the impact that this has on both sexism and heterosexism. In addition to the other authors cited throughout this chapter, see, in particular, Diana Majury in her insightful article, 'Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context' 7(2) *CJWL* 286 (1994); Lynne Pearlman, 'Theorizing Lesbian Oppression and the Politics of Outness in the Case of *Waterman v. National Life Assurance*: A Beginning in Lesbian Human Rights/Equality Jurisprudence' 7(2) *CJWL* 454 (1994); Andrew Koppelman, 'Why Discrimination Against Lesbians and Gay Men is Sex Discrimination,' 69 *NYUL Rev.* 197 (1994); Andrew Koppelman, 'The Miscegenation Analogy: Sodomy Law as Sex Discrimination,' 98 *Yale Lj* 145 (1988); Marie Elana Peluso, 'Tempering Title VII's Straight Arrow Approach: Recognizing and Protecting Gay Victim's of Employment Discrimination,' 46 *Vand. L. Rev.* 1533 (1993); Francisco Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing The Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society,' 83 *California Law Review* 3 (1995); Mary Anne Case, 'Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence,' (1995) *Yale Lj* 1; ER Arriola, 'Gendered Inequality: Lesbians, Gays and Feminist Legal Theory' 9 *Berkeley Women's Lj* 103 (1994); Amelia Craig, 'Musing About Discrimination on Sex and Sexual Orientation as "Gender Role" Discrimination,' 5 *S Cal Rev L & Women's Studies* 105; James Wilets (1995), 'Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective,' 60 *Alb. L. Rev.* 989 (1997); Patricia Cain, 'Feminist Jurisprudence: Grounding the Theories,' 4 *Berkeley Women's Lj* 191 (1989).



inequalities.<sup>59</sup> In a system built on sexual hierarchy, nothing is more threatening to those who benefit from it than the notion that there can be love and justice between equals, that inequality need not be. Lesbians and gay men, to the extent that they choose to build same-sex relationships, monogamous or otherwise, based on mutuality, reciprocity and respect — relationships which reject hierarchical gender roles — are seen as a threat to male supremacy because they challenge the social constructions assigned to the definitions 'male' and 'female'. Homophobia — which can be seen as a reaction to the actual or perceived violation of gender norms — is but one way to ensure that men and women do not violate those gender roles central to male power. For lesbians and gay men, this results in silence, for fear of being identified, and ultimately results in invisibility. And this is exactly what homophobia is about: ensuring that gay men, to the extent that they do not conform, to the extent that they fail to partake in a system of sex inequality are prevented from making public that which their enemies find so politically and socially subversive.

Anti-lesbian and gay stereotypes can be seen to silence the public expression of non-heterosexual sexual identities and both foster and maintain 'appropriate' gender-role behaviour,<sup>60</sup> ensuring that women and men do not violate those gendered norms central to male power and that all lesbians and gay men are suppressed and punished to the extent that they do. As Pharr explains:

To be a lesbian is to be perceived (labeled) as someone who has stepped out of line, who has moved out of sexual/economic dependence on a male, who is woman-identified. A lesbian is perceived as someone who can live without a man, and who is therefore (however illogically) against men. A lesbian is perceived as being outside the acceptable, routinized order of things. She is seen as someone who has no societal institutions to protect her and who is not privileged to the protection of individual males . . . A lesbian is perceived as a threat to the nuclear family, to male dominance and control, to the very heart of sexism.<sup>61</sup>

<sup>59</sup> Pharr, above n. 58. As Pharr explains (at 8), homophobia is central to preserving sexism and ultimately patriarchy: 'Patriarchy — an enforced belief in male dominance and control — is the ideology and sexism the system that holds it in place. The catechism goes like this: who do gender roles serve? Men and the women who seek power from them. Who suffers from gender roles? Women mostly and men in part. How are gender roles maintained? By the weapons of sexism: economics, violence, homophobia.' Homophobia works to maintain gender roles because it silences those women and men whose sexual identity and behaviour, it is believed, will 'bring down the entire system of male dominance . . .'

<sup>60</sup> Fajer, above n. 57 at 607.

<sup>61</sup> Pharr, above n. 58 at 18. As Diana Majury also notes: 'Lesbians are discriminated against because they challenge dominant understandings and meanings of gender in our society. And the more overtly we challenge gender, the more overtly we are discriminated against. Gender differentiation, premised on the subordination of women, is as essential to heterosexualism as it is to sexism. Lesbian inequalities are sex inequalities because they are rooted in a highly circumscribed definition of gender and gender roles, according to which women are seen only in relation to men.' Diana Majury, above n. 58 at 311.

As Pharr further notes, gay men are also perceived as a threat to male dominance:

... and the homophobia expressed against them has the same roots in sexism as does homophobia against lesbians. Visible gay men are the objects of extreme hatred and fear by heterosexual men because their breaking ranks with male heterosexual solidarity is seen as a damaging rent in the very fabric of sexism. They are seen as betrayers, as traitors who must be punished and eliminated. In the beating and killing of gay men we see clear evidence of this hatred.<sup>62</sup>

Much time and effort, often manifesting itself through violence and hostility, has been directed at silencing the public expression of any lesbian and gay male discourse and reality which challenges patriarchal privilege.<sup>63</sup> Indeed, so pervasive is anti-lesbian and gay male discrimination in all societies that the consequences for any who dare to speak and challenge socially imposed definitions of 'normal' are far from appealing or empowering:

To be called a homosexual is to be degraded, denounced, devalued or treated as different. It may well mean shame, ostracism, discrimination, exclusion or physical attack. It may simply mean that one becomes an 'interesting curiosity of permissiveness'. But always, in this culture, the costs of being known as a homosexual must be high.<sup>64</sup>

For lesbians and gay men, the hostility directed at them ultimately ensures the suppression of lesbian and gay male public expression and visibility — a suppression deemed necessary for the maintenance of systemic inequality, linked to heterosexual privilege. As Professor Jeffrey Byrne notes, 'because of the vicious circle of labeling and silencing to which lesbians and gay men are subjected, the personal costs of coming out in a still largely heterosexist and often violently homophobic society serve to ensure

<sup>62</sup> Pharr, above n. 58 at 19.

<sup>63</sup> See generally, Gail Mason and Stephen Tomsen, *Homophobic Violence* (Sydney: Hawkins Press, 1997); Gregory Herek and Kevin Berrill, eds., *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (New York: Sage, 1992); Gary Comstock, *Violence Against Lesbians and Gay Men* (New York: Columbia University Press, 1991). It is worth noting that much of the literature on anti-gay violence draws out the link between violence and perceived gender violations or the need to prove gender adequacy. Herek, for example, notes that the ideological link between sexuality and gender has at least three consequences: 'First, gay people are stigmatized not only for their erotic behaviours but also for their perceived violation of gender norms. Second, because homosexuality is associated with deviation from something so "natural" as masculinity or femininity, its labeling as abnormal receives further justification. Heterosexuals with deep-seated insecurities concerning their own ability to conform to cultural standards for masculinity or femininity may even perceive homosexuality as threatening their own sense of self as a man or woman. Third, a dual pattern of invisibility and hostility, denial and condemnation, is associated with gender that parallels that for cultural heterosexism. People who do not conform to gender roles — regardless of their actual sexual orientation — often are labeled as homosexual and stigmatized or attacked. Fear of such labeling leads heterosexuals and homosexuals alike to monitor their own behaviour carefully to avoid any appearance of gender nonconformity.' Herek, *ibid.* at 260.

<sup>64</sup> Kevin Plummer, *Sexual Stigma: An Interactionist Account* (London: Routledge, 1975) at 175.

the continued invisibility of lesbians and gay men.’<sup>65</sup> And it is this invisibility that is at the heart of homophobia — a socially imposed muzzle aimed at silencing those whose very existence threatens to subvert those gender norms that are the very source of systemic inequality and injustice. A muzzle not removed by judicial pronouncements that ‘discretion’ is a viable human rights option.

#### 4. How Sexism and Homophobia, Made Real through Silencing, Work: The Iranian Example

In *Shah*,<sup>66</sup> Lord Steyn notes that historically Nazi Germany and Stalinist Russia were amongst the most brutal and repressive regimes to homosexuals. A read of his Honour’s analysis that one’s ability to hide is no reason to deny refugee status can be seen to support the argument that the manifestation of homosexuality was repressed because of the threat it posed in the intensely patriarchal regimes to which he refers.<sup>67</sup> Similar brutalities are ongoing today in other nations that continue to persecute homosexual identity. Indeed, throughout the world, there remain states where lesbians and gay men are targeted by governments and their officials for abuse, harassment, sometimes death. Iran is but one of these nations and an examination of the extent to which authorities in that country will go to suppress those deemed to be dissenting from the norm provides a clearer understanding of what homophobia means, how it works and why it should not be tolerated under international refugee law, and why the decision of the Tribunal in the case of Mr S requires a careful re-think.

In 1993, the New Zealand Refugee Status Appeals Authority, in *Re GJ*,<sup>68</sup> provided one of the most comprehensive overviews of the law in Iran regarding same-sex sexual behaviour. The Authority’s findings are also applicable to other nations where lesbians and gay men are persecuted by the state.

Summarizing the information available to it, the Authority concluded that, ‘certain crimes in the [1991 Iran’s Islamic] Penal Code such as adultery, sodomy and malicious accusation are regarded as crimes against God (Houdoud) and therefore liable to divine retribution, and carry a mandatory death sentence.’<sup>69</sup> According to the International Lesbian and Gay Association in its 1999 Report, the law in Iran in this regard has not

<sup>65</sup> Jeffrey Byrne, ‘Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity,’ (1993) 11 *Yale Law and Pol. Rev.* 47 at 56.

<sup>66</sup> Above n. 9.

<sup>67</sup> Ibid. at 644–645.

<sup>68</sup> *Re GJ*, above n. 68.

<sup>69</sup> Ibid. at 3.

changed, with the relevant sections of the *Penal Code* presently mandating the following penalties for lesbian and gay male sexual behaviour:

*Male homosexuality*

Sodomy is a crime, for which both partners are punished. The punishment is death if the participants are adults, of sound mind and consenting; the method of execution is for the Shari'a judge to decide. A non-adult who engages in consensual sodomy is subject to a punishment of 74 lashes. (Articles 108–113).

Sodomy is proved either if a person confesses four times to having committed sodomy or by the testimony of four righteous men. Testimony of women alone or together with a man does not prove sodomy. (Articles 114–119).

'Tafhiz' (the rubbing of the thighs or buttocks) and the like committed by two men is punished by 100 lashes. On the fourth occasion, the punishment is death. (Articles 121 and 122).

If two men 'stand naked under one cover without any necessity', both are punished with up to 99 lashes; if a man 'kisses another with lust' the punishment is 60 lashes. (Articles 123 and 124).

If sodomy, or the lesser crimes referred to above, are proved by confession, and the person concerned repents, the Shari'a judge may request that he be pardoned. If a person who has committed the lesser crimes referred to above repents before the giving of testimony by the witnesses, the punishment is quashed. (Articles 125 and 126).

*Lesbianism*

The punishment for lesbianism involving persons who are mature, of sound mind, and consenting, is 100 lashes. If the act is repeated three times and punishment is enforced each time, the death sentence will apply on the fourth occasion. (Articles 127, 129, 130)

The ways of proving lesbianism in court are the same as for male homosexuality. (Article 128)

Non-Moslem and Moslem alike are subject to punishment (Article 130)

The rules for the quashing of sentences, or for pardoning, are the same as for the lesser male homosexual offences (Articles 132 and 133)

Women who 'stand naked under one cover without necessity' and are not relatives are punished by up to 100 lashes. (Article 134)<sup>70</sup>

In *Re G7*, the Authority was provided with expert evidence to the effect that Iran had adopted an extreme position in developing an Islamic constitution and bringing its legal system in line with strict Shari'a law, under which homosexuality is illegal. This is a view made evident in a letter from the Embassy in Iran in the Hague in which the Embassy declared that 'homosexuality in Iran, treated according to Islamic law, is

<sup>70</sup> International Lesbian and Gay Association, 'Iran: Laws Covering Sexual Activity', found at [http://www.ilga.org/Information/legal\\_survey/middle%20east/iran.htm](http://www.ilga.org/Information/legal_survey/middle%20east/iran.htm).

a sin in the eyes of God and a crime for society. In Islam generally, homosexuality is among the worst possible sins you can imagine.<sup>71</sup> In *Re GJ*, the Authority also noted numerous examples of these laws being applied, summarizing as follows:

The persecution of homosexuals in Iran has been severe. Ariene Swindler in her book *Homosexuality and World Religions*, (Trinity Press, Pa., USA, 1993) writes (p. 194):

'Under Khomeini, hundreds of people were executed as homosexuals. Most of these were not gay at all . . . the fact that the accusation of homosexuality is used for the purpose of physically eliminating people not of the party line (is similar to the situation) in Nazi Germany.'

Similarly, the persecution of Iranian homosexuals is commented upon in the book by Schmitt, A. and Sofer, J. *Sexuality and Eroticism Among Males in Moslem Societies* (Harrington, N.Y., 1992). In Helene Kafi's study (in Schmitt and Sofer at 6719) details are given of the 100 to 200 executions of homosexuals in 1981/2 and the torture and rape of homosexual prisoners in Iranian jails.<sup>72</sup>

In the same case, an expert witness, whose evidence was accepted by the Authority as conclusive, summarized the position in Iran as follows:

My own discussion with judicial figures in Iran such as the former Chief Justice, the former head of the Revolutionary Tribunal, members of the Majlis and Guardianship Council leave me in no doubt that the regime is intent on identifying and punishing anyone regarded as '*mofsed fil arz*' or '*mohareb*' (corrupt on earth or at enmity with God) and that this includes in particular homosexuals who have been singled out by Khomeini and others as both corrupt and as dangerous manifestations of 'westification'. There is no doubt in my mind that the purging of 'morally corrupt' elements is regarded as a duty by the highest political and judicial authorities in Iran and that this duty, sanctioned by the specific institutions of the first *velayat-e faqih*, over-rides any provisions of the Shari'a, the Penal Code or the Iranian Constitution. The evidence for this is clear, documented and abundant. It is reinforced by every conversation or observation which can be made within the country.<sup>73</sup>

As the International Lesbian and Gay Association also explains, the number of reported convictions under the provisions of the *Penal Code* also sends a clear message that same-sex sexual activity will not be tolerated. Specifically, the Association notes, relying on the findings of Amnesty International, at least three gay men and two lesbians were killed in January 1990 as a result of the Iranian government's policy of calling for the execution of homosexuals. They were publicly beheaded. In April 1992, Dr Ali Mozafarian, a Sunni Muslim leader in Fars province (Southern Iran), was executed in Shiraz. He was convicted on charges of

<sup>71</sup> Ibid.

<sup>72</sup> *Re GJ*, above n. 68 at 5.

<sup>73</sup> Ibid. at 5 and 6.

espionage, adultery and sodomy. His videotaped confession was broadcast on television in Shiraz and in the streets of Kazerun and Lar. On 14 March 1994, dissident writer Ali Akbar Saidi Sirjani<sup>74</sup> was charged with offences ranging from espionage to homosexual improprieties. On 12<sup>th</sup> November 1995, by the verdict of the eighth judicial branch of Hamadan, and the confirmation of the Supreme Court of Iran, Mehdi Barazandeh, otherwise known as Safa Ali Shah Hamadani, was condemned to death. The judicial authorities announced that Barazandeh's crimes were repeated acts of adultery and 'the obscene act of sodomy'. The court's decree was carried out by stoning.<sup>74</sup>

## 5. The Nature and Purpose of Persecution under International Refugee Law

In the case of Mr S, the Tribunal held that penalties like those above, while real, could nonetheless be avoided by living a less public lifestyle. With respect, such a finding misunderstands the impact that penalties of this sort have on those who fear similar punishment should they be 'discovered'. It also fails to appreciate the considerable burden imposed on those who do attempt to avoid discovery and the broad systemic impact of forced discretion that results when those lesbians and gay men, fearing persecution, hide their sexual identity. Indeed, any decision that dictates that 'discretion' is a solution to anti-lesbian and anti-gay persecution, presents an understanding of the term persecution that is at best socially myopic, at worst support for considerable individual and social inequality. At its core, the approach adopted by the Tribunal in the case of Mr S attempts to solidify in law the belief that to the extent that gay men and lesbians are able to have sex in private, then state sanctioned measures to curtail the public expression of lesbian and gay male identity, whether that be expressed via political rallies, or via group meetings in clubs, to list but some examples, do not amount to persecution. As argued above, such an approach is problematic and unfounded.

In *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*,<sup>75</sup> a case before the Constitutional Court of South Africa, this line

<sup>74</sup> International Lesbian and Gay Association, above n. 2. On the systematic punishment of homosexuals in Iran: Maryellen Fullerton, 'Persecution due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany' 4 *Geo. Immigration LJ* 381 (1990), and Maryellen Fullerton, 'A Comparative Look at Refugee Status Based on Persecution due to Membership in a Particular Social Group' 26 *Cornell International Law Journal* 505 at 534 (1993). See also the 1986 decision of the Bundesverwaltungsgericht (Federal Administrative Court) reported as Case Abstract IJRL/004 1 IJ.R.L 110 (1989) where the court found that the Iranian state treats homosexuals as 'counter revolutionary criminals'. As noted in *Re GJ*, above n. 68 at 6. For a personal account see, 'Saviz Shafaie: An Iranian Gay Activist Leader', available at <http://gaytoday.badpuppy.com/gayarchive/interview>.

<sup>75</sup> (1999) (1) SALR 6 (CC).

of reasoning was specifically rejected. The Applicants in that case argued that the right to be gay only in private was not 'a right' as defined by international law. Rather, it simply required gay men and lesbians to be invisible and to suppress any public declarations of gay pride, gay rights and gay equality. To require invisibility, in other words, to mandate 'discretion' resulted in the suppression of publicly visible gay and lesbian communities — communities central to self-empowerment — and silenced those who might form the types of social and minority group alliances necessary for full equality.

Sachs J rejected the argument that lesbian and gay male identity should be confined to the private sphere. He summarized the arguments of the Applicant in the case, agreeing that the privacy argument is inadequate:

... [I]t suggests that homosexuality is shameful and therefore should only be protected if it is limited to the private bedroom; it tends to limit the promotion of gay rights to the decriminalization of consensual adult sex, instead of contemplating a more normative framework that addresses discrimination generally against lesbians and gay men; and it assumes a dual structure — public and private — that does not capture the complexity of lived life, in which public and private lives determine each other, with the mobile lines between them being constantly amenable to repressive definition.<sup>76</sup>

Accepting that the 'private' should not be used to silence and make invisible those who need protection, Sachs J continued:

... In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous body affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group. ... Gays constitute a distinct section of the community that has been treated not only with disrespect or condescension but with disapproval and revulsion; they are not obvious as a group, pressurised by society and the law to remain invisible; their identifying characteristic combines all the anxieties produced by sexuality with all the alienating effects resulting from difference; and they are seen as especially contagious or prone to corrupting others ...<sup>77</sup>

Unfortunately, in referring to the experiences of Mr S, the Australian Refugee Review Tribunal was not as insightful in its use and interpretation of the word 'discretion', the ways in which the state enforces it and its effect on those for whom it becomes a means of survival. This becomes evident once we review the facts of Mr S's case.

The Tribunal noted that one of the ways in which gay men meet other gay men in Tehran is to meet at a Park called Daneshjoo in central Tehran and that on one occasion Mr S had arranged to meet his male partner in

<sup>76</sup> Ibid at para. 110.

<sup>77</sup> Ibid. at para. 126.

the park. The police (or Basiji), knowing that the Park was a meeting place for gay men, raided the park. Mr S was arrested, as was his partner and ten other men. He was blindfolded, taken to the police station and then beaten with an electric cable by three or four police officers. He was told that he was being bashed because he was a homosexual and was not released until he signed a document denouncing his homosexuality. In other words, he was only able to avoid prosecution by 'repenting', by denying publicly who he is.

The Tribunal accepted these facts, but nonetheless found that these events were insufficient to prove fear of persecution. The Tribunal relied on the findings of a number of international organisations that have concluded, amongst other things, that homosexuals only avoid prosecution and abuse in Iran when they are not 'overt and public'.<sup>78</sup> The Tribunal accepted this conclusion and implicitly upheld it as an acceptable imposition on the right of lesbians and gay men to identify publicly as lesbian or gay male. In justifying its position, the Tribunal noted that Mr S himself was released from detention and was able to avoid further abuse and persecution by signing a written statement denying his homosexuality. This, according to the Tribunal's reasoning, is an appropriate way to avoid persecution and does not, in an of itself, amount to an unacceptable level of persecution against those who are gay but who are forced to conceal their sexual identity in order to avoid abuse, even death at the hands of a state wanting to limit the expression of gay male sexual identity.

This line of reasoning cannot be supported if we review from an individual and systemic equality perspective. Surely, to require that one avoid harm by hiding an aspect of one's identity that is central to whom they are as a person goes against everything basic human rights norms are meant to protect. To do so would be seen as an unacceptable imposition if imposed on those who face persecution because of their race, gender, religion, political opinion or any other recognized ground of persecution and it should not be permitted when dealing with persecution on the basis of sexual orientation.

The Tribunal found that Mr S had lived discreetly in the past and that he did not seem to have suffered as a result of having to live discreetly. This led the Tribunal to conclude that it would not impose an unreasonable burden on him if he were required to live discreetly in Iran. In other words, silence and invisibility in this context can be seen to be a reasonable expectation. This offers a very narrow interpretation of what it means to be a gay male and of the nature of anti-gay discrimination. It also offers a solution that is both unacceptable and indeed central to ensuring the types of social biases that are at the very heart of anti-gay discrimination and violence. The Applicant's evidence was that when he was not discreet, the

<sup>78</sup> *Re S*, above n. 4 at 14.



police beat him. Thus, discretion, 'repenting', as required under the *Penal Code*, was required in order to avoid persecution. And while being forced to live 'quietly' might be seen by some to be a lesser form of oppression than being attacked for letting others know that you are gay, forced invisibility is still a form of persecution and should be recognized as such. Arguably, it might be preferable to the alternative, but the fact that someone *can* do it does not mean that they should be *required* to do so. If physical harm is held out as a threat, as inevitable in the event of disclosure, this, in law, amounts to persecution.<sup>79</sup> The mere fact that he can avoid harm by being discreet does not make the threat of harm any less real. Nor does it undo the personal and social inequalities that arise when discretion is enforced through state brutality. Indeed, given what is now known about the way in which homophobic harassment works, for judicial bodies in states of refuge to demand that an individual stay silent, be discreet, less public, is to support a course of action that is itself discriminatory.

In *Re X.M.U.*, for example,<sup>80</sup> the Immigration and Refugee Board of Canada considered the position of a gay male who claimed persecution in Venezuela because of his homosexuality. The Applicant in that case argued that, although homosexuality *per se* was not illegal in Venezuela, gay men had been subjected to beatings and abuse from the police for the purpose of intimidating them into 'hiding'. In determining whether his ability to live discreetly invalidated his claim for refugee status, the Board concluded:

The claimant testified that he avoided persecution in Puerto la Cruz by hiding his homosexuality. Therefore, on a balance of probabilities can the Board be satisfied that there is no serious possibility of the claimant's being persecuted in Puerto la Cruz ...?

In *Sabaratham, Thavakaran v. M.E.I.*, (F.C.A., no. A-536-90), October 2, 1992, at page 2, Mahoney J.A. addressed this issue ... He wrote:

'A person successfully hiding from his persecutor can scarcely be said to be experiencing no problems. Such a finding is perverse.'

To find that one can remove one's fear of persecution by successfully hiding is perverse because it puts the onus for removing the fear of persecution on the victim, rather than on the perpetrator.

There are many ways of 'hiding'. One can conceal oneself in a cave, or an attic, or a friend's apartment. One can also attempt to hide one's race, religion, nationality or indeed any one of the attributes of the person which fall under Convention grounds — for example, by practising the official state religion in public and one's

<sup>79</sup> As explained by the High Court in *Chan v. Minister for Immigration and Ethnic Affairs* [1989] 169 CLR 379 at 430: 'As long as a person is threatened with harm and that harm can be seen to be part of a course of action of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purposes of the Convention.'

<sup>80</sup> [1995] CRDD No 146.

own faith only in secret, or by carrying false identification and 'passing' for someone of another race or nationality.

At the heart of the Convention definition of a refugee is the concept that no person should face a reasonable chance of persecution because of her or his race, religion, nationality, membership in a particular social group or political opinion. To deny refugee status to someone who cannot or will not conceal one of these immutable or fundamental attributes, on the grounds that by such concealment he or she could remove the fear of persecution, would make a mockery of the Convention.

The claimant has established that he was able to live safely in Puerto la Cruz only by concealing his sexual orientation, which is defined in *Ward* as 'an innate or unchangeable characteristic' falling under the Convention ground of particular social group. I find that he has a well-founded fear of persecution on a Convention ground in Puerto la Cruz.<sup>81</sup>

The analysis provided in *Re X.M.U.* is supported by leading Canadian academics on the law of immigration and refugee status. Donald G Casswell of the University of Victoria, for example, upon reviewing the jurisprudence on this issue, has concluded that in Canada, the state of the law is such that 'a lesbian or gay man is certainly not expected to hide their sexual orientation in order to be safe somewhere in their country'.<sup>82</sup> A similar conclusion has been drawn by the Refugee Status Appeals Authority in New Zealand. In the case of *Re GJ*,<sup>83</sup> for example, a case concerning a 29 year old gay Iranian man, the Authority found that the claimant could be granted refugee status as a result of the risk of persecution to those who identify or who are identified as lesbian or gay male in Iran.

In *Re GJ*, the Applicant claimed that, in addition to the fact that he was a gay male, he could not return to Iran because he belonged to the banned Tudeh Party. The authority, in examining the argument whether he could avoid persecution by simply refraining from exercising his core rights, such as the right to free expression, rejected this claim. The Authority relied on the work of Professor James C Hathaway who has argued that to impose the silencing of a central and defining personal human trait or characteristic:

... is at odds with the human rights context within which refugee law was established, and is inexplicably unsympathetic to persons who demonstrate the courage to challenge the conformism of authoritarian states. Since the purpose of refugee law is to protect persons from abusive national authority, there is no reason to exclude persons who could avoid risk only be refraining from the exercise of their inalienable human rights.<sup>84</sup>

<sup>81</sup> Ibid. at para.s 99–105.

<sup>82</sup> Donald G Casswell, *Lesbians, Gay Men and Canadian Law* (Edmond Montgomery Publications, 1996) at 577.

<sup>83</sup> Above n. 68.

<sup>84</sup> Hathaway, above n. 16 at 151.

In applying this interpretation to the issue of sexual orientation, the New Zealand Refugee Status Appeals Authority found that it would be equally wrong to require an individual to suppress their sexual identity in order to avoid state efforts to suppress those who do not conform to the 'norm'. Finding that those who identify publicly as gay in Iran risk punishment to the extent that they so, the Authority concluded that it was no answer to this persecution to argue that the Applicant could simply hide his sexual identity from the authorities. Indeed, to do so would be to persecute him through forced silencing and invisibility:

Sexual orientation is a characteristic which is either innate or unchangeable or so fundamental to identity or to human dignity that the individual should not be forced to forsake or change the characteristic . . .<sup>85</sup>

Within the context of public disclosure, the Authority continued:

It might be said that the appellant could avoid persecution by being careful to live a hidden, inconspicuous life, never revealing his sexual orientation. Having seen and heard the appellant, we are of the view that to expect of him the total denial of an essential part of his identity would be both inappropriate and unacceptable.<sup>86</sup>

In the Australian case of *Win v. Minister for Immigration and Multicultural Affairs*,<sup>87</sup> the Court considered whether persecution could be said to be non-existent if those who risked persecution on the basis of political dissent were returned to Burma on the assumption that such persecution would only occur if they chose to speak out — the solution being to cease their political dissent and free expression. The Court unequivocally rejected this claim, holding that:

There appears to be no reason why . . . a denial of freedom to express one's political opinion may not, of itself constitute persecution. To illustrate this point by reference to an historical example, upon the approach adopted by counsel for the respondent, Anne Frank, terrified as a Jew for hiding and for her life in Nazi-occupied Holland, would not be a refugee: if the Tribunal were satisfied that the possibility of her being discovered were remote, she would be sent back to live in the attic. It is inconceivable that the framers of the Convention did have, should be imputed to have had, such a result in contemplation.<sup>88</sup>

<sup>85</sup> *Re GJ*, above n. 68 at 27.

<sup>86</sup> *Ibid.* at 28.

<sup>87</sup> [2001] FCA 132.

<sup>88</sup> *Ibid.* at para. 17. It is worth noting that in the case of Mr S, the Tribunal did accept that in some cases, discretion itself could amount to persecution. The Tribunal held, however, that this could not be the case with lesbians and gay men who faced little detriment by leading a less 'open' lifestyle: 'The Tribunal accepts that the applicant would need to be discreet if he wished to have homosexual relationships in Iran. The Tribunal also accepts that in some circumstances the need to be discreet would support a conclusion that the applicant had a well-founded fear of persecution. (See *Woudneh v. Inder & MILGEA*, unreported, Federal Court, Gray J, 16 Sept 1988 at 18–19, also *Applicant A* per McHugh J at 359–360 and Kirby J at 388). However, the Tribunal does not accept that in the applicant's case the need for discretion to avoid adverse consequences of itself amounts to persecution. On his own evidence, the applicant was discreet in relation to his sexual activities in Iran. The applicant

A similar approach can be seen in the judgment of the German Verwaltungsgericht Weisbaden (Administrative Court), reviewing a claim by a gay male Iranian national who feared execution if forced to return to Iran. In summarising the Court's analysis of the Federal Refugee Office's earlier decision that the applicant could conceal his sexual identity from the authorities, thereby avoiding arrest and persecution, Maryellen Fullerton wrote:

The Court believed that telling a homosexual to live a hidden, inconspicuous life is as unacceptable as suggesting that someone deny and hide his religious beliefs, or try to change his skin colour.<sup>89</sup>

Likewise, it has been held in Australia that the need for a lesbian or gay man to remain discreet may constitute persecution. In *Applicant LSLs v. Minister for Immigration and Multicultural Affairs*,<sup>90</sup> Ryan J explained:

An error of law could readily have been imputed to the Tribunal had it acknowledged, on the one hand, that the practice of a homosexual lifestyle as a whole is protected by the operation of the convention but, on the other hand, had denied the applicant all means of meeting prospective sexual partners, thereby reasoning that the Convention does not as a matter of law, 'protect' a part of the activity of a particular social group that is necessary and integral to the defining characteristic of that group. The erroneous reasoning would render illusory the protection afforded by the Convention...<sup>91</sup>

In *LSLS*, the Court did not determine whether on the facts before it discretion amounted to persecution. It held only that it could. In this regard, the decision is to be applauded. Having said that, however, it should be noted that the decision risks advancing a somewhat stereotypical understanding of lesbian and gay male sexual identity and, as such, risks jeopardising the safety of those most in need of international protection from state persecution. In particular, *LSLS* seems to stand for the proposition that gay male sexual identity is a course of conduct, rather than a personal trait or characteristic. That is, lesbian and gay male identities are defined solely by the sexual act. This offers an incorrect, and essentialist, understanding of what it means to be lesbian or gay socially and why some states and persons invest considerable effort into suppressing the expression of same-sex relationships and sexual identities. As Ackermann J, delivering the judgment of the

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did not claim that the need to be discreet caused him any significant detriment or disadvantage. Having regard to all the circumstances the Tribunal is of the view that it is not unreasonable to expect the applicant to continue to be discreet in his homosexual relationships, to the same extent that he has been discreet in the past.' Case of Mr S, above n. 4 at 14.

<sup>89</sup> Maryellen Fullerton, 'Persecution due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany' 4 *Geo. Immigration LJ* 381 at 408 (1990).

<sup>90</sup> [2000] FCA 211.

<sup>91</sup> *Ibid.* at para. 28.

South African Constitutional Court concluded in *The National Coalition for Gay and Lesbian Equality* case:

At the heart of these stereotypes whether expressly articulated or not, lie misconceptions based on the fact that the sexual orientation of lesbians and gays is such that they have an erotic and emotional affinity for persons of the same sex and may give physical sexual expression thereto with same-sex partners:

There are two predominant narratives that circulate within American society that help to explain the difficulty that lesbians and gays face in adopting children and establishing families. First, there is the story of lesbians and gays that centres on their sexuality. Whether because of disgust, confusion, or ignorance about homosexuality, lesbian and gay sexuality dominates the discourse of not only same-sex adoption, but all lesbian and gay issues. The classification of lesbians and gays as 'exclusively sexual beings' stands in stark contrast to the perception of heterosexual parents as 'people who, along with many other activities in their lives, occasionally engage in sex'. Through this narrative, lesbians and gays are reduced to one-dimensional creatures, defined by their sex and sexuality.<sup>92</sup>

In arguing, as the Tribunal did in the case of Mr S, that lesbians and gay men can live their lives without persecution simply by remaining discreet, the Tribunal did just this — it viewed lesbians and gay men as sexual beings only, persons with no public face or existence. In doing so, the Tribunal risks reinforcing those social norms that require homophobic prejudice and which ensure that this prejudice is normalized. Indeed, by confining lesbians and gay identity to private sex, thereby requiring a discrete identity in public, the Tribunal, in effect, persecuted this young man through state imposed invisibility. It also left heterosexual male discourse as the only legitimate discourse permitted public expression. And this is exactly what homophobia entails: keeping lesbians and gay men closeted and, in the process, reinforcing rigid, dehumanizing gender roles — in essence, preserving male dominance by allowing only those attitudes and biases that keep male supremacy in place. In sum, by requiring discretion, the Tribunal confined lesbian and gay male sexuality to the closet, thereby doing what homophobia has long sought to accomplish. The individual and systemic effects of such an approach are well documented.

Mr S's decision was appealed to the Federal Court in late 2001. On 5 April 2002, Lee J ruled that the decision of the Appeals Tribunal be set aside and remitted to the Tribunal for a re-hearing.<sup>93</sup> While on its face this would appear to be a victory for the claimant, Lee J, like the Appeals Tribunal, failed to understand the meaning of and reasons for anti-gay bias, thereby negating what could have been a momentous clarification of refugee law as it applied to lesbians and gay men seeking protection

<sup>92</sup> Above n. 75 at para. 49.

<sup>93</sup> *W133/01A v. Minister for Immigration & Multicultural Affairs* [2002] FCA 395.

within Australia, and significantly limiting Mr S's likelihood of a successful outcome before the Tribunal.

In reviewing the decision of the Tribunal, Lee J focused on the abuse inflicted on Mr S while frequenting the Daneshjoo Park referred to by the Tribunal. Lee J understands these visits to constitute 'discreet' behaviour from which persecution arose at the hands of the police. From this, Lee J concludes that for the Tribunal to find that 'discretion' did not result in persecution was an error of law:

Properly instructed, on the evidence before it the Tribunal could have found that there was a real chance that a homosexual could suffer persecution at the hands of the Basiji if he continued to frequent a place such as Daneshjoo Park for the purpose of seeking the company of other homosexuals.

Having accepted that homosexuals in Iran constituted a social group, and having accepted that past events had occurred as described by the applicant, the Tribunal had to put all of that material in the balance when assessing whether there was some degree of probability that an event could occur in future involving persecution of the applicant.<sup>94</sup>

With greatest respect, while the decision of Lee J does seem to understand the hostility to which gay men and lesbians are subjected in Iran, this reasoning is inadequate and arguably a mis-reading of the Tribunal's interpretation of the facts. A re-reading of the Tribunal's decision reveals that the Tribunal does not accept that in frequenting the Park, the claimant was acting 'discreetly'. Quite the opposite. The Tribunal seems to imply that the reason Mr S was beaten and incarcerated was because he was *not* acting discreetly and that such abuse/persecution would be avoided in the future if he took greater precautions aimed at avoiding detection. This would require avoiding the Park and other locations where the police might find him. In other words, to the extent that you chose visibility, you fail to act discreetly and risk persecution. But to the extent that you keep your sexuality and identity private, you avoid persecution — a type of discretion which, in the opinion of the Tribunal, does not impose an unreasonable burden.

In failing to understand the implications of the Tribunal's analysis as set out in this paper, Lee J essentially left in place a line of reasoning which allowed future Tribunals to deny refugee status to lesbians and gay men on the grounds that it is not unreasonable to require lesbians and gay men to avoid abuse through invisibility. To the extent that any Tribunal can read the facts before it as representing 'un-discreet' behaviour resulting in persecution and then argue that such persecution can be avoided by avoiding these behaviours, the likelihood of any lesbian or gay man ever being granted asylum in Australia was left significantly reduced. As such,

<sup>94</sup> Ibid. at paragraph 31.

any victory that might have resulted from Lee J's decision to remit this case for a re-hearing was likely to be short lived.

## 6. The High Court Steps In But Not Quite Far Enough

In a separate case, heard after the decision of Lee J, the High Court of Australia, was asked to determine the case of two gay Bangladeshi men seeking protection visas under Australian law. Detailing the case before it, the Court, per McHugh and Kirby JJ, outlined that:

The Tribunal accepted that 'homosexual men in Bangladesh constitute a particular social group under the Convention.' The Tribunal found:

'[H]omosexuality is not accepted or condoned by society in Bangladesh and it is not possible to live openly as a homosexual in Bangladesh. To attempt to do so would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police. However, Bangladeshi men can have homosexual affairs or relationships, provided they are discreet. Bangladeshis generally prefer to deny the existence of homosexuality in their society and, if possible, will ignore rather than confront it. It is also clear that the mere fact that two young men held hands or hugged in the street would not cause them to be seen as homosexuals, and that being caught engaging in sexual activity on one occasion would be most unlikely to cause a young single man to be labelled a homosexual.'<sup>95</sup>

Despite this, as the High Court notes, the Tribunal saw fit to find that the appellants:

... did not experience serious harm or discrimination prior to their departure from Bangladesh and I do not believe that there is a real chance that they will be persecuted because of their sexuality if they return. As discussed above, while homosexuality is not acceptable in Bangladesh, Bangladeshis generally prefer to ignore the issue rather than confront it. [The appellants] lived together for over 4 years without experiencing any more than minor problems with anyone outside their own families. *They clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now.* (Emphasis added)<sup>96</sup>

In responding to the Tribunal's decision, both McHugh J and Kirby J did much to rectify some of the problems evident in Lee J's earlier judgment in the Iranian case discussed above. They argue, for example, that:

The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to

<sup>95</sup> Appellant S395/2002, above n. 3 at para 17.

<sup>96</sup> Ibid. at para. 30.

the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many — perhaps the majority of — cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.<sup>97</sup>

This insightful analysis is further strengthened by the judgment of Gummow and Hayne JJ, who, rejecting the claim that homosexuality is to be viewed solely through the lens of sexual activity, write:

Saying that an applicant for protection would live ‘discreetly’ in the country of nationality may be an accurate general description of the way in which that person would go about his or her daily life. To say that a decision-maker ‘expects’ that that person will live discreetly may also be accurate if it is read as a statement of what is thought likely to happen. But to say that an applicant for protection is ‘expected’ to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant *must* do. The Tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection. Moreover, the use of such language will often reveal that consideration of the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than that range of behaviour and activities of life which may be informed or affected by sexual identity. No less importantly, if the Tribunal makes such a requirement, it has failed to address what we have earlier identified as the fundamental question for its consideration, which is to decide whether there is a well-founded fear of persecution. It has asked the wrong question.

Addressing the question of what an individual is *entitled* to do (as distinct from what the individual *will* do) leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning, exemplified by the passages from reasons of the Tribunal in other cases, cited by the Federal Court in *Applicant LSLs v. Minister for Immigration and Multicultural Affairs*, leads to error. It distracts attention from the fundamental question. It leads to confining the examination undertaken (as it was in *LSLS*) merely ‘to considering whether the applicant had a well-founded fear of

<sup>97</sup> Ibid. at 43.



persecution if he were to pursue a homosexual lifestyle in [the country of nationality], disclosing his sexual orientation to the extent reasonably necessary to identify and attract sexual partners and maintain any relationship established as a result'. That narrow inquiry would be relevant to whether an applicant had a well-founded fear of persecution for a Convention reason only if the description given to what the applicant would do on return was not only comprehensive, but exhaustively described the circumstances relevant to the fear that the applicant alleged. On its face it appears to be an incomplete, and therefore inadequate, description of matters following from, and relevant to, sexual identity. Whether or not that is so, considering what an individual is entitled to do is of little assistance in deciding whether that person has a well-founded fear of persecution.<sup>98</sup>

There is much to be said in favour of the above. Given the history of the same-sex refugee decisions that came before it, and the inevitable reaction of those who will condemn it is a 'political' or 'activist' decision, these statements represent considerable courage on the part of those judges who, in writing what they did, have done much to bring Australia into line with other, arguably more progressive, nations. Discretion represents an extreme form of 'othering', a violent disavowal of non-heterosexual identities. Being forced to identify in secret is recognised as persecution in other contexts.<sup>99</sup> The Tribunal's use of discretion in the judgments like the one detailed in this paper, also highlights an underlying heterosexual bias in the decision-making process. And herein lies the only 'gap' in the High Court's decision — one that will need to be addressed if the Court's desire for all persecuted persons to find safety and inclusion is to become a reality. Discretion, at its core, is the very essence of all that is homophobic and sexist. To not say so, as the High Court has not, clearly brings with it further opportunities to disempower the lesbian or gay refugee claimant. Refugee jurisprudence has the potential to challenge many shortcomings evident in more traditional, western legal narratives about asylum seeking and the prevailing homophobic and ethnocentric practice underpinning some of Australia's RRT decisions. The High Court's judgment, despite the majority's best intentions, does not.

For example, without a clearer articulation of what homophobia is and does, lesbian and gay asylum seekers in Australia will continue to be received with suspicion and distrust. The Australian RRT views refugees seeking asylum because of persecution based on sexual orientation through heterosexist and ethnocentric lens. The resulting decisions reflect a dominant subjectivity that fails to adequately account for the experience of sexual minorities fleeing persecution. Gay men and lesbian refugees may,

<sup>98</sup> Ibid. at para.s 20, 21 and 24.

<sup>99</sup> Discretion to avoid religious persecution has been rejected by the Federal Court. In *Re Woudneh*, Unrep, Federal Court (16 Sept. 1988, para 28), Gray J notes that the 'mere fact of the necessity to conceal would amount to support for the proposition that the applicant had a well-founded fear of persecution on religious grounds'. Quoted in Walker, above n. 36 at 206.

for example, be evaluated by hegemonic heterosexual norms that include issues of respectability. Refugees who appear to mimic idealised heterosexual paradigms of monogamy, in turn, are more likely to be granted status. Refugees whose narratives reveal 'promiscuity', however, may well be rejected for performing gender in a way that is unacceptable to Australian heterosexual mores of homosexual invisibility. As Kirsten Walker explains, decision makers in Australia may be more likely to grant status to gay men who appear to mimic heterosexual relationships in their sexual activity. The High Court's failure to label homophobic and sexist stereotyping as just that, will not address this. Walker notes, for example that in three successful asylum cases — *Ainan*, *Liandi* & *Shuaige* — all applicants were in long term, monogamous relationships. Walker points to a 'distinct note of approval of the committed relationship in *Ainan*'s case'<sup>100</sup> (& disapproval of 'promiscuous' homosexuals engaging in casual sex). The RRT noted, for example that 'Ainan did not express his homosexuality through numerous fleeting sex encounters' and Ainan distinguished himself, in the RRT eyes from homosexuals who 'find sexual expression in casual liaisons in public parks'.<sup>101</sup>

Such comments rely on readily available stereotypes of homosexuals as promiscuous, 'flaunting' their sexuality in public places and deviant in their sexual expression. Further, the Tribunal ignores the fact that parks in countries like Iran or China may be the only place for homosexual couples to meet with relatively little sanction. The RRT also enters into a discourse of respectability that is familiar to feminist scholarship. Through this lens, some homosexuals are worthy of protection; others are not. Those who 'merit respect' are those who are in relationships that are 'serious, monogamous and longstanding'.<sup>102</sup> Similar to the protection of wives and not prostitutes from rape, the RRT seems to demarcate 'respectable' and worthy homosexual refugees and those that are 'promiscuous' and undeserving of protection.

What we are left with is the refugee being forced to adopt a subjectivity that does violence to their identity and that cannot account for the upheaval, displacement and persecution many refugees have suffered. Applicants' 'authenticity' as homosexuals may be challenged. Homosexuality may be seen as a 'passing phase' and an illegitimate alternative to heterosexuality. In so doing, the RRT replicates dominant norms of homosexual invisibility and patriarchal bias against those most in need of basic rights protections. And until this bias is clearly articulated by the High Court in words that specifically challenge heterosexism and patriarchal

<sup>100</sup> Walker, above n. 45 at 583.

<sup>101</sup> N 93/00846 at para. 73.

<sup>102</sup> Walker, above n. 45 at 583.

bias, the plight of the refugee seeking protection in Australia will remain difficult and itself a form of persecution.

## 7. Conclusion

This paper has challenged some of the approaches to lesbian and gay refugees that have found their way into Australian refugee law. Although the High Court has now gone some way towards rectifying bias and discrimination, it is clear that much more remains to be said before justice for lesbians and gay men can find a home in Australian refugee law. Without a clearer articulation of what equality means in a society in which 'the homosexual' is seen to deviate from 'the norm', much pain, oppression and those social hierarchies that form the foundations of systemic inequality will go unchecked. Anti-gay stereotypes, in turn, will continue to form the basis through which to deny refugee status to lesbians and gay men.

In those countries where lesbians and gay men are targeted and persecuted and where no assistance from the state is forthcoming, arguments which dissect the refugee according to discriminatory standards of good and bad, do little more than feed into and ultimately ensure the success of those social hierarchies that make these women and men the target for abuse in the first place. Forced 'normalisation', which can only be addressed once homophobia is seen and articulated by the Courts for what it is and what it does, does not eradicate the inequality faced by lesbians and gay men. On the contrary, it violates a central aspect of their human dignity, discriminates against them on the basis of sexual orientation and lends support to the argument that those who do challenge the norm should be silenced — thereby doing what homophobia and heterosexism have done quite effectively for some time now. This is not a human rights strategy that any government should partake in, least of all one, which, like Australia, professes to take rights and freedoms seriously. Some have criticised the High Court's latest judgment on gay refugees as 'interventionist', even 'radical'. Those critics do so because they fail to recognise what equality is and what the demands of equality require of the Court in its interpretation of the Convention. While the Court has recognised the errors of discretion, it has yet to find the voice that true equality demands.