

THE GAP BETWEEN IMMUTABILITY AND PERCEPTIBILITY: ISSUES EXPERIENCED BY SEXUAL MINORITY ASYLUM SEEKERS IN THE CONTEXT OF THE ‘MEMBERSHIP OF A PARTICULAR SOCIAL GROUP’ GROUND.

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Abstract:

Despite the persecution of sexual minorities being a widely-recognised ground for claiming asylum, this category of asylum seekers still experience a plethora of problems. This is especially so for applicants who fall outside of the homosexual/heterosexual binary and those who express their sexuality in a way that lacks visibility.

This paper examines difficulties experienced by sexual minority applicants that pertain to the relationship between their sexual identity and the legal tests used to establish the ‘membership of a particular social group’ ground. This is done through a comparative analysis of Canadian and Australian refugee law.

It will be demonstrated that, in different ways, both jurisdictions’ ‘membership of a particular social group’ tests are problematically narrow in their construction of sexual identity. This situation sits uneasily with human rights principles, which, as will be argued, are one of the key purposes of refugee law. As such, this paper ultimately recommends a broadening of the relevant tests in order to overcome these difficulties and, thus, bring this area of law into line with its human rights purpose.

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I. INTRODUCTION

Since the mid-1990s, it has been well-accepted in many Western countries that refugee status is available for persons who are persecuted or fear persecution due to their sexual orientation.² Article 1(A)(2) from the Refugee Convention of 1951 (the Convention) classifies a refugee as someone harbouring 'a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.'³ Sexual minority applications are generally accepted as falling within the residual ground of 'membership of a particular social group' (MPSG). Although there have been some attempts to classify sexual minority applications as based on political opinion, especially for gay rights activists,⁴ the MPSG approach for sexual minority applicants was confirmed by the United Nations High Commissioner for Refugees (UNHCR) in 1995.⁵

Under the MPSG ground, the test for a sexual minority refugee is as follows:

- 1) Does their sexual orientation constitute a particular social group in the sending country?
- 2) Do they belong to that particular class of persons?
- 3) Are they, or will they be, in danger of persecution? And;
- 4) Will their persecution be based on their membership of that group?

Each of these elements has presented a range of problems for the sexual minority asylum seeker. For example, Ghai's work details the complications which relate to the

² For an example of the general acceptance of these types of claims, see generally *Guidelines on International Protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UN High Commissioner for Refugees, UN Doc HCR/GIP/12/09 (2012) (hereinafter '*Guidelines on Sexual Minority Claims*'). For the development of the acceptance of sexual minority claims since the mid-1990s, see Catherine Dauvergne and Jenni Millbank, 'Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers' (2003) 31 *Federal Law Review*, 299, 300 (hereinafter 'Burdened by Proof').

³ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁴ See, for example, the Canadian case of *Re C.Y.T.* [1998] CRDD 186 (QL). For mention of this case as an attempt to make a sexual minority claim based on the ground of 'political opinion' see Sean Rehaag, 'Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada', (2008) 53 *McGill Law Journal*, 60, 65.

⁵ Dauvergne and Millbank, 'Burdened by Proof', above n.2, 301.

nexus requirement (element four).⁶ However, this paper will only focus on issues that can be attributed to the expression and construction of the sexual minority applicant's sexual identity when making their claim. In other words, it will only examine obstacles encountered by sexual minority applicants with regard to the first two elements; the existence of the social group and their membership in that group.

Over the past two decades, many improvements have been made with regard to sexual minority claims, and there is now a much higher success rate for sexual minority refugees.⁷ However, difficulties still persist, in particular for those that identify with a sexual orientation that falls outside of the homosexual/heterosexual binary or who have a fluid sexuality.

Rehaag, for example, discusses the issues experienced by bisexual asylum seekers. Noting that bisexual claimants' allegations regarding their sexual identity are commonly disbelieved,⁸ he suggests that this is caused by an essentialist notion that individuals fall certainly into categories such as gay and straight.⁹ Similarly, as Berg and Millbank point out, for the applicant whose sexuality has changed over time, past heterosexual relationships are taken to negatively affect the credibility of an applicant's assertion of their present homosexuality.¹⁰

There are also a range of obstacles for those who express their sexual identity in a discreet manner. Hanna's work, for example, outlines the propensity for Western tribunals to disbelieve gender-conforming homosexuals because their sexual orientation would not be easily identified.¹¹ Millbank has also found that due to the traditional gendered private/public divide, lesbians are more commonly disbelieved because they lack evidence of having expressed their sexuality.¹²

One of the reasons for all these complications is the situation of the sexual minority applicant within the MPSG ground. The problems associated with this ground have been explored by a range of scholars. Foster has described as it 'the most nebulous of the grounds,'¹³ due to the absence of clarity as to what exactly it was intended to cover

⁶ Ritu Ghai, 'Deciphering Motive: Establishing Sexual Orientation as the "One Central Reason" for Persecution in Asylum Claims' (2012) 43 *Columbia Human Rights Law Review*, 521.

⁷ For example, in Canada in 2006 the success rate for sexual minority claimants was 58%, exceeding the average refugee success rate of 54%, see Sean Rehaag, 'Bisexuals Need Not Apply: a Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia' (2009) 13(2) *International Journal of Human Rights* 415, 421.

⁸ Rehaag found that in 63% of the Canadian decisions concerning bisexual asylum seekers from 2001 to 2004, the applicant was disbelieved, Rehaag, (2008), above n.4, 79.

⁹ Rehaag, (2008), *ibid*, 80.

¹⁰ Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22(2) *Journal of Refugee Studies*, 195.

¹¹ Fadi Hanna, 'Punishing Masculinity in Gay Asylum Claims' (2005) 114 *The Yale Law Journal*, 913.

¹² Jenni Millbank, 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (2003) 18 *Georgetown Immigration Law Journal*, 71.

¹³ Michelle Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'* (UNHCR, 2012), 2.

and the lack of consistency in its application in different jurisdictions today.¹⁴ Aleinikoff has noted similar issues, and has made suggestions that the two predominant MPSG tests be reconciled.¹⁵

It has been argued, by academics such as Steinbock, that these issues may be attributable to the historical origins of refugee law, in which the drafters of the Convention were perhaps not thinking beyond the 'Holocaust groups' upon which it was modelled.¹⁶

The tension between the MPSG ground and the nature of sexual minority group identities has been recognised by some scholars. Rehaag, for example, attributes the obstacles encountered by bisexual applicants to the preference for fixed-identity in the Canadian MPSG test.¹⁷ Foster also briefly discusses the approaches to this category of claims under the different MPSG tests.¹⁸

However, there is a gap in the literature with regard to a comprehensive analysis on the relationship between the MPSG ground, and all its shortcomings, and problems of identity construction encountered by sexual minority applicants. This paper will thus bring these two areas together by analysing the difficulties experienced by sexual minority applicants under each of the predominant MPSG tests.

A. Methodology

This paper will explore the issues experienced by sexual minority asylum seekers through an examination of tribunal case law from Australia and Canada over the past two decades. These jurisdictions were chosen because each represents one of the prevailing approaches to MPSG. Canada employs the 'protected characteristics' approach, while Australia favours the 'social perception' test. This case law will be discussed against a backdrop of literature focused on queer theory and refugee law.

It will also be supplemented by information gathered in interviews conducted in Mexico and Sri Lanka. This was done to gather information about queer communities in different countries and cultures. Sri Lanka was chosen because it is a contemporary example of a country from which sexual minority applicants are coming; its LGBT nationals are currently considered by the UNHCR to be at risk on account of their

¹⁴ Foster (2012), *ibid*, 2.

¹⁵ Alexander T. Aleinikoff, 'Protected Characteristics and Social Perceptions: an Analysis of the Meaning of 'Membership of a Particular Social Group' in Erika Feller (ed.) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (1st ed, 2003), 263, 265-266.

¹⁶ Daniel J. Steinbock, 'The Refugee Definition as Law: Issues of Interpretation', in Nicholson, S. and Twomey, P., (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1st ed, 1999), 13, 18.

¹⁷ Rehaag, (2008), above n.4, 64-67.

¹⁸ Foster (2012), above n.13, 48-53.

MPSG.¹⁹ Mexico was selected because it was a Mexican national who was the first bisexual refugee to be accepted by Canada.²⁰ Before that case, neither Australia nor Canada had accepted a refugee claim on the basis of bisexuality. As such, it was used to gather information on queer culture that exists outside of the heterosexual/homosexual binary.

Interviews took place in Mexico City with three organisations; Aston Rigel from *Udiversidad*,²¹ a university advocacy group for LGBT I persons, Natalia Anaya Quintal, on behalf of the Mexican bisexual advocacy group, *Opción Bi*,²² and with Ileana Esparanza Romero from *La Comisión de Derechos Humanos del Distrito Federal*,²³ a human rights organisation in Mexico City. In Sri Lanka an interview was conducted with Rosanna Flamer-Caldera, executive director of *Equal Ground*.²⁴

While these interviews will occasionally be cited, the information gathered from them has been largely used to inform this paper's discussion rather than to serve as a direct reference.

B. Framework

The first chapter provides background to the development of the MPSG ground in refugee law and the principal MPSG tests used throughout the world. It also briefly compares the refugee laws and processes of Canada and Australia.

The second chapter looks explicitly at the Canadian approach to MPSG and how it interacts with the sexual minority refugee category. The third chapter gives a similar analysis with regard to the Australian approach to MPSG.

Finally, chapter four highlights the tension between the issues encountered by sexual minority asylum seekers and the human rights purpose of refugee law. This is followed

¹⁹ *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, N High Commissioner for Refugees, UN Doc HCR/EG/LKA/12/04 (2012), 35-37.

²⁰ *Re B.D.K* [2000] CRDD 72 (QL). For a discussion of this case see Rehaag (2008), above n.4, 76.

²¹ This interview took place on the 26/02/2013 at the National Autonomous University of Mexico in Mexico City in a mixture of Spanish and English. This interview was approved by the Monash University Human Research Ethics Committee on the 5th of February 2013 (project number: CF13/300 - 2013000131).

²² This interview took place on the 26/02/2013 in Mexico City in Spanish. This interview was approved by the Monash University Human Research Ethics Committee on the 5th of February 2013 (project number: CF13/300 - 2013000131).

²³ This interview took place on the 26/02/2013 at the Comisión de Derechos Humanos del Distrito Federal building in Mexico City in Spanish with the assistance of a colleague who spoke English. This interview was approved by the Monash University Human Research Ethics Committee on the 5th of February 2013 (project number: CF13/300 - 2013000131).

²⁴ This interview took place on the 05/04/2013 at the Equal Ground building in Colombo, Sri Lanka. This interview was approved by the Monash University Human Research Ethics Committee on the 4th of April 2013 by way of amendment to the original application, approved on the 5th of February 2013 (project number: CF13/300 - 2013000131).

by some recommendations which aim to ameliorate the narrow identity construction evident in the current MPSG tests.

C. A Note about Terminology

Throughout this paper the terms 'sexual minority' and 'queer'²⁵ will be used interchangeably to describe all non-heterosexual sexual orientations and non-cisgender²⁶ identities. Although non-cisgender identities are not 'sexual' minorities, for simplicity's sake this term may still be utilised to capture such persons. No offence is intended by doing this. Occasionally, the acronym 'LGBT' or 'LGBTI' will also be employed. This refers to lesbian, gay, bisexual, transgender and, in the latter, intersex persons. However, this will only be done when referring to advocacy groups, movements or theories that identify with this acronym, as it is less inclusive than the term 'queer'.²⁷

²⁵ Queer is being used here as an umbrella term to describe all non-traditional sexual and gender identities.

²⁶ Schilt and Westbrook define *cisgender* as a label for 'individuals who have a match between the gender they were assigned at birth, their bodies, and their personal identity', Kristen Schilt, and Laurel Westbrook, 'Doing Gender, Doing Heteronormativity: 'Gender Normals,' Transgender People, and the Social Maintenance of Heterosexuality' (2009) 23 (4) *Gender & Society*, 440, 461.

²⁷ LGBTI, for example, does not include pansexuals, which are persons who are attracted to all genders, including transgendered persons, whereas the umbrella term 'queer' does capture such persons.

II. BACKGROUND: THE ORIGINS OF REFUGEE LAW AND THE MEMBERSHIP OF A PARTICULAR SOCIAL GROUP GROUND.

A. *The Group Focus of Refugee Law*

Even though the refugee must prove an individual well-founded fear of persecution, refugee law is group-focused. The refugee's fear of persecution must be 'by reason of' a certain 'ground' - and four of the five listed grounds pertain to the individual's membership of a *group*. The reasons for this nexus requirement, as well as the focus on 'groups', are historical. The modern refugee system, as Hannah Arendt claims, is fundamentally a twentieth century phenomenon.²⁸

It developed after World War II in the wake of the Holocaust wherein the persecution the world had just witnessed in the context of Nazi Germany was very much linked to group membership. As such, the refugee definition that emerged reflected this understanding of persecution.²⁹ Furthermore, the groups envisaged by the drafters of the Convention were those that had most obviously suffered during the Holocaust; racial, national and religious groups.³⁰ As Steinbock writes, 'the treatment of Jews for reasons of their religion and perceived 'race' was the paradigm condition the drafters meant to encompass.'³¹

This understanding of persecution as something inherently linked to group membership is also evident in other areas of international law that developed around that time. Genocide, for example, must be aimed at a group defined only by ethnicity, race, religion or nationality.³² If the group in question falls outside of this particular list, it will not constitute genocide. The Convention definition of a refugee is of course broader than that of genocide. For one, it includes political opinion as well. The inclusion of this

²⁸ Hannah Arendt, *The Origins of Totalitarianism*, (1st ed, 1951).

²⁹ Jack Garvey, 'Toward a Reformulation of International Refugee Law', (1985) 26(2) *Harvard Journal of International Law*, 483.

³⁰ For a discussion of the manner in which the refugee is an object of the 1951 Refugee Convention which was developed in the aftermath of World War II see James C. Hathaway, 'Forced Migration Studies: Could We Agree Just to 'Date'?' (2007) 20 *Journal of Refugee Studies*, 349, 352.

³¹ Steinbock, above n.16, 18.

³² *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951), art. 2.

ground is again most likely historical; a reaction to the post-war emergence of persecution of persons who objected to the communist regimes of Eastern Europe.³³ Moreover, unlike genocide, refugee law also includes the more general ground of MPSG.

The insertion of this ground suggests that the other grounds were not thought to be all-encompassing.³⁴ Nonetheless, it seems that neither the drafters, nor, for many years, those implementing refugee law, were really thinking beyond the confines of the conventional Holocaust paradigm and its focus on the 'traditional groups'. This is evident in the lack of explanation given at the time to its last-minute insertion into the Convention,³⁵ and the fact that the MPSG ground was hardly used for many years as a ground for refugee status.³⁶

It is unclear what the MPSG ground was originally intended to cover. Indeed some argue that perhaps it was only ever inserted to extend refugee protection to those persecuted due to 'social class'.³⁷ Although even at the time it was known that other groups, including sexual minorities, had suffered at the hands of the Nazi regime,³⁸ there is no evidence as to whether the drafters of refugee law intended to encompass sexuality based claims into the MPSG ground or not.³⁹ This has meant that, despite the fact that sexual minority claims are now well accepted in many different jurisdictions,⁴⁰ the predominant tests used to establish MPSG are in many ways inappropriate to address them.

Both tests, in different ways, attempt to reflect the narrow and historically placed characteristics of the other group-based grounds. This has given rise to various obstacles for the sexual minority refugee because groups based on sexuality can be very different to those based on race, nationality and religion. Firstly, sexual minorities can be less visible than other groups and there can be difficulties in providing evidence of one's sexual identity.⁴¹ In addition, sexuality may be less easily defined and more ambiguous

³³ Steinbock, above n.16, 21.

³⁴ Steinbock, above n.16, 18.

³⁵ Aleinikoff (2003), above n.15, 265-266.

³⁶ Foster (2012), above n.13, 5.

³⁷ Steinbock, above n.16, 29.

³⁸ Volker Türk, 'Ensuring Protection to LGBTI Persons of Concern', (2013) 25(1) *International Journal of Refugee Law*, 120, 121.

³⁹ Steinbock notes, in relation to gender-based claim, the lack of information about the groups the drafters originally intended to encompass, above n.16, 29.

⁴⁰ Foster (2012), above n.13, 48.

⁴¹ Barry O'Leary, "'We Cannot Claim Any Particular Knowledge of the Ways of Homosexuals, Still Less of Iranian Homosexuals...': The Particular Problems Facing Those Who Seek Asylum on the Basis of Their Sexual Identity' (2008) 16 *Feminist Legal Studies*, 87.

than other groups.⁴² Sexuality can also be, for some persons, much more fluid than other group status and change throughout the individual's lifetime.⁴³

B. The Development of the Predominant Membership of a Particular Social Group Tests

The 'protected characteristics' approach originated in the 1985 United States Board of Immigration Appeals (BIA) case, *In the Matter of Acosta*⁴⁴ and is now well entrenched in countries such as Canada,⁴⁵ South Africa,⁴⁶ and New Zealand.⁴⁷ This approach explicitly attempts to reflect the other group-based grounds in the refugee definition. In *Acosta*, the BIA employed the doctrine of *ejusdem generis*⁴⁸ to determine the meaning of MPSG.⁴⁹ This doctrine holds that 'general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.'⁵⁰ Applying this principle to the refugee definition, the BIA held that the characteristic common to all the listed groups was immutability.⁵¹

The use of the *ejusdem generis* has been criticised as an inappropriate interpretive method for the Convention's definition because MPSG should be treated as a ground in its own right, rather than construed as a completely residual ground where one would usually employ this method.⁵² Furthermore, as will be shown in this paper, this focus on

⁴² Alice M. Miller, 'Gay Enough: Some Tensions in Seeking the Grant of Asylum and Protecting Global Sexual Diversity' in Brad Epps, Keja Valens and Bill Johnson Gonzalez (eds.), *Passing Lines: Sexuality and Immigration*. Cambridge, (1st ed, 2005), 137, 138.

⁴³ Miller, above n.42, 138.

⁴⁴ *In the Matter of Acosta* 19 I. & N, 211, BIA (1985) (hereinafter '*Acosta*')

⁴⁵ *Canada (Attorney General) v. Ward* [1993] 2 SCR 689 (hereinafter '*Ward*')

⁴⁶ In *Jian-Qiang Fang v Refugee Appeal Board et al*, Case No. 40771/05, 15 November 2006, the High Court of South Africa set out the 'protected characteristics' test as set out in *Ward*, cited in Foster (2012), above n.13, 8.

⁴⁷ *Re GJ; Refugee Appeal 71427/99* [2000] NZAR 545, 93- 102.

⁴⁸ *Ejusdem generis* is Latin for 'of the same kind'. It is a rule of construction stipulating that where general words follow particular words, the general words may be construed as being limited to the same kind as the particular words, Peter Butt, *Butterworths Concise Australian Legal Dictionary*, (3rd ed, 2004), 'ejusdem generis', 145. For example, if a law refers to 'automobiles, trucks, tractors, motorcycles and other motor-powered vehicles', 'vehicles' would not include airplanes because the list was of land-based transportation, Gerald N. Hill and Kathleen T. Hill, 'Ejusdem Generis', *Legal Dictionary*, The Free Dictionary <<http://legal-dictionary.thefreedictionary.com/Ejusdem+generis>> at 26 September 2013.

⁴⁹ *Matter of Acosta*, above n.44, at 233.

⁵⁰ *Matter of Acosta*, *ibid.*

⁵¹ *Matter of Acosta*, *ibid.* In jurisdictions, such as Canada, this test has since been expanded to also cover social groups that are not necessarily unchangeable. For example, it also includes defined by a characteristic that is fundamental to human dignity such that person should not have to relinquish it; and those defined by a former status, unchangeable because of its historical permanence. See *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593, refining the test set out in *Ward*, above n.45. This modification will be discussed further below.

⁵² *Ejusdem generis* is ordinarily used to interpret a very broad, residual term used at the end of a phrase, see above n.47. However, as Aleinikoff notes 'the Convention does not list four grounds and then add a fifth such as 'and all other grounds that are frequently a basis for persecution'. The term 'particular social group' appears to define a free-standing Convention ground of equal kind and status to the other identified grounds'. Aleinikoff (2003), above n.15, 289-290.

immutability presents a range of difficulties for sexual minority groups which are defined by fluid, ambiguous or chosen sexual identities.

The other dominant approach that developed is the 'social perception' test, which is employed in countries such as Australia and France. It began in Australia with the High Court decision of *Applicant A*,⁵³ while it developed independently in France following the *Ourbih* decision⁵⁴. In both these jurisdictions, the prevailing method is to determine whether a social group exists essentially by reference to 'perceptions of the group... [and by asking whether it is] identifiable as a social unit.'⁵⁵ This approach was arrived at by a more literal interpretation of the terms 'particular', 'social' and 'group'⁵⁶ rather than a deliberate attempt to bring the MPSG in line with the other group-based grounds. For this reason it is generally regarded as being able to encompass a broader range of groups than the 'protected characteristics' approach.⁵⁷ However, it still exhibits a problematic fixation with group membership and can be difficult to satisfy if the sexual minority applicant has not visibly expressed their sexual orientation or if their group is not itself particularly socially visible.

There are also a number of other approaches used throughout the world. Some jurisdictions, such as the US, employ a completely unique MPSG test,⁵⁸ while others have in some way combined the two dominant tests.⁵⁹ However, it is not within the

⁵³ *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (hereinafter '*Applicant A*')

⁵⁴ *Ourbih*, Conseil d'Etat [French Council of State], 171858, 23 June 1997, as cited in J. Freedman, *Female Asylum-Seekers and Refugees in France*, UNHCR Legal and Protection Policy Series, June 2009, PPLAS/2009/01, 30.

⁵⁵ *Applicant A*, above n.53, at 264.

⁵⁶ *Applicant A*, *ibid*, at 241.

⁵⁷ *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN High Commissioner for Refugees, UN Doc HCR/GIP/02/02 (2002), 9 (hereinafter *MPSG Guidelines*)

⁵⁸ The United States, for example, has recently begun employing a new 'social visibility' test. This test, developed in *In the Matter of C-A* 23 I. & N. Dec. 951 (BIA, 2006), interim decision #3535. It is important to note, however, that it is not employed by all circuit courts. It is rejected by the third and seventh circuit courts. See *Gatimi*, 578 F. 3d 611, 3 (7th Cir., 2009) and *Valdiviezo-Galdamez v Attorney General*, 663 F. 3d 582, 585 (3rd Cir., 2011). This test is similar to the 'social perception' test, but places a far greater emphasis on whether the group is observable in the sending country. See Foster (2012), above n.13, 28. The development of this test can put down to a recent emphasis on the inclusion of the word 'particular' in 'particular social group', see *In the Matter of C-A*, *ibid*, at 602.

⁵⁹ Some jurisdictions, such as the United Kingdom, have amalgamated both the 'social perception' and the 'protected characteristics' tests. This approach entails asking first whether the applicant meets the 'protected characteristics' test, and, in the case that they do not, asking nevertheless whether they meet the 'social perception' test. See *Fornah v. Secretary of State for the Home Department* [2007] 1 AC 412 ('hereinafter '*Fornah*'). Indeed, this is the approach recommended by the UNHCR in its 2002 guidelines; see *MPSG Guidelines*, above n.57, 10. Other jurisdictions, such as Germany and Belgium, have also adopted a single combined test, but have done so in a manner which requires the more burdensome satisfaction of *both* tests. For Germany, see Section 60 of the German *Aufenthaltsgesetz* [Residence Act] B085, 25th February 2008 (Federal Law Gazette I, 162). and, e.g., *Hessischer Verwaltungsgerichtshof* (VGH) [Hessen Higher Administrative Court Hessen], 3UE 455/06.A, 10 April 2008 [Anne Kallies

scope of this paper to go into detail about these alternatives and instead it will only focus on the two tests mentioned above.

C. A Brief Comparison of the Canadian and Australian Refugee Systems

Before turning to the specific relationship between the Canadian and Australian approaches to MPSG and the sexual minority applicant, it is necessary to explain briefly some of the key procedural and legal differences between the two jurisdictions.

Australia and Canada have relatively similar refugee laws and processes.⁶⁰ For example both employ the standard Convention definition and, in most cases, both assess asylum claims through an independent and specialised tribunal.

However, the role and structure of the tribunal is slightly different in each case. In Australia, the Refugee Review Tribunal (RRT) sits with a single member and only conducts a merits review as a form of appeal from original decisions made by delegates of the Minister for Immigration and Citizenship.⁶¹ In Canada, the Immigration and Refugee Board (IRB) conducts a first instance hearing and usually sits with two members.⁶² Yet, as Dauvergne and Millbank note, this difference is not significant as a majority of asylum claimants in Australia are rejected at first instance and appeal to the RRT.⁶³ Another distinction, which is the focus of this paper, is in the application of the law. As has already been flagged, Canada and Australia employ different MPSG tests; Australia uses the 'social perception' approach and Canada the 'protected characteristics' test.

Canada and Australia were both amongst the first jurisdictions to accept sexual minority refugee claims. They have even been described as 'leading the way' in the acceptance of these types of claims.⁶⁴ Yet, the literature suggests that over the past twenty years

trans]. For Belgium see Belgium's Alien Legislation (*Loi du 15 Décembre 1980 sur L'accès au Territoire, le Séjour, L'établissement et L'éloignement des Étrangers*) article 48/3. This position derives from the 2011 European Union's Qualification Directive, which employs the use of the word 'and' between the tests. See 2011/95/EU (the 2011 QD), article 10(1)(d). Due to this, the European Union's Qualification Directive has received a lot of criticism. Foster (2012), above n.13, 16.

⁶⁰ Audrey Macklin 'Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims' (1998) 13 *Georgetown Immigration Law Journal*, 25. In Australian refugee law, the principal statute guiding asylum claims is the *Migration Act 1958* (Cth). In Canada, it is the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

⁶¹ Macklin, *ibid*, 30-33.

⁶² Macklin, *ibid*, 30-33. In the case of refugee claims, it is the Refugee Protection Division (RPD), a subsection of the IRB, which conducts these hearings. Before 2001, this body was known as the Convention Refugee Determination Division (CRDD).

⁶³ Dauvergne and Millbank, 'Burdened by Proof', above n.2, 302.

⁶⁴ John Russ, 'The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum Standards' (1998) 4 *University of California Davis International Journal of Law and Policy* 29, 55..

Canada's approach to sexual minority claimants has been more liberal than that of Australia. Dauvergne and Millbank's comparison of the two jurisdictions from the mid-1990s until the early 2000s, for example, found that Australia was harsher in its reasoning in sexual minority cases, employed poorer standards of evidence⁶⁵ and had a lower success rate for sexual minority applicants than Canada.⁶⁶ However, a thorough comparison of the two jurisdictions has not been done for some time and, through the research conducted for this paper, it seems that the outcomes of sexual minority claims in each jurisdiction are no longer so disparate.

⁶⁵ For example, Australia had evidential practices such as assessing a country conditions by using *Spartacus*, a Western gay travel guide, see Dauvergne and Millbank, 'Burdened by Proof', above n.2.

⁶⁶ Dauvergne and Millbank found that, in general, sexual minority asylum seekers were more than twice as likely to succeed in Canada as they were in Australia, Dauvergne and Millbank, 'Burdened by Proof', above n.2, 302. See also Millbank (2003), above n.12. Canada was also a few years ahead of Australia in granting asylum to a bisexual applicant. Canada first granted asylum to a bisexual applicant in 2000, see *Re B.D.K.*, above n.20, whereas Australia did not until 2004, see *V02/14641* [2004] RRTA 351.

III.

THE SEXUAL MINORITY REFUGEE AND THE 'PROTECTED CHARACTERISTICS' TEST: AN ANALYSIS OF CANADIAN REFUGEE LAW

A. Negative Aspects of the 'Protected Characteristics' Test: Issues for Applicants with Fluid or Uncertain Sexual Identities

The most problematic aspect of the 'protected characteristics' test for the sexual minority asylum seeker is its preference for proof of a fixed sexual identity. As previously discussed, this test derives from an attempt to reflect the common characteristic linking the other group-based grounds, which was found to be 'immutability'. However, this focus is troublesome as sexuality is not necessarily immutable.

Yet, before going into detail about the potentially flexible nature of sexuality, it is first important to note that the 'protected characteristics' test has in fact been expanded within Canadian refugee law to cover groups that are not necessarily immutable.⁶⁷ In the case of *Canada (Attorney General) v. Ward*⁶⁸ (*Ward*), where the 'protected characteristics' test was first adopted, La Forest J held that the MPSG ground encompassed:

- 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 and;
- 3) Groups associated by a former voluntary status, unalterable due to its historical permanence.⁶⁹

⁶⁷ This expansion was due to the court being influenced by the human right to non-discrimination *in addition* to the interpretive doctrine of *ejusdem generis* that was employed in *Acosta*, see Aleinikoff (2003), above n.15, 269.

⁶⁸ *Ward*, above n.45.

⁶⁹ *Ward*, *ibid*, at 739.

As Aleinkoff notes, this definition of MPSG includes groups that are based on *voluntary* association and thus, 'groups beyond those based on characteristics that are unchangeable'.⁷⁰

Nonetheless, the *Ward* decision characterised sexual orientation as falling within the first category, as an innate or unchangeable characteristic.⁷¹ This characterisation, despite being mere obiter dicta, was incredibly important to sexual minority claimants seeking asylum in Canada. This is because, it served to put it 'beyond doubt'⁷² the position that sexual-minority refugee claims fall within the ambit of the social-group category.⁷³

However, this placement of sexual minority refugees has been sharply criticised by a number of commentators.⁷⁴ Although an 'essentialist' understanding of sexuality is common and one often endorsed by queer rights advocates,⁷⁵ it is neither the view nor the experience of *all* sexual minorities.⁷⁶ Here, 'essentialist' is being used to denote a conception of sexuality as something innate and unchangeable that is either essentially heterosexual or essentially homosexual.⁷⁷ Nevertheless, there are people who are uncertain about their sexuality, who do see their sexuality as a choice,⁷⁸ whose sexuality has changed over time⁷⁹ and who are bisexual. As this paper will now go on to show, this focus on immutability presents many difficulties for such applicants. Each of these non-essentialist groups will be discussed in turn.

1. Issues for Applicants who Exhibit Uncertainty about their Sexuality

The 'protected characteristics' test, and its conception of sexuality as innate and immutable, has caused problems for applicants who exhibit uncertainty about their sexual orientation. However, there are a number of reasons why a sexual minority applicant may very well be unsure of their sexual identity or at least seem so during the refugee claim process. For one, many sexual minority applicants have undergone years

⁷⁰ Aleinkoff (2003), above n.15, 269-270.

⁷¹ *Ward*, above n.45, at 739.

⁷² The Canadian Federal Court found that the question of whether sexual orientation can be the basis of a claimant's MPSG had 'effectively been put beyond doubt by the decision of the Supreme Court of Canada in *Ward*', see *Pizarro v. Canada (Minister of Employment and Immigration)*, [1994] FCJ 320 (QL).

⁷³ *Pizarro v. Canada (Minister of Employment and Immigration)*, *ibid*; see also Nicole LaViolette, 'The Immutable Refugees' Sexual Orientation in *Canada (A.G.) v. Ward*', (1997) 55(1) *University of Toronto Faculty of Law Review*, 1, 22.

⁷⁴ LaViolette, *ibid*. See also, Rehaag, (2008), above n.4, 68.

⁷⁵ LaViolette, *ibid*, 28; Rehaag (2009), above n.7, 420.

⁷⁶ Rehaag (2009), *ibid*, 419.

⁷⁷ Rehaag, (2008), above n.4, 80.

⁷⁸ There are many bisexuals, for example, that are drawn to bisexuality because of the choice it represents for them, see Simon Scott, 'Politically Bi' in Sharon Rose *et al.* (eds.), *Bisexual Horizons* (1st ed, 1996) 149, 236.

⁷⁹ For a discussion on shifting sexuality, see Edward Stein (ed.), *Forms of Desire: Sexual Orientation and the Social Constructivist Controversy* (1st ed, 1992). See also Michel Foucault, *The History of Sexuality*, Volume I: An Introduction (1st ed, 1978).

of negative stereotyping about queer sexuality and, as a result, have internalised such negative images.⁸⁰ This can cause such applicants to exhibit a reluctance to identify with a queer sexual identity and, thus, struggle to articulate it the tribunal.⁸¹

The internalisation of negative societal views may also result in a propensity for some to identify with an alternative queer sexuality that they believe is more acceptable. For example, Flamer-Caldera, executive director *Equal Ground*, an LGBT advocacy organisation in Sri Lanka, stated that some homosexuals in her organisation identified as bisexual in order to maintain the 'possibility' of family values that have been culturally instilled in them.⁸² The interview with Anaya Quintal, a senior member of Mexican bisexual advocacy group *Opción Bi*, on the other hand, brought to light the manner in which internalised 'bi-phobia'⁸³ in Mexico has meant that bisexual persons there would prefer to publically identify as homosexual or heterosexual due to their internalisation of the negative connotations associated with bisexuality.⁸⁴ The tendency to identify with a different sexual identity, or the desire to deny one's queer identity altogether, may result in an applicant making inconsistent or uncertain statements regarding their sexuality.

Moreover, sexual minority asylum seekers can experience difficulties in expressing their self-identification due to a lack of the adequate queer terminology or confusion about Western sexual constructs. As the UNHCR *Guidelines on Sexual Minority Claims*⁸⁵ state, 'not all applicants will self-identify with the LGBTI terminology and constructs...or may be unaware of these labels.'⁸⁶ Flamer-Caldera of *Equal Ground* spoke of the manner in which persons utilising the organisation's services often had some confusion over their sexual identity.⁸⁷ She described one member who would sometimes identify as a transgendered woman, but at other times as a homosexual male, believing this to most likely be due to their lack of familiarity with the exact meaning of these identities.

⁸⁰ Berg and Millbank, above n.10, 199-200.

⁸¹ Berg and Millbank, *ibid*, 199-200.

⁸² Interview with Rosanna Flamer-Caldera (Colombo, 5th April 2013). For details of ethics approval, see above n.24.

⁸³ Bi-phobia is 'the intense hatred, fear or aversion towards bisexuals or bisexuality, which may include negative stereotyping or denial of the existence of bisexuals', see 'Biphobia', *Dictionary Submission*, Collins Dictionary, <<http://www.collinsdictionary.com/submission/3130/biphobia>> at 30 September 2013. For further details on the nature of bi-phobia see Gender and Sexuality Center, *What is Biphobia?*, University of Texas Website, <http://www.utexas.edu/diversity/ddce/gsc/downloads/resources/Bisexuality_Biphobia.pdf> at 30 September 2013.

⁸⁴ Interview with Natalia Anaya Quintal (Mexico City, 26th February 2013). For details of ethics approval, see above n.22.

⁸⁵ *Guidelines on Sexual Minority Claims*, see above n.2.

⁸⁶ *Guidelines on Sexual Minority Claims*, *ibid*, at 11.

⁸⁷ Flamer-Caldera, above n. 82.

However, the 'protected characteristics' approach has not been sensitive to such issues and, instead, uncertainty of sexuality or difficulty in expressing one's sexual identity have been construed as negatively affecting the applicant's credibility. For example, in a 1994 hearing, an Estonian man made an application for asylum based on persecution attributable to his nationality and the fact that he had had an affair with a man.⁸⁸ However, when questioned about his sexuality, in the first hearing the applicant claimed that he was not a homosexual and that he did not intend to continue having homosexual relations. In the second hearing, the applicant stated that he had only made these claims because he had been ashamed but that he was actually uncertain of his sexuality.

The IRB found this to adversely affect his credibility and, despite accepting that he had had a homosexual encounter, they did not find him to be a member of a particular social group based on a queer sexual identity.⁸⁹ LaViolette notes that this decision reflects the manner in which the Canadian 'protected characteristics' approach protects status and not conduct.⁹⁰ This is problematic, as she points out, because the persecution of sexual minorities often targets the conduct that gays and lesbians engage in and not simply who they are.⁹¹

In recent years, the IRB has been more willing to accept the applicant's uncertainty about their sexuality. For example, in a 2009 decision concerning a Mexican man who identified as 'both gay and bisexual',⁹² the IRB used broad terms to describe his ambiguous queer sexuality, such as 'not heterosexual'.⁹³ However, it is important to note that this characterisation, although progressive, appears to have been made as a special exception due to the claimant being 'psychotic and delusional',⁹⁴ rather than a general response to the exhibition of uncertainty by a sexual minority applicant.

Moreover, despite the IRB's recent advances, it seems that even today claimants who exhibit confusion over their sexuality can endure obstacles under the Canadian approach to MPSG. An example of this can be found in a 2009 hearing of an Indian man who originally claimed to be bisexual, but later identified himself as homosexual.⁹⁵ The claimant explained that he had been confused by the two different terms, believing them to mean the same thing. Nonetheless, the IRB drew a negative inference as to the credibility of the claimant and his assertion of his homosexuality.⁹⁶

⁸⁸ *Re S. (I.Q.)* [1994] CRDD. 323 (QL).

⁸⁹ *Re S. (I.Q.)*, *ibid.*

⁹⁰ LaViolette, above n.73, 33-35.

⁹¹ LaViolette, *ibid.*, 34.

⁹² *Re X* [2009] RPDD 90035 (QL) at 2.

⁹³ *Re X* [2009], *ibid.*, at 5.

⁹⁴ *Re X* [2009], *ibid.*, at 5. Throughout the hearing, the applicant often agreed to two contradictory statements.

⁹⁵ *Re X* [2009] RPDD 88450 (QL)

⁹⁶ The IRB stated 'from this the Panel makes a negative inference as to credibility, and uses this as evidence that the claimant's allegation that he is gay is not true', *Re X* [2009], *ibid.*

This is, at least in part, attributable to the nature of the 'protected characteristics' test. This can be seen through a comparison with Australian case law, wherein the RRT, employing the 'social perception' test, seems to have been content in recent times with identifying claimants as 'homosexual and/or bisexual'.⁹⁷ While under the 'protected characteristics' test, uncertainty could take away from the innateness and immutable nature of one's sexuality, the social perception' test is simply looking for a socially perceived group, of which an applicant could clearly form part even if they are not themselves certain of their own sexual orientation. The relationship between the 'social perception' test and the sexual minority applicant will be discussed in detail further below. However, for now, it is clear that for uncertain applicants, the 'protected characteristics' test can be quite problematic.

2. Issues for Applicants who Experience their Sexuality as a Choice

The construction of sexuality as innate in Canadian refugee law also poses difficulties for asylum seekers who see their sexual orientation as a choice. Despite the fact that an essentialist view of sexuality seems to be the dominant understanding of sexuality,⁹⁸ many queer persons *do* feel that it is a matter of choice.⁹⁹ A prominent example of sexuality by choice is political lesbianism; a second-wave feminist phenomenon that advocates that women choose lesbianism as a positive alternative to heterosexuality.¹⁰⁰ There are also much less politicised examples wherein the individual simply feels that they chose their sexual orientation.¹⁰¹

However, Canadian refugee law does not take too kindly to this viewpoint. For example, in the 2004 case concerning a homosexual male from the Ukraine,¹⁰² the IRB,

⁹⁷ For example, in a 2007 decision concerning a Mongolian woman, the claimant described her sexual identity as "a lesbian and a bisexual". The RRT took no issue with this uncertain assertion of identity. Indeed, even after accepting a statement from an organisation which described the applicant as "openly bisexual" and the applicant's own submission that she had had sexual relations with both men and women, it granted her refugee status on the basis of her group status of being a *lesbian* in Mongolia. In other words, the RRT itself was unclear about the applicant's exact sexual identity. This goes to show the manner in which, in Australian refugee law, particularities of sexual identity may be less important than in Canada, especially where there is substantial evidence of same-sex relationships. See 061020474 [2007] RRTA 25.

⁹⁸ LaViolette, above n.73, 28; Rehaag (2009), above n.7, 420.

⁹⁹ Vera Whisman, *Queer by Choice: Lesbians, Gay Men, and the Politics of Identity* (1st ed, 1996).

¹⁰⁰ Onlywomen Press, *Love Your Enemy? The Debate Between Heterosexual Feminism and Political Lesbianism* (1st ed, 1981).

¹⁰¹ Whisman, above n.99.

¹⁰² All information of the original hearing has been taken from the appeal decision, *Kravchenko v. Canada (Minister of Citizenship and Immigration)* [2004] RPDD 384 (QL) at 8. The decision was overturned on judicial review, with the Federal Court finding that 'the Board's conclusions reflect an uninformed view of male homosexuality; at worst, they demonstrate reliance on preconceived ideas about homosexuality', see *Kravchenko v Canada (Minister of Citizenship and Immigration)* [2005] FCJ 479 (QL) at 6. For discussion of this case, see Jenni Millbank "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21(1) *International Journal of Refugee Law*, 1, 10.

in response to the claimant's assertion that his sexuality was a 'choice', held that it was unreasonable that he would have chosen a life style which would inevitably cause him problems.¹⁰³ This emphasis on the innateness of sexuality can also be seen in a 2006 case concerning a Sri Lankan homosexual man.¹⁰⁴ In that case, the claimant's assertion that his friends had pleaded with him to change his life style was greeted with the IRB asking why he had been unable to persuade his friends that his homosexuality was in-born. In response, the claimant stated that no Sri Lankan believes that homosexuality is in-born and, instead, everyone believes that it is a chosen life-style, including his parents. The IRB described this statement as 'embellishing and astonishing',¹⁰⁵ and rejected it outright.

While it is most certainly a generalisation that all Sri Lankans think in this way, Flamer-Caldera stated that, at least in her opinion, the prevailing opinion in Sri Lanka *is* that sexuality is a life-style choice.¹⁰⁶ In this hearing the IRB should not have been so astounded by the existence of a different viewpoint, especially when it was not even the one held by the claimant himself but instead that of his persecutors. Hence, the 'protected characteristics' test's construction of sexuality as innate presents an obstacle for those whose narratives involve different but legitimate views of sexuality. This focus on immutability, as Rehaag writes, 'serve[s] to erase the sexual identity of a claimant who dares to forward an alternative understanding'.¹⁰⁷

3. Issues Pertaining to Fluidity of Sexuality

The IRB has also exhibited a tendency to draw adverse inferences on credibility when a sexual minority asylum seeker has a past history of heterosexual conduct.¹⁰⁸ Yet, it should come as no surprise that many sexual minority claimants have such a history. It is not uncommon for homosexual persons to engage in some form of heterosexual behaviour at some point in their lifetime due to the 'presumption of heterosexuality',¹⁰⁹

¹⁰³ *Kravchenko v. Canada (Minister of Citizenship and Immigration)*, *ibid* at 8. While these findings clearly exhibit a view that sexuality is innate and cannot be a matter of choice, it should be noted that the reasoning here also reflects the 'discretion requirement'. As will be discussed below, both Canada and Australia previously held that the nexus requirement could not be satisfied where a sexual minority applicant could conceal their sexual orientation.

¹⁰⁴ *Re X*, [2006] RPDD 63808 (QL).

¹⁰⁵ *Re X*, [2006], *ibid*.

¹⁰⁶ Flamer-Caldera, above n. 82.

¹⁰⁷ Rehaag, (2008), above n.4, 74.

¹⁰⁸ As Rehaag explains with regard to the Canadian approach to sexual minority claims wherein the applicant has had a heterosexual relationship, '...because sexual orientation is presumed to be immutable, evidence of sexual practices that depart from an asserted sexual orientation are relevant to establishing fraud and misrepresentation, even if those practices occur a significant amount of time after the initial refugee hearing. It would seem, then, that when claimants' asserted sexual identities or sexual practices change over time (much as when claimants assert that their sexual identity is partly a matter of choice), the IRB believes that they must be lying', Rehaag, (2008), above n.4, 75

¹⁰⁹ Douglas Whaley, *The Presumption of Heterosexuality and the Invisible Homosexual* (2010) Douglas Whaley Blogspot, < <http://douglaswhaley.blogspot.com/2011/10/presumption-of-heterosexuality-and.html> > at 27th of July 2013.

across many societies. It is usually later on that they become aware or certain of their homosexual orientation.¹¹⁰

As Millbank and Berg observe, an attempt to comply with this presumption is even more likely for queer persons in homophobic countries, where, even after discovering their true sexuality, they may spend their entire life attempting to pass as heterosexual.¹¹¹ As the UNHCR *Guidelines on Sexual Minority Claims* note, both lesbians and gay men may have had heterosexual relationships and/or have children because of social pressures.¹¹²

Moreover, there are persons that, regardless of social expectations, experience sexuality as something fluid.¹¹³ Countless stories can be found from persons who have experienced several sexual orientations throughout their lifetime.¹¹⁴

However, in the context of the 'protected characteristics' test, 'the fluidity of sexuality... is frozen in the name of the protection offered by asylum'.¹¹⁵ For example, in a 2006 hearing concerning a homosexual Nigerian man,¹¹⁶ the IRB held that he could not be homosexual due to the fact that he a spouse with whom he had two children. This was because the IRB found that it was 'highly improbable that a homosexual would father two sons.'¹¹⁷ In another hearing where the male homosexual claimant had had a brief relationship with a woman after arriving in Canada, the IRB rejected his claim,¹¹⁸

¹¹⁰ The American Psychiatric Association states, 'Some people believe that sexual orientation is innate and fixed; however, sexual orientation develops across a person's lifetime' see *LGBT- Sexual Orientation* (2012) American Psychiatric <<http://www.psychiatry.org/mental-health/people/lgbt-sexual-orientation>> at 30 September 2013.

¹¹¹ Berg and Millbank, above n.10, 200.

¹¹² *Guidelines on Sexual Minority Claims*, above n.2, article 10.

¹¹³ Rehaag (2009), above n.7, 425.

¹¹⁴ Rehaag cites a number of bisexual persons discussing the fluidity of their sexuality, Rehaag (2009), above n.7, 425. The fluid nature of sexuality can also be seen in the various colloquial terms within the Western queer community, such as 'yestergay' or a 'hasbian', for example, which refer to persons who used to be homosexual, or a lesbian in the case of the latter, but is no longer. There are also many terms to describe situational homosexuality, such as 'lesbian until graduation' (LUG) and 'bi for now'. While many of these terms are often deemed offensive and each have their own specific histories, they exist to describe a very real form of queer sexuality which emphasises 'ephemerality, mutability, and environmental factors,' see Benjamin Kahan, *The Walk-In Closet: Situational Homosexuality and Homosexual Panic in Hellman's the Children's Hour* (2013) Read Periodicals <<http://www.readperiodicals.com/201304/2975450101.html#ixzz2aI5LrtP7>>, at 27/07/2013.

¹¹⁵ Miller, above n.42, 138.

¹¹⁶ *Re X* [2006] RPDD 80026 (QL)

¹¹⁷ *Re X* [2006], *ibid.* However, it should be noted that the Federal Court overturned this decision, holding that the IRB had erred in ignoring the evidence that the man was a homosexual, see *Leke v. Canada (Citizenship and Immigration)*, 2007 FC 848 (QL).

¹¹⁸ *Khrystych v. Canada (Minister of Citizenship and Immigration)* [2004] RPDD 339. This decision was overturned by way of judicial review because the Board was found to not have given reasons for casting doubt upon the applicant's credibility in clear and in unmistakable terms: *Khrystych v. Canada (Minister of Citizenship and Immigration)* [2005] FC 498.

finding his explanation that this was an attempt to try and change himself to 'not have a ring of truth'.¹¹⁹ These decisions demonstrate the manner in which the 'protected characteristics' test makes it difficult for those with fluid or concealed sexualities to traverse the Canadian refugee system.

4. *Issues Experienced by Bisexual Applicants*

Like those with fluid sexual identities, bisexual applicants have also suffered under the 'protected characteristics' test due to its construction of sexuality as an innate and unchangeable characteristic. As Rehaag notes, bisexual claims tend to enjoy far less success within the Canadian refugee system than other sexual minority claims.¹²⁰ In 2004, the grant rate for bisexual claims at the IRB was only 25%,¹²¹ and in 65% of cases allegations regarding their bisexual identity were disbelieved.¹²² Even in a later study of 2004-2007, the grant rate was 30% for bisexuals in Canada, compared to 52% for gay men and 55% for lesbians.¹²³

Figure 1. Grant rates for sexual minority asylum seekers in Canada

IRB(2004-2007) Principal Claimant RPD Decisions ¹²⁴		
Type	Number	Grant Rate %
Lesbian	450	55.1
Gay	2,036	52.1
Bisexual	199	30.7
Total at RPD (2004-2007)	56,916	49.4

It has been suggested that this low success rate is due to the fact that the *Ward* decision enshrines a view of sexuality wherein it is believed that individuals fall into sexual categories 'naturally, completely, and unchangeably'.¹²⁵ Bisexuality, on the other hand is far less neat; it incorporates aspects of both homosexuality and heterosexuality and often the preference for one gender is neither evenly nor consistently balanced.

¹¹⁹ *Khrystych v. Canada (Minister of Citizenship and Immigration)* [2004], *ibid.*

¹²⁰ Rehaag, (2008), above n.4, 77.

¹²¹ Rehaag, (2008), *ibid.*, 77.

¹²² Rehaag, (2008), *ibid.*, 79.

¹²³ Vivienne Namaste *et al*, *Sexual Minority Refugee Determinations in Canada: The Experience of Bisexual Claimants* (2011) Metropolis <http://www.metropolis.net/pdfs/sean_rehaag_bb_6july11_e.pdf> at 1 October 2013.

¹²⁴ Vivienne Namaste *et al*, *ibid.*

¹²⁵ Rehaag, (2008), above n.4, 80.

Moreover, it is not so static; many bisexuals describe their sexuality as fluid or flexible.¹²⁶

The uneasy relationship between the *Ward* view of sexuality and bisexuality can be seen in the IRB occasionally mistaking evidence of heterosexual relationships as counting against bisexuality, despite the fact that bisexuality by its very nature also encompasses heterosexual experiences. For example, in a 2003 hearing, a bisexual Iranian woman's claim for asylum was rejected because of her arrival in Canada with a boyfriend and her subsequent marriage to another man.¹²⁷ The IRB found her 'actions to be those of a heterosexual woman and did not find that her fears of persecution [were] based on her profile as a bisexual woman.'¹²⁸

This case is now a decade old now and, as with most of the issues discussed in this chapter, there has been some progress on the part of the IRB with regard to acceptance of bisexuality. In recent cases it seems that often, as long as there is some evidence of homosexual activity, the IRB will readily accept the applicant's self-identification as bisexual.¹²⁹ However, for bisexual applicants with more notable heterosexual experiences than homosexual, issues in establishing their queer identity certainly still persist today.

This can be seen in a 2010 case involving a bisexual man from Mali. In that case, the fact that the claimant had been married to a woman and had not had any sexual encounters with men since his separation from his wife, was taken to negatively affect his credibility.¹³⁰ The IRB stated that, 'the claimant's behaviour is inconsistent and implausible if he is truly bisexual in a country...where he is free to live as such'.¹³¹ This view of heterosexuality counting against bisexuality, is problematic because bisexuality is not only a unique sexual identity,¹³² but one that is actually quite widespread.¹³³

¹²⁶ This is recognised by the UNHCR *Guidelines on Sexual Minority Claims*, above n.2, at 10

¹²⁷ *Re K.O.C.*, [2003] RPDD 420 (QL). The Federal Court found nothing in this decision to be unreasonable and affirmed it in 2004: *Rassan v. Canada (Minister of Citizenship and Immigration)* [2004] FC 1279 (QL) at 17.

¹²⁸ *Re K.O.C.*, [2003] *ibid.*

¹²⁹ For example, in *Re X* [2011] RPDD 95127, the IRB readily accepted that a Mexican applicant was a bisexual [at 66]. Despite there being many other issues pertaining to the applicant's credibility- issues which eventually led to the rejection of his claim- the IRB hardly even questioned his assertion of his sexual identity. This decision was overturned by the Federal Court because it was deemed unreasonable to conclude that the applicant's claim had no credible basis after having accepted that he was bisexual and faced with extensive documentary evidence of persecution of sexual minorities in Mexico, see *Ramón Levario v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 314, at 21. This appeal decision further highlights the ease with which the IRB accepted the applicant's bisexuality. This is because they did so in the face of doubting much of the applicant's story and rejecting his claim, even when such a finding could- and indeed did- weigh so gravely.

¹³⁰ *Re X* [2010] RPDD 97642 (QL), at 7.

¹³¹ *Re X* [2010] *ibid* at 7.

¹³² The UNHCR notes that 'bisexuality is a unique identity, which requires an examination in its own right,' see *Guidelines on Sexual Minority Claims*, above n.2, at 10

It is important to note that difficulties for bisexual applicants are also evident in the 'social perception' test, as will be discussed below. However, we can conclude from this chapter that the 'protected characteristics' test's characterisation of sexuality as unchangeable and innate gives rise to a range of obstacles for sexual minority applicants with fluid, chosen or uncertain sexual orientations, as well as for those who are bisexual.

B. Positive Aspects of the 'Protected Characteristics' Test: The Potential Ability to Define a Group Negatively

In some ways, however, the 'protected characteristics' test can be beneficial to particular sexual minority applicants, or at least have the potential to be so. Firstly, in relation to straightforward homosexual or lesbian claimants, it is well accepted that the 'protected characteristics' test has little difficulty in accepting that such groups can constitute a 'particular social group' for the purposes of refugee law.¹³⁴ Indeed, sexual orientation was used as an example of a group defined by innate or unchangeable characteristics in *Ward*, the case which introduced the 'protected characteristics' test into Canadian refugee law.¹³⁵

Moreover, the 'protected characteristics' test has the potential to be used in a way that is much more beneficial to applicants with obscure or uncertain sexual identities than it is in its current state. This is because it could possibly be used to define a group negatively. As was discussed above, in a 2009 hearing concerning a Mexican man, the IRB defined his 'social group' as 'not heterosexual'.¹³⁶ Although this appears to have been a special exception due to the applicant being psychotic and confused about his identity, it could potentially be used in other cases dealing with persons with sexual orientations that are difficult to define. This is because a lack of heterosexuality could be an innate and immutable characteristic.

This is in contrast to the 'social perception' test which requires the group to be cognisable and, therefore, needs to conceptualise groups in a more positive manner. Thus, though the 'protected characteristics' test presents many difficulties for the sexual minority asylum seeker, it has in some ways proven to be useful for this category of applicants and also may have the potential to be even more so if used to define a group negatively.

¹³³ While studies vary in their statistics as to how many bisexuals there are in the population, most of these studies agree that there are a larger number of bisexuals than lesbians and gays, see Yoshino, K., 'The Epistemic Contract of Bisexual Erasure' (2000) 52 *Stanford Law Review*, 353, 380.

¹³⁴ Foster (2012), above n.13, 49.

¹³⁵ *Ward*, above n.45.

¹³⁶ *Re X* [2009], above n.92.

IV. THE SEXUAL MINORITY REFUGEE AND THE 'SOCIAL PERCEPTION' TEST: AN ANALYSIS OF AUSTRALIAN REFUGEE LAW

A. Negative Aspects of the 'Social Perception' Test: Issues of Invisibility

The 'social perception' test also poses various issues to sexual minority asylum seekers. Yet the set of problems it presents are different to those of the 'protected characteristics' test. It predominantly presents difficulties for applicants whose individual sexuality or sexual minority group is largely invisible. Ordinarily the 'social perception' test is seen as easier to satisfy than the 'protected characteristics' test. This is because, as noted by the UNHCR *MPSG Guidelines*, it 'might recognise as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity such as, perhaps, occupation or social class'.¹³⁷

However, due to the test's emphasis on the group being cognisable in the sending country,¹³⁸ it can prove to be a difficult test for groups that are not immediately apparent by their outward appearance or behaviour. This is particularly evident in the application of the 'social perception' test in France, wherein homosexuals are required to express their sexuality openly through their exterior behaviour in order to constitute a 'particular social group'.¹³⁹

The Australian application of the 'social perception' test has not been nearly as strict and, even as long ago as 1997, it has been recognised that sexual minorities can

¹³⁷ *MPSG Guidelines*, above n.57, at 9.

¹³⁸ *Applicant A*, above n.53, at 265–6.

¹³⁹ For example, the Cour Nationale du Droit d'Asile (The National Court of the Right to Asylum) established one homosexual applicant's membership of a particular social group through his display of his homosexuality externally by way of his job as a folk dancer and his choice of clothes, *G*, Cour Nationale du Droit, 571886 (11 April 2008). As a result, it has been noted that persons who hide their sexual orientation or are discreet about it may not be found to constitute a member of a particular social group for the purposes of French refugee law, Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender identity in Europe* (2011), 36. See also Foster (2012), above n.13, 52.

constitute a particular social group.¹⁴⁰ Nonetheless, while the 'social perception' test does not explicitly require visibility of a group, it has become an important factor in its application in Australia. This is because, as McHugh J emphasises, 'the existence of such a group depends in most, perhaps all, cases on external perceptions of the group.'¹⁴¹ As such, sexual minority groups that are themselves largely underground, as well applicants whose own behaviour has been discreet can encounter difficulties under this test.

1. Sexual Minority Groups that Lack Visibility: Issues for Bisexuals and Persons with Obscure Sexual Identities

Some sexual minority groups, especially those that fall outside homosexual/heterosexual norms, tend to experience problems in satisfying the Australian 'social perception' test. This is because such groups are often less visible in their sending country and, thus, are not as easily 'socially perceived'.

This can be seen in some of the difficulties experienced by bisexual applicants. Just as in Canada, bisexual refugees experience a much lower grant rate in Australia than other sexual minorities.¹⁴² However, in Australia, rather than it being the test itself that directly imposes an essentialist understanding of sexuality- as something neatly divided into homosexuality and heterosexuality- onto applicants, it is due to the 'social perception' test reflecting this *perception* within society.

There is a social phenomenon called 'bi-invisibility' which refers to 'a lack of acknowledgment and ignoring of the clear evidence that bisexuals exist.'¹⁴³ This 'erasure'¹⁴⁴ of bisexuality comes from both the sexual minority and mainstream communities.¹⁴⁵ It is largely due to the fact that an essentialist understanding of sexuality is in the interest of both communities.¹⁴⁶ On one hand, it is beneficial to the heterosexual community because heterosexuals occupy a privileged position in this binary hierarchy.¹⁴⁷ On the other hand, an essentialist conception of sexuality is useful

¹⁴⁰ In 1997, Kirby J stated in obiter dicta that homosexual and bisexual men and women can qualify for asylum based on their MPSG, see *Applicant A*, above n.57, at 390. This statement has since been cited with approval by the Australian High Court: *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*; *Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, (2003) 216 CLR 473, at 126 (hereinafter *Appellant S395/2002* and *Appellant S396/2002*)

¹⁴¹ *Applicant A*, above n.57, at 264.

¹⁴² Rehaag (2009), above n.7, 426.

¹⁴³ André M. Miller *et al*, *Bisexual Health: An Introduction and Model Practices for HIV/STI Prevention Programming* (National Gay and Lesbian Task Force, 2007), 2.

¹⁴⁴ Yoshino, above n.133.

¹⁴⁵ LGBT Advocacy Committee, *Bisexual Invisibility: Impacts and Recommendation*, San Francisco Human Rights Commission Website,

<<http://www.sfhrc.org/modules/showdocument.aspx?documentid=989>>, at 1 October 2013, 1.

¹⁴⁶ Rehaag (2009), above n.7, 424.

¹⁴⁷ Yoshino, above n.133, 402–4.

to the homosexual community as a political device to challenge heterosexist oppression because it paints sexuality as something genetically determined and therefore something that cannot be discriminated against.¹⁴⁸ Anaya Quintal of *Opción Bi* asserted that, even in countries that have seen gay rights activism, such as Mexico, bisexuals are frequently disregarded and excluded from this movement.¹⁴⁹

The relative invisibility of bisexuals has meant that the RRT, on occasion, has characterised bisexuals as not being cognisable enough to meet the refugee definition. For example, in a 1997 case concerning a bisexual Chinese man, the RRT questioned whether 'the Applicant would let the disparateness of his activities or inclinations be visible or detectable',¹⁵⁰ due to the fact that his sexual history was not comprised of consistent homosexual activity. It then concluded that 'he would not be seen as part of the 'recognisable or cognisable' group known within PRC society as homosexuals.'¹⁵¹

The RRT also explicitly noted that bisexuals were only being considered as a social group 'insofar as the homosexual side of bisexual nature of persons in the PRC were an issue'.¹⁵² The consequence of this view was to find that:

...by stressing at the hearing that he is bisexual, the Applicant has not satisfied the Tribunal that he is reconciled to homosexual activity, lifestyle or even social association... If this case were about political opinion, it would be as if the Applicant were saying that, at heart, he was a little bit disposed towards democracy but also eager to support authoritarianism; if it were about religion, it would be as if the Applicant, at heart, were a little bit Christian and a little bit atheist.¹⁵³

By determining that bisexuals were not socially perceptible enough to constitute their own social group, and thus assessing the applicant as a homosexual, his claim ultimately failed because, of course, he was not one. This case- and its strict categorisation of groups- shows just how much the post-Holocaust view of 'groups' can permeate jurisdictions utilising the 'social perception' test, as it can those employing the 'protected characteristics' test.

¹⁴⁸ An essentialist view of sexuality was adopted by and then spread through the Gay Rights Movement. This movement began in Western countries in the mid-1970s, following the more anarchic Gay Liberation Movement (see below n.183). The Gay Rights Movement adopted a minority-based civil rights discourse which strove to frame homosexual persons as no different to heterosexual persons other than in their private sexual lives. This mission lent itself to an essentialist conception of sexuality as something innate and neatly divided into homosexuality or heterosexuality because it construes sexuality as something like race or gender, characteristics which the Western human rights movement had already accepted one could not discriminate against. See Clare Hemmings, *Bisexual Spaces: A Geography of Sexuality and Gender* (1st ed, 2002), 82–90.

¹⁴⁹ Anaya Quintal, above n.84.

¹⁵⁰ N95/07313 [1997] RRTA 2438.

¹⁵¹ N95/07313 [1997], *ibid.*

¹⁵² N95/07313 [1997], *ibid.*

¹⁵³ N95/07313 [1997], *ibid.*

However, as Mexican bisexual advocate Anaya Quintal stated, the global bisexual movement is gaining strength, and bisexuality is becoming more visible.¹⁵⁴ Accordingly, the Australian 'social perception' test has followed suit and in recent times has not posed such an issue for bisexual applicants. For example, in a 2011 decision involving a bisexual polyamorous¹⁵⁵ married couple from Lithuania, the Tribunal easily accepted that both married bisexual men and women constitute particular social groups for the purpose of refugee law.¹⁵⁶ This was despite the fact that these groups are more obscure than bisexuals in general.

Moreover, the RRT has also recently exhibited recognition of the difficulties experienced by sexual minorities that lack visibility. In a 2011 hearing involving a bisexual Kenyan man, the tribunal acknowledged that the reason there was so little information available on the bisexual community in Kenya was because of them 'being largely underground.'¹⁵⁷ In addition, in that case it even went so far as to accept the existence of the bisexual community in Kenya in the absence of any evidence about it.¹⁵⁸

Nonetheless, problems have persisted for applicants of more obscure sexual orientations which may be less socially perceptible than bisexuality. For example, in a 2012 case concerning a Mongolian man whose sexuality 'consisted exclusively of visiting transsexual prostitutes',¹⁵⁹ the RRT stated that 'some interest in transsexuals... might not make him a member of a particular social group in Mongolia'.¹⁶⁰

Eventually the case was decided on other social groups; bisexuals or homosexuals and the Applicant's claim was rejected because he would not be perceived as a member of either of these groups.¹⁶¹ Such an outcome may not have occurred under the 'protected characteristics' test because an attraction to transsexuals could potentially be described as an innate and immutable characteristic, even if it does not form a visible group. Therefore, the 'social perception' test is difficult for those of niche or underground sexual minority groups.

¹⁵⁴ Anaya Quintal, above n.84.

¹⁵⁵ 'Polyamory' is the participation in multiple and simultaneous loving or sexual relationships, *Polyamory* (2009) Reference.com, <<http://www.reference.com/browse/wiki/Polyamory>> at 1 October 2013.

¹⁵⁶ 1102720 [2011] RRTA 714, at 118-119.

¹⁵⁷ 1011325 [2011] RRTA 227, at 69.

¹⁵⁸ 1011325 [2011], *ibid.* In this case, the RRT could not find any information on the bisexual community in Kenya. Nonetheless it accepted that it formed 'a cognisable social group within that country' [at 122] and simply utilised evidence on the Kenyan homosexual community instead, 'While no information was found on the bisexual community, it appears that almost all of the information on the homosexual community could be applied to them.' [at 69].

¹⁵⁹ 1200151 [2012] RRTA 1010, at 38.

¹⁶⁰ 1200151 [2012], *ibid.*, at 38.

¹⁶¹ 1200151 [2012], *ibid.*, at 54.

2. Sexual Minority Applicants Whose Behaviour and/or Appearance Lack Visibility: Issues for Lesbians and those who conceal their Sexuality

Another issue experienced by sexual minority applicants is whether their *own conduct* has not been visible enough for them to constitute a *member* of a particular social group. Previously, Australia employed the 'discretion requirement', a doctrine which rejected sexual minority applicants who had the option of being discreet about their sexual orientation.¹⁶² Dauvergne and Millbank contend that this was a major reason for the much lower acceptance rate of sexual minority refugees in Australia than in Canada around the late 1990s and early 2000s.¹⁶³ This is because the discretion requirement produced a 98% failure rate for such applicants.¹⁶⁴ While Canada had a similar approach at the time, it was only applied to 4% of cases rather than 20% of cases in Australia.¹⁶⁵ This difference can be linked, in part, to the Australian use of the 'social perception' test and the interrelationship between visibility and discretion.¹⁶⁶

The 'discretion requirement' was eventually overturned by the High Court of Australia in *Appellants S395/2002 and S396/2002*,¹⁶⁷ in which the majority found that being forced to identify with one's social group in secret can amount to persecution itself.¹⁶⁸ Nevertheless, there are still problems today for applicants who *do* act discreetly, as they may not have enough evidence of their sexuality to provide to the RRT.

For example, in a 2012 case involving a Mongolian bisexual man, the RRT rejected his claim because he had been too discreet about his sexuality; he was married with two children and produced 'no credible or reliable independent evidence' in relation to his

¹⁶² Christopher N. Kendall, 'Lesbian and Gay Refugees in Australia: Now that "Acting Discreetly" Is No longer an Option, Will Equality Be Forthcoming?' (2003) 15(4) *International Journal of Refugee Law*, 715, 717. An example of the 'discretion requirement' being used in practice can be seen in a 1998 hearing involving a homosexual applicant from Sri Lanka. In that case, the RRT stated 'the evidence is that he can avoid a real chance of serious harm simply by refraining from making his sexuality widely known by not saying that he is homosexual and not engaging in public displays of affection towards other men. He will be able to function as a *normal* member of society if he does this. This does not seem to me to involve any infringement of fundamental human rights.' See *198108356* [1998] RRTA (Unreported) (28 October 1998). This case was upheld on appeal to the Federal Court: *Applicant LSLs v Minister for Immigration and Multicultural Affairs* [2000] FCA 211 and endorsed by the Full Federal Court of Australia when it reviewed 'discretion' in *WABR v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 124.

¹⁶³ Catherine Dauvergne and Jenni Millbank, 'Before the High Court: Applicants S396/2002 and S395/2002: A Gay Refugee Couple from Bangladesh' (2003) 23 *Sydney Law Review* 97, 98-99 (hereinafter 'Before the High Court').

¹⁶⁴ Dauvergne, and Millbank, 'Before the High Court', *ibid*, 99.

¹⁶⁵ Dauvergne, and Millbank, 'Before the High Court', *ibid*, 98-99.

¹⁶⁶ As Dauvergne and Millbank write, 'The discretion requirement is also linked to the definition of the particular social group. As the group is very broadly defined, it is then open to the tribunal to utilise information about the situation of 'discreet' members of that group as evidence that the applicant is not at risk', Dauvergne, and Millbank, 'Before the High Court', *ibid*, 100.

¹⁶⁷ *Appellant S395/2002 and Appellant S396/2002*, above n.140.

¹⁶⁸ Kendall, above n.162, 747.

sexual orientation.¹⁶⁹ This decision was arrived at despite the applicant testifying that there was no visible gay community in Ulaan Bator,¹⁷⁰ that he had hidden his sexuality in Mongolia,¹⁷¹ and that he only married because 'all gay and bisexual men in Mongolia have fake families'.¹⁷²

The tendency to reject claimants who lack evidence regarding their sexual history is particularly problematic for lesbians who are rendered further invisible by virtue of their gendered existence within the private sphere. The National Centre for Lesbian Rights (NCLR) discusses the manner in which, unlike gay men, 'lesbians' daily lives may be more closely bound to the home, and many lesbians do not have the financial resources to leave home, travel, or participate in social activities where their homosexuality would be outwardly expressed.¹⁷³ This has resulted in many lesbian claims being rejected in Australia because their sexual conduct has simply been 'too private'.¹⁷⁴

This situation was previously in contrast to Canada, wherein the IRB was less concerned with visibility and more sensitive to the interrelationship of sexuality with gender norms.¹⁷⁵ As a result, Dauvergne and Millbank found that in the late 1990s and early 2000s, lesbians were ten times more likely to be granted asylum in Canada than in Australia.¹⁷⁶

Yet, the RRT has also shown some progress with regard to lesbian claimants. For example, in a 2011 case concerning a Turkish lesbian, the Tribunal made considerable reference to the NCLR's paper on difficulties in lesbian asylum claims.¹⁷⁷ The RRT, like the IRB,¹⁷⁸ now also has Gender Guidelines.¹⁷⁹ These Guidelines, sensitive to the invisibility of lesbianism, require the RRT to focus on the applicant's realisation and

¹⁶⁹ 1200151 [2012], above n.159, at 100.

¹⁷⁰ 1200151 [2012], *ibid*, at 74.

¹⁷¹ 1200151 [2012], *ibid*, at 81.

¹⁷² 1200151 [2012], *ibid*, at 72.

¹⁷³ Lena Ayoub, *The Challenges of Lesbian Asylum Claims*, (National Centre for Lesbian Rights, 2007), 6.

¹⁷⁴ See generally, Jenni Millbank, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia' (2002) 26 *Melbourne University Law Review*, 144.

¹⁷⁵ Millbank (2002), *ibid*, 162. The manner in which Canada was better at understanding the gendered issues encountered by lesbians, even as far back as 1996, can be seen in *Re L.Q.* [1996] CRDD 145. In that case, the IRB noted a lesbian is Venezuela is 'not only challenging the social norm of heterosexuality, she is also transgressing the social mores regarding the role of women in society' and concluded that the claim was based on her membership in two particular social groups, women and homosexuals.

¹⁷⁶ Dauvergne and Millbank, 'Burdened by Proof', above n.2, 302.

¹⁷⁷ 1106192 [2011] RRTA 845, at 92.

¹⁷⁸ Canada's IRB issued *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* in 1993. Its current guidelines are *Compendium of Decisions: Guideline 4- Women Refugee Claimants Fearing Gender-Related Persecution (Update)* (2003). These can be accessed at <<http://www.refworld.org/pdfid/4713831e2.pdf>>, at 1 October 2013.

¹⁷⁹ Migration Review Tribunal- Refugee Review Tribunal, *Gender Guidelines* (2010) <<http://www.mrt-rrt.gov.au/Files/HTML/GenderGuidelines-GU-CD.html>>, at 1 October 2013. Australia's Department of Immigration and Citizenship (DIAC) also has guidelines on gender-related issues, see *Guidelines on Gender Issues for Decision Makers* (DIAC1996, 2010).

experience of sexual orientation, rather than ask questions about sex acts when determining a lesbian applicant's credibility.¹⁸⁰

However, difficulties still exist for applicants who desire to remain discreet about their sexuality after arriving in Australia.¹⁸¹ In a case concerning a bisexual Brazilian woman, the RRT drew an adverse conclusion from the fact that the applicant had not demonstrated any interest in participating in the gay and lesbian community in Sydney.¹⁸² This reasoning is most likely tied in with the decision maker imposing a Western conception of queer culture on the applicant,¹⁸³ which includes notions such as 'gay pride' and the expectation that queer persons should 'come out of the closet'.¹⁸⁴

This is troublesome, as Decena asserts, because the dichotomous states of being inside or out of the closet are not common to all cultures.¹⁸⁵ For example, in some Latin American cultures sexuality is treated as a 'tacit subject'; something not necessarily kept as a secret, but something that does not need to be mentioned or explained.¹⁸⁶ Thus, while the 'social perception' test is no longer as difficult as it once was for applicants who concealed their sexuality in their sending country, it can still present issues for

¹⁸⁰ MRT-RRT *Gender Guidelines*, *ibid*, at 20.

¹⁸¹ Berg and Millbank, above n.10, 214.

¹⁸² N01/36734 [2002] RRTA 898.

¹⁸³ Western decision makers can require sexual minority applicants to align their 'sexual and gender identity with dominant Western, white, middle-class, and male cultural norms of sexual identity formation,' Edward Ou Jin Lee and Shari Brotman 'Identity, Refugeeess, Belonging: Experiences of Sexual Minority Refugees in Canada' (2011) 48(3) *Canadian Review of Sociology*, 241, 265. This is due to the decision maker's individual interaction with the *other* and their attempt to translate the experience of a lesbian or gay man from another culture into something intelligible to themselves, see Millbank (2002), above n.174, 145. In this process, it is not uncommon for adjudicators to assess the applicant's claim based on what has been termed 'folk knowledge'; a culturally specific form of 'juridical common sense', in which they may utilise their personal, often uninformed, culturally-placed understandings of sexuality, see Miller, above n.42, 138.

¹⁸⁴ The idea of 'coming out of the closet', which is where the homosexual individual publically informs those around them of their sexual orientation, came about in the West as part of the Gay Liberation Movement, which emphasised values such as 'gay pride', a concept closely linked to 'coming out'. This movement began with the Stonewall riots of 1969 in New York and continued on into the 1970s, before being taken over by the Gay Rights Movement (see above n.148), Robert McRuer, *The Queer Renaissance: Contemporary American Literature and the Reinvention of Lesbian and Gay Identities* (1st ed, 1997). The phenomenon of 'coming out of the closet' was mainstreamed in the West in the 1980s and 1990s and has become a normalised and depoliticised Neoliberal concept, see Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation* (1st ed, 1995). As Decena writes, 'Today, one comes out not to be radical or change the world but to be a "normal" gay subject.' Carlos Decena, 'Tacit Subjects' (2008) 14(2-3) *Gay and Lesbian Quarterly*, 339, 339. The cultural expectation that applicants should wish to 'come out' once they have reached the 'liberated' West can also be seen in Canadian hearings. For example, the IRB has made comments such as, 'To the panel's surprise, the claimant apparently prefers to stay in the closet even in an open and free country such as Canada. Seemingly, he is not the type of a person who asserts his gay rights and does not believe in trumpeting his homosexuality', *Re X*, [2006], above n.104.

¹⁸⁵ Decena, *ibid*.

¹⁸⁶ Decena, *ibid*, 340. In fact, Latin American queer scholarship has criticised the 'closet' metaphor because it suggests that 'there is something wrong with you and you have to explain it.' This quote is from Francisco Paredes, an informant in Decena's study. In the original Spanish it is 'tú estás mal y tienes que explicarlo,' Decena, *ibid*, 349. However, some of the Latin American scholars who have made these criticisms include Sifuentes-Jáuregui and Quiroga, Decena, *ibid*, 358.

applicants whose behaviour remains invisible. This is particularly so when it is coupled with the tendency for decision makers to view claims through a culturally hegemonic lens and to apply Western ideas of 'out and proud' queer culture in such cases.¹⁸⁷

B. Positive Aspects of the 'Social Perception' Test: the Potential Ability to Define a Group through its Persecution.

Just as the 'protected characteristics' test has the potential to benefit some sexual minority claims, the 'social perception' test could also be advantageous to this category of applicants due to its ability to identify a group or an individual's membership in a group by reference to their persecution. As aforementioned, in refugee law, a particular social group cannot be defined by persecution alone.¹⁸⁸ However, under the 'social perception' test, an accepted social group, such as a sexual minority group, could be identified through persecution because it could amount to evidence of the group's visibility. For example, in the 2011 case concerning the Kenyan bisexual man, the RRT accepted the applicant's submission that 'the focus should be on the risk to the applicant arising from the fact that many in Kenya, including his family, now believe him to be gay'.¹⁸⁹ It was said that this pointed 'to the reality that he is at risk, whether or not he is actually gay, and the law is well established that membership of the social group can be in the perceptions of the persecutor'.¹⁹⁰

While this approach is not yet common, it could prove to be very beneficial to applicants who lack visible evidence of their sexual history or to those who have a vague or fluid sexual orientation. This is because the applicant's sexual identity would be less relevant where the applicant has suffered persecution for their sexual orientation. Therefore, while the 'social perception' test can be very problematic for sexual minority applicants whose sexuality lacks visibility, it could overcome some of these issues by looking to the applicant's persecutory experiences to determine their MPSG rather than evidence of their sexual expression.

¹⁸⁷ The propensity for decision makers to view sexual minority claims through a Western lens can be seen throughout the RRT case law. For example, in an 2002 claim by a homosexual man from Iran, the RRT did not find the applicant's assertion of his sexuality to be credible due to his lack of awareness of Western gay cultural reference points. Although the RRT stated that it did not expect that 'all or any homosexual men in Iran ... take an interest, for example, in Oscar Wilde, or in Alexander the Great...let alone, say, in the alleged mystique of Bette Midler or Madonna,' it was still 'surprised to observe a comprehensive inability on the Applicant's part to identify any kind of emotion-stirring or dignity-arousing phenomena in the world around him,' *WAAG v Minister for Immigration* [2002] FMCA 191.

¹⁸⁸ For an explanation of the rule in refugee law that the particular social group must exist as a group outside its persecution, see e.g. Aleinikoff (2003), above n.15, 300.

¹⁸⁹ 1011325 [2011], above n.157, at 128.

¹⁹⁰ 1011325 [2011], *ibid*, at 128.

V. RECOMMENDATIONS: TOWARDS A HUMAN RIGHTS APPROACH TO REFUGEE LAW

As we have seen, the positioning of the sexual minority refugee within the MPSG ground has given rise to a range of problems. The two dominant MPSG tests used in domestic jurisdictions reflect refugee law's historically placed focus on group status rather than the individual's conduct.¹⁹¹ This has caused them to be largely inadequate to address complex sexual minority asylum claims. Yet, as will be discussed below, refugee law should be interpreted as upholding human rights principles, and, in particular, that of non-discrimination. The tension between MPSG tests and sexual minority applicants detract from this human rights purpose by potentially denying refugee status to persecuted persons due to a simple confusion over their group status.

This section will make some recommendations designed to ameliorate some of the issues that this paper has been discussing. Firstly, it will recommend an amalgamation of both the 'protected characteristics' and the 'social perception' tests. This will be followed by the suggestion that the 'protected characteristics' test shift its categorisation of sexual minority asylum seekers from the 'immutability' category to 'fundamental-dignity' category.

A. The Human Rights Purpose of Refugee Law

Although some powerful states,¹⁹² as well as some prominent refugee scholars,¹⁹³ have asserted that the principal purpose of refugee law is to facilitate states in dealing with the burden of accommodating displaced persons, it is difficult to deny the human rights

¹⁹¹ See, e.g. LaViolette, above n.73, 33-35.

¹⁹² For mention of the manner in which some states maintain this viewpoint, see Marissa Jackson 'Closing the Gap: Towards a Rights-Based Approach to Refugee Law' (2011) 4(1) *Northwestern Interdisciplinary Law Review*, 147, 166.

¹⁹³ Tuitt, for example, argues that the main function of refugee law is to control the costs of refugees to Western states, see Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (1st ed, 1996). Another popular view of the purpose of refugee law, is emphasising the key role it plays in maintaining the nation-state system and the concepts of alienage and citizenship Hathaway, for example, describes this 'juridical' approach wherein the purpose of refugee law is to confer status onto to those who no longer enjoy the protection of their government but have not yet acquired another nationality, see James C. Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) 33 *International and Comparative Law Quarterly*, 348, 350-361.

origins of refugee law.¹⁹⁴ Indeed, the preamble to the Refugee Convention begins with a reference to the Universal Declaration of Human Rights and affirms the principle that 'human beings shall enjoy fundamental rights and freedoms without discrimination.'¹⁹⁵ Furthermore, a range of scholars, courts and states around the world contend that the primary purpose of refugee law is still to uphold the human rights system.¹⁹⁶

There is variation in scholarship on views as to the extent to which refugee law protects human rights.¹⁹⁷ Yet, the most common position is that the 'human rights embodied in the refugee definition itself centre around non-discrimination and freedom of thought and expression.'¹⁹⁸ The right to freedom of expression is embodied in the ground of political opinion, whilst the other four grounds- race, nationality, religion and MPSG- uphold the right to non-discrimination.

This link between the group-based grounds of refugee law and non-discrimination is evident in the development of the 'protected characteristics' test. The Supreme Court of Canada explained in *Ward* that the 'protected characteristics' approach takes into account the 'general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.'¹⁹⁹ This is because non-discrimination is intended to prevent the arbitrary treatment of persons as second-class citizens.²⁰⁰ The 'protected characteristics' test does just that by protecting those who are persecuted due to morally irrelevant group status, rather than individual conduct.²⁰¹

However, it becomes immediately obvious that a group-based view of persecution- embodied by the nexus requirement²⁰²- has the potential to behave in a somewhat discriminatory manner. This is because it allows those without any notable group- the

¹⁹⁴ Jackson, above n.192, 166.

¹⁹⁵ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

¹⁹⁶ For example, Goodwin-Gill describes the protection of refugees as 'ultimately a matter of principle, reflecting the conviction of the international community that certain values inhere in the individual human being and transcend the indices of citizenship or origins.' See Guy S. Goodwin-Gill, 'Refugees: Challenges to Protection' (2001)35(1) *International Migration Review*, 130, 134.

¹⁹⁷ Some, such as Hathaway, have argued that the refugee definition incorporates *all* 'serious' human rights violations, see James C. Hathaway, *The Law of Refugee Status* (1st ed, 1991). Serious human rights violations here seem to be referring to civil and political rights only, such as such as the right to life, liberty and security person, freedom from slavery, and freedom from torture. Others have gone even further to argue that the refugee definition should include social, cultural and economic rights as well. See eg Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge Studies in International and Comparative Law), (1st ed, 2007). See also Jackson, above n.192, 147.

¹⁹⁸ Steinbock, above n.16, 32.

¹⁹⁹ *Ward*, above n.45, 734

²⁰⁰ Cass R. Sunstein, 'Words, Conduct, Caste', (1993) 60 *University of Chicago Law Review*, 759, 800.

²⁰¹ Steinbock, above n.16, 21-22.

²⁰² The nexus requirement refers to the requirement that the refugee's persecution must be 'by reason of' a particular 'ground'. When applied to one of the group-based grounds, such as race, religion, nationality or membership of a particular social group, it reflects a view of persecution as something inherently linked to group membership- a notion explored above in Chapter Two.

minorities of the minorities- to fall through the gaps. What is to become of the only known gender-queer, asexual individual in Gambia who is persecuted by their society, but unable to prove that they belong to any group? If you are a member of the most underground, niche group, and, thus likely to be the most vulnerable to persecution, refugee law can discriminate against you by denying you any form of recourse. This outcome is contrary to a human rights purpose. There is no justifiable reason that sexual minority asylum seekers whose identity is complex, ambiguous, fluid or lacks in visibility should continue to endure persecution at the hands of their discriminatory sending country.

Some scholars, such as Aleinikoff, have argued that, for this reason, the meaning of persecution in refugee law should be a free-standing concept, not linked to any 'ground' but instead simply the 'unacceptable, unjustified, abhorrent' infliction of harm.²⁰³ Yet, this argument ignores much of the actual language of the Convention²⁰⁴ and is, thus, unlikely to be adopted.²⁰⁵ Nonetheless, this anomaly must be resolved and it seems that the most straightforward way to do so is to ensure that the MPSG tests are broad enough to encompass persons who belong to obscure and socially imperceptible groups.

As Steinbock argues, if the underlying purpose of refugee law is to protect those who are persecuted for their morally irrelevant status, then the social group ground should be 'applied to a wide variety of social statuses and affiliations'.²⁰⁶ Prerequisites such as immutability need not exist when viewing refugee law through this general principle.²⁰⁷ Furthermore, by attempting to reflect the human rights purpose of refugee law, this interpretation of MPSG is consistent with the Vienna Convention on the Law of Treaties' requirement that a treaty be interpreted 'in light of its object and purpose'.²⁰⁸ As such, specific recommendations will be made below that will give effect to this broader interpretation of the MPSG ground.

²⁰³ Alexander T. Aleinikoff, 'The Meaning of 'Persecution' in United States Asylum Law', (1991) 3 *International Journal of Refugee Law*, 1, 5.

²⁰⁴ This point is discussed by Steinbock, above n.16, 31.

²⁰⁵ Firstly, this interpretation is inconsistent with interpretive principles embodied in the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). Article 31(1) states that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The ordinary meaning of the terms in the Refugee Convention's definition of a refugee under art. 1(A)(2), which states that the persecution must be 'by reason of' one of the listed grounds, is that persecution is not a free standing concept, but clearly one that requires a nexus. Furthermore, it is unlikely to be adopted for pragmatic reasons; Aleinikoff's interpretation considerably broadens the refugee definition, bringing many more persons within the ambit of the Convention's protection. It is likely that many states would oppose such a broadening as, for some, it would dramatically increase their refugee burden.

²⁰⁶ Steinbock, above n.16, 34.

²⁰⁷ Steinbock, above n.16, 34.

²⁰⁸ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), article 31(1).

B. The Amalgamation of the 'Protected Characteristics' and 'Social Perception' Tests.

Due the fact that the principal MPSG tests each pose a set of different problems for the sexual minority asylum seeker, they should be reconciled in order to reduce the incidence of such issues. The UNHCR in its *MPSG Guidelines* proposed the adoption of a single test which amalgamates both the 'protected characteristics' and the 'social perception' approaches.²⁰⁹ This test entails asking first whether the applicant meets the 'protected characteristics' test, and, in the case that they do not, asking nevertheless whether they meet the 'social perception' test.²¹⁰

This is because, as Aleinikoff explains, the two approaches should not necessarily be conceived as being inconsistent and competing analyses.²¹¹ Instead, the 'protected characteristics' should be seen at the core of the 'social perception' test because immutable characteristics often produce social perceptions about a group.²¹² However, in the case that there is a group that is not defined by immutable characteristics but is still socially perceived and persecuted, they will also have the capacity to qualify as a particular social group for the purposes of refugee law.

Such an approach has been adopted in the United Kingdom. In *Fornah v. Secretary of State for the Home Department*,²¹³ Lord Bingham cited the UNHCR recommendation of a reconciled test with emphatic approval.²¹⁴ Since then, there appears to be a wide acceptance of a range of sexual minorities. For example in *HJ and HT*, Lord Rodger of Earlsferry stated,

The Convention offers protection to gay and lesbian people — and, I would add, bisexuals and everyone else on a broad spectrum of sexual behaviour— because they are entitled to have the same freedom from fear of persecution as their straight counterparts.²¹⁵

This broad understanding, which represents a return to a more straightforward application of the Convention that focuses on whether the individual has a well-founded fear of persecution rather than on their group status, is arguably influenced by the adoption of a more comprehensive MPSG test.

²⁰⁹ *MPSG Guidelines*, above n.57, 10.

²¹⁰ Foster explains the way that the UNHCR's conception of an amalgamated approach would function; 'where a group is not based on a characteristic deemed to be either unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society', Foster (2012), above n.13, 14.

²¹¹ Aleinikoff (2003), above n.15, 300.

²¹² Aleinikoff (2003), *ibid*, 300.

²¹³ *Fornah*, above n.59.

²¹⁴ *Fornah*, *ibid*, at 432.

²¹⁵ *HJ and HT* [2010] 3 WLR 386, at 76.

An amalgamated MPSG approach would indeed go some way towards resolving the difficulties that sexual minority asylum seekers experience under each of the dominant tests when employed on their own. For example, if an applicant has a particularly obscure sexuality that renders them socially imperceptible as a *group*, such as in the RRT case of the Mongolian man who was attracted to transsexuals, then would satisfy this test because their sexual orientation may be able to be classified as immutable.

On the other hand, the bisexual applicant who experiences their sexuality as particularly fluid, thus failing the immutability test, may still qualify as a member of a particular social group because bisexuals in their country may be socially perceived. By resolving some of the issues sexual minority asylum seekers experience on account of their group identity, this amalgamated test would sit more easily with the anti-discrimination object of refugee law.

C. The Re-Categorisation of Sexual Minority Asylum Seekers under the 'Protected Characteristics' Test: From Immutability to Fundamental Dignity

As much as joining the two tests would go a long way in ameliorating the plight of sexual minority asylum seekers, there is still a potential category of such applicants that may experience issues under this new test. Sexual minority asylum seekers who both experience their sexuality as fluid *and* are relatively invisible may still not qualify as members of a particular social group. This means that bisexuals, for example, may continue to experience issues even if such a reform were made. This is evident in the fact that they already suffer under both tests.

Yet, this issue could also be resolved by altering the situation of sexual minority asylum seekers under the 'protected characteristics' test. Currently the IRB places them within the 'immutability' category.²¹⁶ However, recall that there are two other categories.²¹⁷ It has been argued that they should be re-situated under the category which encompasses 'groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association.'²¹⁸ As Rehaag contends, this isn't to deny that sexuality may be an immutable characteristic, but rather to simply advance the principle that 'forcing sexual minorities to disassociate in order to avoid persecution would violate their fundamental human dignity'.²¹⁹

²¹⁶ *Ward*, above n.45, 739.

²¹⁷ As discussed in Chapter Three, La Forest J set out three categories that would be captured by the 'protected characteristics' test: 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 and; 3) Groups associated by a former voluntary status, unalterable due to its historical permanence, *Ward*, *ibid*, 739

²¹⁸ *Ward*, *ibid*, at 739.

²¹⁹ Rehaag, (2008), above n.4, 98.

This approach is also not completely foreign to refugee law. For example, in its *Guidelines on Sexual Minority Claims*, the UNHCR states,

Sexual orientation can be viewed as either an innate and unchangeable characteristic, or as a characteristic that is so fundamental to human dignity that the person should not be compelled to forsake it.²²⁰

Furthermore, some other 'protected characteristics' jurisdictions, such as New Zealand, have also accepted that sexual orientation can fall within either category.²²¹

This re-categorisation would be beneficial to sexual minority refugees because, unlike the 'immutability' approach which frames the sexual minority social groups narrowly, it would cast the relevant social group as 'those whose associations challenge heteronormativity'.²²² By requiring the decision maker to simply inquire into the persecution aimed at compelling sexual minorities to forsake their associations, this would shift the focus from the post-Holocaust fixation with group-status to the maltreatment of certain groups of people, however they may be defined. This would aid in the cessation of pointless deliberation over the particulars of sexual identity in refugee hearings,²²³ and, thus, would serve to bring refugee law into line with the contemporary issues with which it deals, placing it in a better position to comply with its human-rights purpose.

This alteration could either be coupled with the amalgamation of both tests as recommended above, or made in lieu of that change in 'protected characteristics' jurisdictions'. However, it would be preferable to change the positioning of sexual minority applicants under the 'protected characteristics' test *in addition* to joining the two MPSG tests. This is because the adoption of both recommendations would render the MPSG test more encompassing. Moreover, joining both tests as well would increase consistency across jurisdictions, facilitating their capacity to borrow and learn from one another.

²²⁰ *Guidelines on Sexual Minority Claims*, above n.2, at 32.

²²¹ The New Zealand Refugee Status Appeals Authority (RSAA) stated that 'little point would be served by preferring one [category] 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,' *Re G.J.; Refugee Appeal 1312/93* [1995] RSAA, at 53-54.

²²² Rehaag, (2008), above n.4, 99.

²²³ As Rehaag explains, under this new categorisation, 'rather than mandating the suspect exercise of assessing refugee claimants' "true" or "authentic" sexual identities, the fundamental-dignity approach directs IRB members to inquire into alleged human-rights violations that are aimed at compelling claimants to forsake associations in the name of heterosexuality,' Rehaag, (2008), *ibid*, 99.

D. Other Options for Further Consideration.

1. Utilising the 'Political Opinion' Ground.

Another possible alternative would be for sexual minority applicants to make their claims based on persecution on account of political opinion. This ground lends itself well to queer rights activists, and has been predominantly employed by such persons.²²⁴ Nevertheless, *Ward* held that political opinion need not be expressed by the refugee claimant themselves but may be imputed to them by the agents of persecution.²²⁵ Furthermore, these agents need not be state actors.²²⁶ This means, as Rehaag notes, sexual minority asylum seekers could make their claim on account of political opinion simply because they challenge heterosexuality.²²⁷ This would resolve some of the issues described in this paper because they would only need to show that they express their sexuality in a way that transgresses social norms, rather than needing to prove that they are in fact members of a specific group.²²⁸ Thus, while further discussion of this option is beyond the scope of this paper, it should be considered as an alternative way for sexual minority asylum seekers to make their claims.

2. Recent Advancements in Tribunal Decisions which Could Serve to Broaden Each Test.

There is also the possibility of each jurisdiction further implementing and developing some of the broader and more flexible approaches to which they have both recently alluded. As flagged above, the IRB has demonstrated the capacity for the 'protective characteristics' to define a group in negative terms, such as 'non-heterosexual'.²²⁹ This would go a long way in ameliorating issues of identity construction for persons of obscure or uncertain sexual orientations. The RRT has also indicated the potential for the 'social perception' test to utilise persecution as evidence of the existence of a social group and the applicant's membership therein. This would be beneficial for persons with complicated or invisible sexual identities. Both these new methods present potential directions that each test may take, which may serve to resolve some of the difficulties discussed. Therefore, they should also be considered for further research.

²²⁴ See e.g. *Re C.Y.T.* [1998], above n.4.

²²⁵ *Ward*, above n.45, at 747.

²²⁶ *Ward*, *ibid*, at 716-17

²²⁷ Rehaag, (2008), above n.4, 94.

²²⁸ Rehaag, (2008), *ibid*, 95.

²²⁹ Rehaag, (2008), *ibid*, 94.

VI. CONCLUSION

Refugee law should, for both reasons of policy and legal interpretation, be viewed as having primarily a human rights purpose and, more specifically, forming part of the non-discrimination regime. However, it is currently falling short of this purpose in relation to its interaction with the sexual minority asylum seeker. This is because the two predominant MPSG tests reflect an out-dated fixation with group status which sits uneasily with this new category of refugees. Unlike the more traditional groups that refugee law protects, sexual minority groups can be more fluid, complex, obscure or invisible. This has led to difficulties for the sexual minority applicant under both the 'social perception' and the 'protected characteristics' tests.

On one hand the 'protected characteristics' test, which in Canadian refugee law characterises sexuality as an immutable condition, is a problem for sexual minority applicants whose sexual identity is fluid or ambiguous. On the other hand, the 'social perception' test is problematic for members of sexual minorities that are not easily perceivable within their sending-country. As a result, both tests have seen the rejection of potentially legitimate claims for asylum by sexual minorities, due to mere qualms over the identity construction.

This presents quite an anomaly because it effectively means that refugee law can discriminate against particular classes of sexual minority asylum seekers, despite its link with the principle of non-discrimination. For these reasons, this paper has recommended some changes which may render refugee law more capable of encompassing a wide range of sexual identities. One way of broadening the scope of the MPSG ground is by amalgamating both the tests as the UNHCR recommends. Either in addition to this, or in lieu of it, sexual minority refugees should also be moved within the 'protected characteristics' test, from the 'immutability' category to the 'fundamental dignity' one.

GLOSSARY

Acronyms and Abbreviations.

- *Acosta*= *In the Matter of Acosta* 19 I. & N, 211, BIA (1985) (United States)
- *Applicant A*= *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225
- BIA- United States Board of Immigration Appeals
- The Convention- *Convention Relating to the Status of Refugees* (1951), as amended by the *Protocol Relating to the Status of Refugees* (1967).
- LGBT- Lesbian, Gay, Bisexual, Transgender/ Transsexual
- LGBTI- Lesbian, Gay, Bisexual, Transgender/ Transsexual, Intersex
- IRB- The Canadian Immigration and Refugee Board
- MPSG- Membership of a Particular Social Group
- *MPSG Guidelines*- The United Nations High Commissioner for Refugees' *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*
- RRT- The Australian Refugee Review Tribunal
- *Guidelines on Sexual Minority Claims* - The United Nations High Commissioner for Refugees' *Guidelines on International Protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*
- UNHCR- United Nations High Commissioner for Refugees
- *Ward*= *Canada (Attorney General) v. Ward* [1993] 2 SCR 689 (Canada)

REFERENCES

A. ARTICLES/ BOOKS/ REPORTS

Alexander Aleinikoff, 'Protected Characteristics and Social Perceptions: an Analysis of the Meaning of 'Membership of a Particular Social Group' in Erika Feller (ed.) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (1st ed, 2003), 263.

Alexander T. Aleinikoff, 'The Meaning of 'Persecution' in United States Asylum Law', (1991) 3 *International Journal of Refugee Law*, 1.

Alice M. Miller, 'Gay Enough: Some Tensions in Seeking the Grant of Asylum and Protecting Global Sexual Diversity' in Brad Epps, Keja Valens and Bill Johnson Gonzalez (eds.), *Passing Lines: Sexuality and Immigration*. Cambridge, , (1st ed, 2005), 137.

André M. Miller *et al*, *Bisexual Health: An Introduction and Model Practices for HIV/STI Prevention Programming* (National Gay and Lesbian Task Force, 2007).

Audrey Macklin 'Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims' (1998) 13 *Georgetown Immigration Law Journal*, 25.

Barry O'Leary, "'We Cannot Claim Any Particular Knowledge of the Ways of Homosexuals, Still Less of Iranian Homosexuals...': The Particular Problems Facing Those Who Seek Asylum on the Basis of Their Sexual Identity' (2008) 16 *Feminist Legal Studies*, 87.

Carlos Decena, 'Tacit Subjects' (2008) 14(2-3) *Gay and Lesbian Quarterly*, 339.

Cass R Sunstein, 'Words, Conduct, Caste', (1993) 60 *University of Chicago Law Review*, 759.

Catherine Dauvergne and Jenni Millbank, 'Before the High Court: Applicants S396/2002 and S395/202: A Gay Refugee Couple from Bangladesh' (2003) 23 *Sydney Law Review*, 97.

Catherine Dauvergne and Jenni Millbank, 'Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers' (2003) 31 *Federal Law Review*, 299.

Christopher N. Kendall, 'Lesbian and Gay Refugees in Australia: Now that "Acting

Discreetly' Is No longer an Option, Will Equality Be Forthcoming?' (2003) 15(4) *International Journal of Refugee Law*, 715.

Clare Hemmings, *Bisexual Spaces: A Geography of Sexuality and Gender* (1st ed, 2002).

Daniel J. Steinbock, 'The Refugee Definition as Law: Issues of Interpretation', in Nicholson, S. and Twomey, P., (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1st ed, 1999), 13.

Edward Ou Jin Lee and Shari Brotman, 'Identity, Refugeeeness, Belonging: Experiences of Sexual Minority Refugees in Canada' (2011) 48(3) *Canadian Review of Sociology*, 241.

Edward Stein (ed.), *Forms of Desire: Sexual Orientation and the Social Constructivist Controversy* (1st ed, 1992).

Fadi Hanna, 'Punishing Masculinity in Gay Asylum Claims' (2005) 114 *The Yale Law Journal*, 913.

Guy S. Goodwin-Gill, 'Refugees: Challenges to Protection' (2001) 35(1) *International Migration Review*, 130.

Hannah Arendt, *The Origins of Totalitarianism*, (1st ed, 1951).

J. Freedman, *Female Asylum-Seekers and Refugees in France*, UNHCR Legal and Protection Policy Series, June 2009, PPLAS/2009/01.

Jack Garvey, 'Toward a Reformulation of International Refugee Law, (1985) 26(2) *Harvard Journal of International Law*, 483.

James C. Hathaway, 'Forced Migration Studies: Could We Agree Just to 'Date'?' (2007) 20 *Journal of Refugee Studies*, 349.

James C. Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) 33 *International and Comparative Law Quarterly*, 348.

James C. Hathaway, *The Law of Refugee Status* (1st ed, 1991).

Jenni Millbank, 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (2003) 18 *Georgetown Immigration Law Journal*, 71.

Jenni Millbank, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia' (2002) 26 *Melbourne University Law Review*, 144.

Jenni Millbank 'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21(1) *International Journal of Refugee Law*, 1.

John Russ, 'The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum

Standards' (1998) 4 *University of California Davis International Journal of Law and Policy*, 29.

Kristen Schilt, and Laurel Westbrook, 'Doing Gender, Doing Heteronormativity: 'Gender Normals,' Transgender People, and the Social Maintenance of Heterosexuality' (2009) 23 (4) *Gender & Society*, 440

Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22(2) *International Journal of Refugee Studies*, 195.

Lena Ayoub, *The Challenges of Lesbian Asylum Claims*, (National Centre for Lesbian Rights, 2007).

Marissa Jackson 'Closing the Gap: Towards a Rights-Based Approach to Refugee Law' (2011) 4(1) *Northwestern Interdisciplinary Law Review*, 147.

Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation (Cambridge Studies in International and Comparative Law)*, (1st ed, 2007).

Michelle Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'* (UNHCR, 2012).

Michel Foucault, *The History of Sexuality, Volume I: An Introduction* (1st ed, 1978).

Nicole LaViolette, 'The Immutable Refugees' Sexual Orientation in *Canada (A.G.) v. Ward*', (1997) 55(1) *University of Toronto Faculty of Law Review*, 1.

Onlywomen Press, *Love Your Enemy? The Debate Between Heterosexual Feminism and Political Lesbianism* (1st ed, 1981).

Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (1st ed, 1996).

Ritu Ghai, 'Deciphering Motive: Establishing Sexual Orientation as the "One Central Reason" for Persecution in Asylum Claims' (2012) 43 *Columbia Human Rights Law Review*, 521.

Robert McRuer, *The Queer Renaissance: Contemporary American Literature and the Reinvention of Lesbian and Gay Identities* (1st ed, 1997).

Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender identity in Europe* (2011), 36.

Sean Rehaag, 'Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada', (2008) 53 *McGill Law Journal*, 60.

Sean Rehaag, 'Bisexuals Need Not Apply: a Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia' (2009) 13(2) *International Journal of Human Rights*, 415.

Simon Scott, 'Politically Bi' in Sharon Rose *et al.* (eds.), *Bisexual Horizons* (1st ed, 1996), 149.

Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation* (1st ed, 1995).

Vera Whisman, *Queer by Choice: Lesbians, Gay Men, and the Politics of Identity* (1st ed, 1996).

Volker Türk, 'Ensuring Protection to LGBTI Persons of Concern', (2013) 25(1) *International Journal of Refugee Law*, 120.

Yoshino, K., 'The Epistemic Contract of Bisexual Erasure' (2000) 52 *Stanford Law Review*, 353.

CASES/ TRIBUNAL DECISIONS

Australia

Appellant S395/2002 v.. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs, (2003) 216 CLR 473.

Applicant A v. Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225.

Applicant LSLs v. Minister for Immigration and Multicultural Affairs [2000] FCA 211.

N01/36734 [2002] RRTA 898.

N95/07313 [1997] RRTA 2438.

V02/14641 [2004] RRTA 351.

WABR v. Minister for Immigration and Multicultural Affairs [2002] FCAFC 124.

061020474 [2007] RRTA 25.

1011325 [2011] RRTA 227.

1102720 [2011] RRTA 714.

1106192 [2011] RRTA 845.

1200151 [2012] RRTA 1010.

198108356 [1998] RRTA (Unreported) (28 October 1998).

Canada

Chan v Canada (Minister of Employment and Immigration) [1995] 3 SCR 593.

Kravchenko v. Canada (Minister of Citizenship and Immigration), [2004] RPDD 384 (QL).

Kravchenko v Canada (Minister of Citizenship and Immigration) [2005] FCJ 479 (QL).

Khrystych v. Canada (Minister of Citizenship and Immigration)[2004] RPDD. No. 339.

Khrystych v. Canada (Minister of Citizenship and Immigration) [2005] FC 498.

Leke v. Canada (Citizenship and Immigration), 2007 FC 848 (QL).

Pizarro v. Canada (Minister of Employment and Immigration), [1994] FCJ 320 (QL).

Ramón Levario v. Canada (Minister of Citizenship and Immigration), 2012 FC 314.

Rassan v. Canada (Minister of Citizenship and Immigration)[2004] FC 1279 (QL).

Re B.D.K [2000] CRDD 72 (QL).

Re C.Y.T. [1998] CRDD 186 (QL).

Re K.O.C. [2003] RPDD No. 420 (QL).

Re L.Q. [1996] CRDD 145 (QL).

Re S. (I.Q.) [1994] CRDD. 323 (QL).

Re X [2006] RPDD 63808 (QL).

Re X [2006] RPDD 80026 (QL).

Re X [2009] RPDD 88450 (QL).

Re X [2009] RPDD 90035 (QL).

Re X [2010] RPDD 97642 (QL).

Re X [2011] RPDD 95127 (QL).

France

G, Cour Nationale du Droit, 571886 (11 April 2008).

Ourbih, Conseil d'Etat [French Council of State], 171858, 23 June 1997.

Germany

Hessischer Verwaltungsgerichtshof (VGH) [Hessen Higher Administrative Court Hessen], 3UE 455/06.A, 10 April 2008 [Anne Kallies trans].

New Zealand

Re G.J; Refugee Appeal 1312/93 [1995] RSAA.

Re GJ; Refugee Appeal 71427/99 [2000] NZAR 545.

South Africa

Jian-Qiang Fang v Refugee Appeal Board et al, Case No. 40771/05, 15 November 2006.

United Kingdom

Fornah v. Secretary of State for the Home Department [2007] 1 AC 412.

HJ and HT [2010] 3 WLR 386.

United States

In the Matter of Acosta 19 I. & N, 211, BIA (1985).

In the Matter of C-A 23 I. & N. Dec. 951 (BIA, 2006), interim decision #3535.

Gatimi, 578 F. 3d 611, 3 (7th Cir., 2009).

Valdiviezo-Galdamez v Attorney General, 663 F. 3d 582, 585 (3rd Cir., 2011).

LEGISLATION

Australia

Migration Act 1958 (Cth).

Belgium

Alien Legislation (*Loi du 15 Décembre 1980 sur L'accès au Territoire, le Séjour, L'établissement et L'éloignement des Étrangers*).

Canada

Immigration and Refugee Protection Act, S.C. 2001, c. 27.

Germany

Aufenthaltsgesetz [Residence Act] B085, 25th February 2008 (Federal Law Gazette I, 162).

TREATIES

Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

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

Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

GUIDELINES/ DIRECTIVES

Australia

Guidelines on Gender Issues for Decision Makers (DIAC1996, 2010).

Migration Review Tribunal- Refugee Review Tribunal, *Gender Guidelines* (2010)
<<http://www.mrt-rrt.gov.au/Files/HTML/GenderGuidelines-GU-CD.html>>, at 1 October 2013

Canada

Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution in 1993. Its current guidelines are *Compendium of Decisions: Guideline 4- Women Refugee Claimants Fearing Gender-Relating Persecution (Update)* (2003)
<<http://www.refworld.org/pdfid/4713831e2.pdf>>, at 1 October 2013.

European Union

European Union Qualification Directive, 2011/95/EU.

United Nations High Commissioner for Refugees

Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, N High Commissioner for Refugees, UN Doc HCR/EG/LKA/12/04 (2012).

Guidelines on International Protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UN High Commissioner for Refugees, UN Doc HCR/GIP/12/09 (2012).

Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN High Commissioner for Refugees, UN Doc HCR/GIP/02/02 (2002).

OTHER

Benjamin Kahan, *The Walk-In Closet: Situational Homosexuality and Homosexual Panic in Hellman's the Children's Hour* (2013) Read Periodicals
<<http://www.readperiodicals.com/201304/2975450101.html#ixzz2aI5LrtP7>>, at 27/07/2013.

'Biphobia', *Dictionary Submission*, Collins Dictionary,
<<http://www.collinsdictionary.com/submission/3130/biphobia>> at 30 September 2013.

Douglas Whaley, *The Presumption of Heterosexuality and the Invisible Homosexual* (2010)
Douglas Whaley Blogspot, <<http://douglaswhaley.blogspot.com/2011/10/presumption-of-heterosexuality-and.html>> at 27th of July 2013.

Gender and Sexuality Center, *What is Biphobia?*, University of Texas Website,
<http://www.utexas.edu/diversity/ddce/gsc/downloads/resources/Bisexuality_Biphobia.pdf>
at 30 September 2013.

Gerald N. Hill and Kathleen T. Hill, 'Ejusdem Generis', *Legal Dictionary*, The Free
Dictionary <<http://legal-dictionary.thefreedictionary.com/Ejusdem+generis>> at 26 September
2013.

LGBT Advocacy Committee, *Bisexual Invisibility: Impacts and Recommendation*, San
Francisco Human Rights Commission Website,
<<http://www.sfhrc.org/modules/showdocument.aspx?documentid=989>>, at 1 October 2013.

LGBT- Sexual Orientation (2012) American Psychiatric <<http://www.psychiatry.org/mental-health/people/lgbt-sexual-orientation>> at 30 September 2013.

Peter Butt, *Butterworths Concise Australian Legal Dictionary*, (3rd ed, 2004), 'ejusdem
generis'.

Polyamory (2009) Reference.com, <<http://www.reference.com/browse/wiki/Polyamory>> at 1
October 2013.

Vivienne Namaste *et al*, *Sexual Minority Refugee Determinations in Canada: The Experience
of Bisexual Claimants* (2011) Metropolis
<http://www.metropolis.net/pdfs/sean_rehaag_bb_6july11_e.pdf> at 1 October 2013.

APPENDIX: DETAILS OF INTERVIEWS

Attached are the following:

- Monash Human Ethics Approval (In its original form before amendments were made)
- Organisation Consent Form: *Udiversidad*.
- Individual Consent Form: Aston Rigel (*Udiversidad*)
- Organisation Consent Form: *La Comisión de Derechos Humanos del Distrito Federal*
- Individual Consent Form: Ileana Esparanza Romero (*La Comisión de Derechos Humanos del Distrito Federal*)
- Organisation Consent Form: *Opción Bi*
- Individual Consent Form: Natalia Anaya Quintal (*Opción Bi*)
- Organisation Consent Form: *Equal Ground*
- Individual Consent Form: Rosanna Flamer-Caldera, executive director of (*Equal Ground*)



Monash University Human Research Ethics Committee (MUHREC)
Research Office

Human Ethics Certificate of Approval

Date: 5 February 2013 Project Number: CF13/300 – 2013000131

Project Title: Bisexual and Transgender Refugee claims: Mexican case study

Chief Investigator: Prof Susan Kneebone

Approved: From: 5 February 2013 To: 5 February 2018

Terms of approval

1. The Chief investigator is responsible for ensuring that permission letters are obtained, if relevant, and a copy forwarded to MUHREC before any data collection can occur at the specified organisation. **Failure to provide permission letters to MUHREC before data collection commences is in breach of the National Statement on Ethical Conduct in Human Research and the Australian Code for the Responsible Conduct of Research.**
2. Approval is only valid whilst you hold a position at Monash University.
3. It is the responsibility of the Chief Investigator to ensure that all investigators are aware of the terms of approval and to ensure the project is conducted as approved by MUHREC.
4. You should notify MUHREC immediately of any serious or unexpected adverse effects on participants or unforeseen events affecting the ethical acceptability of the project.
5. The Explanatory Statement must be on Monash University letterhead and the Monash University complaints clause must contain your project number.
6. **Amendments to the approved project (including changes in personnel):** Requires the submission of a Request for Amendment form to MUHREC and must not begin without written approval from MUHREC. Substantial variations may require a new application.
7. **Future correspondence:** Please quote the project number and project title above in any further correspondence.
8. **Annual reports:** Continued approval of this project is dependent on the submission of an Annual Report. This is determined by the date of your letter of approval.
9. **Final report:** A Final Report should be provided at the conclusion of the project. MUHREC should be notified if the project is discontinued before the expected date of completion.
10. **Monitoring:** Projects may be subject to an audit or any other form of monitoring by MUHREC at any time.
11. **Retention and storage of data:** The Chief Investigator is responsible for the storage and retention of original data pertaining to a project for a minimum period of five years.

Professor Ben Canny Chair, MUHREC

A handwritten signature in black ink, appearing to read "Ben Canny".

cc: Ms Claerwen O'Hara

Postal – Monash University, Vic 3800, Australia Building 3E, Room 111, Clayton Campus, Wellington Road, Clayton Telephone +61 3 9905 5490 Facsimile +61 3 9905 3831 Email muhrec@monash.edu www.monash.edu/research/ethics/human/index/html ABN 12 377 614 012 CRICOS Provider #00008C

Organisation permission letter**Organisation: Udiversidad****Title of study- Bisexual and transgender refugee claims: case study of Mexico.**

I, _____, give permission for student researcher Claerwen O'Hara to interview me on behalf of the organisation, Udiversidad about the transgender and bisexual communities in Mexico.

Yo, Astron Rigel, doy permiso por investigadora estudiante Claerwen O'Hara a me entrevistar en nombre de la organización, Udiversidad sobre las comunidades bisexuales y transgéneras en México.

I understand that this interview is part of a research project that will contribute towards a Bachelor of Laws (Honours) degree at Monash University.

Entiendo que esta entrevista es parte de un proyecto de investigación que contribuirá a una licenciatura de derecho (con mención honorífica) a la Universidad de Monash.

I also understand that data from this interview may be included in the final thesis.

Entiendo También que los datos de la entrevista puede ser incluidos en la tesis final.

Signature (*firma*):  _____

Date (*fecha*): 26th February 2013.

MONASH University



Consent Form (formulario de consentimiento)
Mexican LGBT Organisations (organizaciones LGBT de México)

Title of study: (Tema de la investigación): Bisexual and transgender refugee claims: case study of Mexico. (Peticiones de asilo de personas bisexual y transgénero: estudio de caso de México)

NOTE: This consent form will remain with the Monash University researcher for their records. (este formulario de consentimiento permanecerá con la investigadora de la Universidad de Monash para sus archivos.)

I understand I have been asked to take part in the Monash University research project specified above. I have had the project explained to me, and I have read the Explanatory Statement, which I keep for my records.

Entiendo que estoy invitado/a a participar en el proyecto de investigación especificado anterior. La investigadora me ha explicado el proyecto, y he leído la Declaración Explicativa, la cual que mantengo para mis archivos.

I understand that: <i>Entiendo que:</i>	YES/ SI	NO/ NO
- I will be asked to be interviewed by the researcher <i>- Me pide ser entrevistado/a por la investigadora</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- I agree to allow the interview to be audio-taped <i>- Consiento que la entrevista sea grabado.</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

And/ y

I understand that my participation is voluntary, that I can choose not to participate in part or all of the project, and that I can withdraw at any stage of the project without being penalised or disadvantaged in any way.

Entiendo que mi participación en la entrevista es voluntaria, que no estoy obligado/a a consentir a un parte o a todo del proyecto, y que puedo retirar su participación a cualquier etapa sin sanción o desventaja.

And/ y

I understand that any data that the researcher extracts from the interview for use in reports or published findings will not, under any circumstances, contain names or identifying characteristics without my signed consent below.

Entiendo que cualquier información que la investigadora toma de la entrevista para usar en un document de investigación o descubrimientos publicados no contendrán, en ninguna circunstancia, nombres o características identificables sin mi consentimiento firmado bajo.

MONASH University**And/or y/ o**

I understand that I will be given a transcript of data concerning me for my approval before it is included in the write up of the research.

Entiendo que me dará una transcripción de los datos con respecto a yo para mi aprobación antes que estarán incluidos en la tesis final.

And/or y/o

I understand that I may ask at any time prior to my giving final consent for my data to be withdrawn from the project

Entiendo que puedo pedir a cualquier momento antes de dar mi consentimiento final que mis datos son retirados del proyecto.

And/or y/o

I understand that no information I have provided that could lead to the identification of any other individual will be disclosed in any reports on the project, or to any other party

Entiendo que ninguna información que he dado que puede llevar a la identificación de cualquiera otra persona será revelada en cualquier documento del proyecto, o a cualquiera otra persona.

And/ y

I understand that data from the interview will be kept in secure storage and accessible to the research team. I also understand that the data will be destroyed after a 5 year period unless I consent to it being used in future research.

Entiendo que los datos de la entrevista serán guardados en un depósito seguro y accesible al equipo de investigación. Entiendo también que los datos serán desechados después de un tiempo de cinco años a menos que consienta que ellos puedan ser usados en investigaciones futuras.

And/ y

I do/do not give permission to be identified by name/by a pseudonym/ understand I will remain anonymous at all times in any reports or publications from the project.

Doy/ no doy permiso a ser identificado/a por nombre/ por un seudónimo/ entiendo que será anónimo a todos tiempos en cualquier documentos o publicaciones del proyecto.

Participant's name (nombre de participante):

Astron Miguel Ortiz, Kosen

Signature (firma):



Date (fecha): 26th February 2013.

Organisation permission letter

Organisation: Comisión de Derechos Humanos del Distrito Federal.

Title of study- Bisexual and transgender refugee claims: case study of Mexico.

I, _____, give permission for student researcher Claerwen O'Hara to interview me on behalf of the organisation, Comisión de Derechos Humanos del Distrito Federal about the transgender and bisexual communities in Mexico.

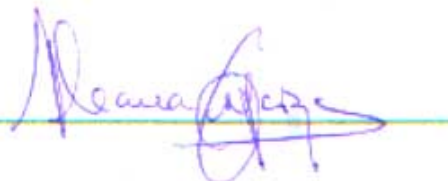
Yo, Ilse Espinoza doy permiso por investigadora estudiante Claerwen O'Hara a me entrevistar en nombre de la organización, Comisión de Derechos Humanos del Distrito Federal sobre las comunidades bisexuales y transgéneras en México.

I understand that this interview is part of a research project that will contribute towards a Bachelor of Laws (Honours) degree at Monash University.

Entiendo que esta entrevista es parte de un proyecto de investigación que contribuirá a una licenciatura de derecho (con mención honorífica) a la Universidad de Monash.

I also understand that data from this interview may be included in the final thesis.

Entiendo También que los datos de la entrevista puede ser incluidos en la tesis final.

Signature (*firma*): 

Date (*fecha*): 26 February 2013

MONASH University



Consent Form (formulario de consentimiento)
Mexican LGBT Organisations (organizaciones LGBT de México)

Title of study: (*Tema de la investigación*): **Bisexual and transgender refugee claims: case study of Mexico.** (*Peticiones de asilo de personas bisexual y transgénero: estudio de caso de México*)

NOTE: This consent form will remain with the Monash University researcher for their records. (*este formulario de consentimiento permanecerá con la investigadora de la Universidad de Monash para sus archivos.*)

I understand I have been asked to take part in the Monash University research project specified above. I have had the project explained to me, and I have read the Explanatory Statement, which I keep for my records.

Entiendo que estoy invitado/a a participar en el proyecto de investigación especificado anterior. La investigadora me ha explicado el proyecto, y he leído la Declaración Explicativa, la cual que mantengo para mis archivos.

I understand that: <i>Entiendo que:</i>	YES/ SI	NO/ NO
- I will be asked to be interviewed by the researcher - <i>Me pide ser entrevistado/a por la investigadora</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- I agree to allow the interview to be audio-taped - <i>Consiento que la entrevista sea grabado.</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

And/ y

I understand that my participation is voluntary, that I can choose not to participate in part or all of the project, and that I can withdraw at any stage of the project without being penalised or disadvantaged in any way.

Entiendo que mi participación en la entrevista es voluntaria, que no estoy obligado/a a consentir a un parte o a todo del proyecto, y que puedo retirar su participación a cualquier etapa sin sanción o desventaja.

And/ y

I understand that any data that the researcher extracts from the interview for use in reports or published findings will not, under any circumstances, contain names or identifying characteristics without my signed consent below.

Entiendo que cualquier información que la investigadora toma de la entrevista para usar en un document de investigación o descubrimientos publicados no contendrán, en ninguna circunstancia, nombres o características identificables sin mi consentimiento firmado bajo.

MONASH University**And/or y/ o**

I understand that I will be given a transcript of data concerning me for my approval before it is included in the write up of the research.

Entiendo que me dará una transcripción de los datos con respecto a yo para mi aprobación antes que estarán incluidos en la tesis final.

And/or y/o

I understand that I may ask at any time prior to my giving final consent for my data to be withdrawn from the project

Entiendo que puedo pedir a cualquier momento antes de dar mi consentimiento final que mis datos son retirados del proyecto.

And/or y/o

I understand that no information I have provided that could lead to the identification of any other individual will be disclosed in any reports on the project, or to any other party

Entiendo que ninguna información que he dado que puede llevar a la identificación de cualquiera otra persona será revelada en cualquier documento del proyecto, o a cualquiera otra persona.

And/ y

I understand that data from the interview will be kept in secure storage and accessible to the research team. I also understand that the data will be destroyed after a 5 year period unless I consent to it being used in future research.

Entiendo que los datos de la entrevista serán guardados en un depósito seguro y accesible al equipo de investigación. Entiendo también que los datos serán desechados después de un tiempo de cinco años a menos que consienta que ellos puedan ser usados en investigaciones futuras.

And/ y

I do/do not give permission to be identified by name/by a pseudonym/ understand I will remain anonymous at all times in any reports or publications from the project.

Doy/ no doy permiso a ser identificado/a por nombre/ por un seudónimo/ entiendo que será anónimo a todos tiempos en cualquier documentos o publicaciones del proyecto.

Participant's name (*nombre de participante*):

Shana Espinoza R.

Signature (*firma*):

Shana Espinoza R.

Date (*fecha*):

26 Feb 2013

Organisation permission letter**Organisation: Opción Bi****Title of study- Bisexual and transgender refugee claims: case study of Mexico.**

Natalia Anaya Quintal

I, Natalia Anayabitrans, give permission for student researcher Claerwen O'Hara to interview me on behalf of the bisexual advocacy organisation, Opción Bi about the transgender and bisexual communities in Mexico.

Yo, Natalia Anayabitrans, doy permiso por investigadora estudiante Claerwen O'Hara a me entrevistar en nombre de la organización de la defensa de la bisexualidad, Opción Bi sobre las comunidades bisexuales y transgéneras en México.

I understand that this interview is part of a research project that will contribute towards a Bachelor of Laws (Honours) degree at Monash University.

Entiendo que esta entrevista es parte de un proyecto de investigación que contribuirá a una licenciatura de derecho (con mención honorífica) a la Universidad de Monash.

I also understand that data from this interview may be included in the final thesis.

Entiendo También que los datos de la entrevista puede ser incluidos en la tesis final.

Name (*nombre*):

Natalie Anaya Quintal

Signature (*firma*):

Natalie Anaya

Date (*fecha*): *26 de Febrero de 2013*

MONASH University



Consent Form (formulario de consentimiento)
Mexican LGBT Organisations (organizaciones LGBT de México)

Title of study: (Tema de la investigación): Bisexual and transgender refugee claims: case study of Mexico. (Peticiones de asilo de personas bisexual y transgénero: estudio de caso de México)

NOTE: This consent form will remain with the Monash University researcher for their records. (este formulario de consentimiento permanecerá con la investigadora de la Universidad de Monash para sus archivos.)

I understand I have been asked to take part in the Monash University research project specified above. I have had the project explained to me, and I have read the Explanatory Statement, which I keep for my records.

Entiendo que estoy invitado/a a participar en el proyecto de investigación especificado anterior. La investigadora me ha explicado el proyecto, y he leído la Declaración Explicativa, la cual que mantengo para mis archivos.

I understand that: <i>Entiendo que:</i>	YES/ SI	NO/ NO
- I will be asked to be interviewed by the researcher <i>- Me pide ser entrevistado/a por la investigadora</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
- I agree to allow the interview to be audio-taped <i>- Consiento que la entrevista sea grabado.</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

And/ y

I understand that my participation is voluntary, that I can choose not to participate in part or all of the project, and that I can withdraw at any stage of the project without being penalised or disadvantaged in any way.

Entiendo que mi participación en la entrevista es voluntaria, que no estoy obligado/a a consentir a un parte o a todo del proyecto, y que puedo retirar su participación a cualquier etapa sin sanción o desventaja.

And/ y

I understand that any data that the researcher extracts from the interview for use in reports or published findings will not, under any circumstances, contain names or identifying characteristics without my signed consent below.

Entiendo que cualquier información que la investigadora toma de la entrevista para usar en un document de investigación o descubrimientos publicados no contendrán, en ninguna circunstancia, nombres o características identificables sin mi consentimiento firmado bajo.

MONASH University**And/or y/ o**

I understand that I will be given a transcript of data concerning me for my approval before it is included in the write up of the research.

Entiendo que me dará una transcripción de los datos con respecto a yo para mi aprobación antes que estarán incluidos en la tesis final.

And/or y/o

I understand that I may ask at any time prior to my giving final consent for my data to be withdrawn from the project

Entiendo que puedo pedir a cualquier momento antes de dar mi consentimiento final que mis datos son retirados del proyecto.

And/or y/o

I understand that no information I have provided that could lead to the identification of any other individual will be disclosed in any reports on the project, or to any other party

Entiendo que ninguna información que he dado que puede llevar a la identificación de cualquiera otra persona será revelada en cualquier documento del proyecto, o a cualquiera otra persona.

And/ y

I understand that data from the interview will be kept in secure storage and accessible to the research team. I also understand that the data will be destroyed after a 5 year period unless I consent to it being used in future research.

Entiendo que los datos de la entrevista serán guardados en un depósito seguro y accesible al equipo de investigación. Entiendo también que los datos serán desechados después de un tiempo de cinco años a menos que consienta que ellos puedan ser usados en investigaciones futuras.

And/ y

I do/do not give permission to be identified by name/by a pseudonym/ understand I will remain anonymous at all times in any reports or publications from the project.

Doy/ no doy permiso a ser identificado/a por nombre/ por un seudónimo/ entiendo que será anónimo a todos tiempos en cualquier documentos o publicaciones del proyecto.

Participant's name (nombre de participante):

Natalia Anaya Quinti

Signature (firma): Natalia Anaya

Date (fecha): 26/02/2013