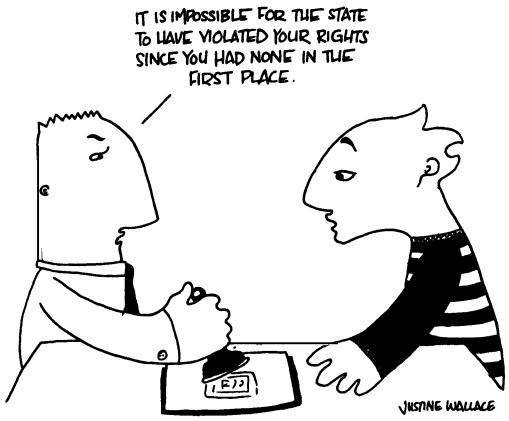
Fear of persecution or just a queer feeling?

Jenni Millbank

Refugee status and sexual orientation in Australia.



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Lesbians and gay men have been subjected to harassment, violence and discrimination in every part of the world. This oppression continues with varying degrees of severity and with varying degrees of state complicity, or even state initiation, in different parts of the world. This article concerns recent decisions by the Australian Refugee Review Tribunal regarding the claims of six gay men from Iran, China (three), Fiji and Zimbabwe to refugee status on the basis that they had been or would be persecuted in their nation of origin.[1] These cases appear to be the only decisions in Australia which discuss sexual orientation as a ground for refugee status. Like the handful of such decisions worldwide, all concern male applicants and all are unreported.[2]

The Refugee Review Tribunal was established in July 1993 as an independent administrative body to review the merits of adverse refugee status decisions made by the delegate of the Minister for Immigration. The Tribunal has the power to make a final binding decision rather than recommendations to the Minister as under the previous system. In deciding whether an applicant is a refugee, the Tribunal applies the definition of refugee in s.4(1) of the *Migration Act 1958* (Cth) which specifically adopts the meaning of refugee from Article 1 of the 1951 Convention Relating to the Status of Refugees (as amended by the 1967 Protocol Relating to the Status of Refugees). The Refugee Convention provides that a refugee is someone who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or, who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it . . .

All six men claimed a well-founded fear of persecution based on their membership of a social group as homosexuals (claims on the basis of political opinion or race were made in some of the cases but were not decisive in any). The two issues to be decided in the cases were first, whether being homosexual qualified as membership of a 'particular social group' under the Convention and secondly, whether each individual applicant had a 'well-founded fear of being persecuted' based on his homosexuality.

The main point of contrast in the cases is in the interpretation of 'well-founded fear of being persecuted'. The focus of this article, therefore, is on such questions as: When will a fear be well founded? What is expected of an applicant in avoiding risks? What is the extent of harassment or denial of rights required to constitute persecution?

A social group?

The 'social group' category is the most diffuse and thus most contentious ground of refugee status, and has been the focus of varying definitions by different bodies over the years. The definition in the

United Nations High Commissioner for Refugees Handbook is disarmingly simple: a group of people of 'similar background, habits, or social status'.[3] Nation states, no doubt anxious to limit refugee intake, have tended to be more restrictive in their interpretations, for instance imposing the requirements that groups must be distinctive, relatively small and immutable. Whether 'homosexuals' (for lesbians and gay men are almost always denoted as a gender neutral class in human rights case law and literature) form a 'particular social group' for the purposes of the Convention has been the subject of extensive debate and discussion.[4]

The Full Federal Court of Australia held in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 that for a person to be in a 'particular social group', 'what is required is that he or she belongs to or is identifiable with a recognisable or cognisable group within society that shares some interest or experience in common'.[5]

In the first gay refugee case in January 1994, the *Iranian man* case, the Tribunal decided that 'homosexuals' did constitute a social group after a concise review of literature and refugee case law from other jurisdictions such as the former West Germany and Canada, as well as other human rights jurisprudence. Those cases and literature contain diverse views varying from positing sexuality as something which cannot be changed, or cannot easily be changed, to something which should not have to be changed, to something which, whatever its changeability, identifies some individuals as a class subject to stigmatisation from those outside of it. The Tribunal appeared to decide that homosexual and bisexual people were defined by a 'fundamental immutable characteristic' but exactly what was meant by 'immutable' and how essential this was to a claim of social group status was unexplored as the Tribunal did not indicate which view they preferred of those canvassed.

In the second claim, the *Chinese Christian* case, the Tribunal decided likewise that sexual orientation was 'unchangeable or immutable'. It noted that homosexuality is a characteristic which has been the subject of persecution historically, and argued that the linguistic identification of lesbians and gay men in both Australia and China ('homosexual' and 'tongxinglian') proves that such societies view homosexuals as belonging to a group. This focus, while avoiding the sticky wicket of whether sexuality is changeable, also adhered to the 'outsider' perspective of social group adopted in *Morato* by stressing the significance that society attaches to the characteristic which the refugee applicant has in common with other members of the claimed group.

As the Tribunal is an administrative review body, not a judicial body, the decisions do not constitute binding precedent for subsequent Tribunal cases. However, it is both commonsense and sound practice for the Tribunal to refer to its own decisions in previous similar cases. The four cases subsequently decided all accepted the reasoning in the *Iranian man* and *Chinese Christian man* cases that 'homosexuals' are a social group. It seems likely that later cases will simply accept lesbians and gay men as belonging to a social group, without deciding in fine detail the basis on which such a group is founded. Having reached that threshold, the crucial issue becomes the fear of and nature of persecution.

A well-founded fear of persecution

The essence of persecution within the meaning of the Refugee Convention is that the harm must be something for which the state is responsible, in the sense that it either inflicts the harm (paradigmatic examples being torture at the hands of soldiers or police), sanctions the harm, or offers no protection from it. Thus, in the *Indian Fijian* case, evidence that the applicant had been subjected to considerable discrimination and harassment at the hands of his family and other citizens was insufficient:

> Although ostracism and mockery by friends and family is unpleasant, discriminatory and demeaning, it cannot be considered to be of sufficient gravity as to constitute 'a serious harm' or 'a serious violation of a fundamental right' requiring the protection available under the Convention. [para.28]

The term 'persecution' is not defined by the Convention and the issue remains as to which forms of harm or discrimination will be sufficient to constitute persecution for Convention purposes. The requirement of a 'well-founded fear of persecution' was considered by the High Court of Australia in *Chan Yee Kin v The Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 379. Mason CJ noted that 'the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage ...' (at 388). McHugh J held that:

> [t]he notion of persecution involves selective harassment. It is not necessary, however, that the conduct complained of should be directed against a person as an individual. He or she may be 'persecuted' because he or she is a member of a group which is the subject of systematic harassment. [at 429]

Moreover, he said, '[a] single act of oppression may suffice'. The harm threatened may be less than a loss of life or liberty and will include, in appropriate cases, measures 'in disregard of human dignity' (at 429).

In discussing 'persecution', the Tribunal decisions make continual reference to *Chan*, and also to James Hathaway's definitive book.[6] Hathaway argues that refugee law is concerned with 'actions which deny human dignity in any key way' (p.108) and that persecution is 'most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community' (p.112).

Hathaway posits a hierarchy of rights, in four distinct categories drawn from the Universal Declaration of Human Rights (UDHR). The first level of rights, included in a binding form in the International Covenant on Civil and Political Rights (ICCPR), are the most important and breach of these in any circumstances amounts to persecution. These include protection from torture or cruel, inhuman or degrading punishment, freedom from slavery and freedom of thought, conscience and religion. The second level of rights, also included in the ICCPR, may be breached by a state for reasons of public emergency or national security. These include the right to equal protection, a fair trial, protection of privacy, freedom of opinion and freedom of association. If a breach of these rights goes beyond what is necessary to respond to any emergency or impacts disproportionately on a section of the population, a finding of persecution may still be warranted.

The third level of rights are included in the International Covenant on Economic, Social, and Cultural Rights and include the right to work, entitlement to education, housing and food and the freedom to engage and benefit from cultural life. Deprivation of these rights will not be persecution unless it is so extreme as to be tantamount to a deprivation of life or to cruel, inhuman or degrading treatment. The fourth level of rights have not been codified in a binding form and include

the right to be free from arbitrary deprivation of property. Hathaway argues that breach of a fourth level right will not usually suffice to found a claim of persecution.

Prohibition or persecution?

The Hathaway definition links 'persecution' closely with internationally accepted human rights formulations. The problem is that such formulations have often been held by various national and international bodies *not* to include the rights of lesbians and gay men. If you don't have rights in the first place, then a state breach of them will not constitute persecution. A burning issue is thus whether action taken by a state against lesbians and gay men — such as the criminalisation of consensual homosexual sex — constitutes a denial of human rights or whether it constitutes an acceptable regulation of a non-rights-bearing minority.

In the *Iranian man* case, the basis of the applicant's claim was that his father had discovered his homosexuality and threatened to report him and his lover to the police if the applicant did not end the relationship. The lover was subsequently arrested on political grounds, and the applicant attributed this to his father's actions. The Tribunal accepted that gay men in Iran may be executed or subjected to torture to extract confessions and are also likely to be subjected to torture and rape if imprisoned. Although claiming that the nature of the evidence made it unnecessary to determine whether laws criminalising homosexual acts between consenting adults are persecutory in themselves, the Tribunal said:

> [I]t would be a very surprising result if laws merely prohibiting homosexual acts between consenting adults, and imposing penalties for such acts, were to be held to be persecutory. Many major religions, including Christianity and Islam, condemn homosexuality. Many legislatures, including the Parliament of the Australian state of Tasmania, still have laws on their statute books that prohibit homosexual conduct. (I am aware of an attempt now being made by a member of the homosexual community in Tasmania to have that law held to be unlawful. However, it is instructive that the challenge before the Human Rights Committee of the United Nations is being based only on two grounds, namely (a) the right to privacy contained in Article 17 in the ICCPR and (b) on the prohibition on discrimination in Article 26 of the ICCPR.)
>
> Moreover, forms of heterosexual activity between consenting adults, such as incest, are also regulated by the domestic laws of many countries. [para.32]

It later affirmed that:

> [P]ersecution cannot be found in either legitimate prosecutions for offences against the criminal law of a country or proportionate measures for the enforcement of valid criminal laws. I, therefore, start from an assumption that Iran may prohibit homosexual acts between consenting adults and that it may impose penalties on those who break such laws. [para.57]

These statements display both an unthinking cultural imperialism and a sloppy cultural relativism. Imperialism is evident in that the Tribunal seems to suggest that because Australia does (did) it too, criminalising consensual gay male sex cannot be an abuse of human rights. We do it, and we don't abuse human rights, so it must be okay. Likewise, the applicant's fear of violence in the *Chinese married man* case was dismissed with a reference to the high rates of violence against lesbians and gays in Australia. Even a complaint to the Human Rights Committee under the ICCPR (subsequently upheld: *Toonen*, Communication No. 488/1992) is insufficient to demonstrate that such laws are a human rights abuse of considerable magnitude. Cultural relativism is displayed in the suggestion that many different religions condemn homosexuality and so criminalising it is not an abuse of human rights. Yet laws preventing freedom of speech or political opinion which are based upon various religious doctrines do not carry the same level of acceptance. The analogy with 'forms of heterosexual activity between consenting adults, such as incest', betrays the paradigm at work — homosexuality is placed firmly in the 'moral wrong' category.

Happily, the Tribunal decided in the *Iranian man* case that execution, assault, rape and torture are neither legitimate nor 'proportionate' to the crime of being a sexually active gay man. The Tribunal therefore found that the actions the applicant feared did indeed amount to persecution and granted him refugee status. This was in many ways an easy case, and the Tribunal was able to leave for another time the question of what criminal measures directed against gay men and lesbians by the state will be acceptable as 'proportionate'.

In the *Chinese Christian* case, the Tribunal once again affirmed that 'mere' criminalisation of homosexuality did not constitute persecution. In China homosexuality is not specifically criminalised but gay men and lesbians are subject to selective criminalisation on the grounds of the public order offence of 'hooliganism'. The applicant had been deliberately separated from his lover by authorities who had sent the men to geographically distant work units on becoming aware of their relationship. He was then monitored closely by others in the work unit, and when he and his partner managed to meet, they were detained and beaten on a number of occasions by work unit security officers — including two incidents where they burst in upon the two men in bed. The applicant was also compelled to write 'self criticism' denouncing himself and his relationship. Later they were transferred even further apart. When the applicant's partner was caught for spending leave with the applicant instead of with sick parents as he had claimed, the partner was arrested and detained at an 'education through labour camp' — an administrative punishment which does not require trial.

In a neat sidestep, the Tribunal decided that the applicant's right to privacy under Article 17 of the ICCPR had been breached by the harassment and the inequitable and unjust application of the 'hooliganism' law. It reasoned that the applicant and his lover were having sex in private, therefore not committing a public order offence and noted that the law was applied differentially to heterosexuals. Thus, the applicant was granted refugee status. The Tribunal's affirmation of state power to criminalise homosexual acts may have been merely lip service in this case, as the issue was moot. This case provides perhaps the strongest support to date for the position that lesbians and gay men are to be viewed as subjects entitled to human rights rather than a group to be permitted mere tolerance. The Tribunal referred to the applicant's 'right to sexual expression' (para.74) and argued:

> If this was a heterosexual matter and there was an established relationship between two consenting adults there is no question but that this treatment would clearly be identified as persecution. For example if the couple were a heterosexual de facto couple harassed and constantly separated for no reason, other than their relationship, this treatment would be deemed persecutory. If the two men were brothers and their filial relationship were the only reason that society and the state employed harassment and force to separate them the actions would clearly be persecution. [para.79]

In the *Indian Fijian* case, the Tribunal somewhat hesitantly affirmed state power to criminalise homosexual acts,

noting that Article 29 of the UDHR permits legal limitations on the exercise of rights and freedoms for the purpose of 'meeting the just requirements of morality, public order and the general welfare'. The implication of this reasoning is that universal rights are not so universal after all; and if lesbians and gay men are considered 'immoral' by a state party, then they do not qualify as rights-bearing subjects deserving of convention protection. The Tribunal distinguished the *Toonen* decision in which the criminalisation of consensual adult gay sex was found to be an arbitrary interference with Mr Toonen's right to privacy under the ICCPR on the basis that 'mere interference' does not constitute persecution.

However, once again, a delicate fudging by the Tribunal occurred, as it held that the penalty in Fiji for consensual lesbian or gay sex, which included caning, *was* a breach of the ICCPR (Article 7 prohibits cruel, inhuman or degrading treatment or punishment) which *would* be regarded as persecutory. Instructively, the seven year maximum gaol sentence was *not* found to be persecutory, with the implication that up to seven years in gaol constitutes a legitimate and proportionate sanction against lesbian and gay sex.

Paradoxically, it appears from these cases that the selective application of a general criminal law to harass and discriminate against homosexuals may constitute persecution, while enacting discriminatory laws specifically criminalising homosexual acts (and 'proportionately' enforcing them with gaol terms and not corporal punishment) may not.

The Tribunal's decision in the *Zimbabwean man* case is a marked but unexplored contrast to the approach above. In that case, the Tribunal considered evidence that homosexual acts are illegal under Zimbabwean law (although there was no evidence available as to prosecutions) and under customary law (where it is not mentioned but is treated as an unnatural act akin to witchcraft, responsible for drought, plagues etc). The Tribunal did not discuss the earlier cases or the implications of its decision, but implicitly accepted that prosecution under such laws could amount to persecution. In granting the applicant refugee status, the Tribunal also accepted that systemic harassment, serious discrimination such as job loss and the possibility of violent attack by members of the applicant's local community constituted persecution.

When will a fear be well founded?

In *Chan*, Dawson J observed that the phrase 'a well-founded fear of persecution' 'contains both a subjective and an objective requirement. There must be a state of mind — fear of being persecuted — and a basis — well-founded — for that fear' (at 396). The Court held that an applicant's fear of persecution will be well-founded if there 'is a real chance that he will suffer persecution'.[7] This test does not require proof that persecution is likely to occur on the balance of probabilities, only that there is more than a remote chance of persecution occurring.

The Refugee Convention does not require that there be past persecution of the applicant, although evidence of such past actions may be helpful in demonstrating the likelihood of future persecution. Evidence of the persecution of similarly situated individuals, either specific (such as former lovers) or general (such as Amnesty reports) is also admissible to demonstrate the likelihood of future persecution. In the *Iranian man* and *Chinese Christian* cases the applicant and/or his lover had been subject to persecution, and it was accepted that the risks of such persecution of the applicant himself on returning to his home country were sufficiently high to satisfy the convention.

The other four cases all concerned evidence of the persecution of gay men and lesbians generally. In the *Indian Fijian* case the applicant did not submit any direct evidence concerning persecution of gays and lesbians. The Tribunal was extremely pro-active and sought for itself information from press reports and opinion evidence regarding the likelihood of prosecutions of gay men occurring under criminal law (with a view to assessing the likelihood of the persecutory penalty of caning occurring). Having found that such occurrences were rare, the Tribunal decided that a fear of persecution would not be well founded. Moreover, in denying the application for refugee status, the Tribunal suggested that a fear of persecution was not even subjectively held by the applicant, finding that the main factor motivating the applicant to stay in Australia was a desire to continue a relationship he had established here. By contrast, in the *Zimbabwean man* case, recent press reports of a police 'crackdown' on homosexuals and opinion evidence to like effect were sufficient to demonstrate a well-founded fear.

In the *Chinese married man* and *Chinese gay activist* cases, neither applicant had suffered persecution in the past. In both cases the Tribunal considered general evidence from media reports and Amnesty International of the 'typical' persecution of those similarly situated, which, in addition to the activities mentioned earlier, included violence at the hands of the police and compulsory detention in mental hospitals. Such actions were held to constitute persecution. Thus the issue was whether the applicants' fears were well founded because such persecution was likely.

These two cases provide a marked contrast with one another on this issue, particularly as both were based on similar evidence of persecution of gays and lesbians in China, using many of the same sources. They were decided within one month of each other. In both cases the Tribunal accepted that the applicant had a subjective fear. However, in the *Chinese married man* case, the Tribunal held that the fear was not well founded as the applicant could avoid persecution by his own 'discretion'. It therefore denied him refugee status. In the *Chinese gay activist* case, it was held that the fear was indeed well founded and the applicant was granted refugee status.

In the *Chinese married man* case, the Tribunal gave a great deal of weight to reports suggesting that persecution was far less likely if homosexuals were 'discreet':

> . . . [T]he view I take of the evidence as reviewed above is that homosexuals in China today may face difficulties and discrimination and even, in certain situations, some risk of violence, depending upon their location and *their own behaviour* . . . Nevertheless, it appears likely that in Shanghai a homosexual who is discreet in his behaviour can avoid the risk of harm. [para. 68, emphasis added]

The Tribunal next considered the question of whether 'the fact that some degree of discretion is required of the applicant is in itself discriminatory' (para. 69). Noting Hathaway's argument that one cannot simply dismiss risks of harm to those persecuted on the basis of political opinion by telling the applicant to keep quiet (p.150), the Tribunal briskly rejected that analogy by arguing that freedom of expression under the ICCPR permits restrictions which are necessary 'for the protection . . . of public health or morals'. Once again, gays and lesbians are to be tolerated, but do not actually have human rights such as freedom of expression or association. It is therefore 'not unreasonable for the applicant to exercise discretion in giving expression to his homosexuality' (para. 69).[8]

There was no evidence to support the view that the applicant would be 'discreet' in this case. His evidence was that if he was compelled to return to China, his lover would accompany him. Effectively, then, the Tribunal imposed a duty of secrecy on the applicant to minimise the risk of persecution.

In the *Chinese gay activist* case the Tribunal did not refer to the *Chinese married man* case. In holding that the applicant *did* have a well-founded fear of persecution, the Tribunal found that:

> The Applicant avoided problems with authorities prior to his departure from China by keeping his sexuality a secret from all but his closest associates. Since arriving in Australia he has lived openly in gay relationships with two men and been publicly involved in a range of activities in the gay community. I consider it likely that his sexual preference and activities are known within the Chinese community in Sydney and that it is also possible that local authorities [in China] who hold his personal file are also aware of these matters. *More importantly*, after his experiences and his openly gay lifestyle in Australia, I accept that he would be more outspoken and honest about his sexual preference on return to China than he had been prior to departure. [para. 32, emphasis added]

Where did the girls go?

Although most of the world's refugees are women[9] there are no decisions either within or without Australia which consider refugee status based on the sexual orientation of a female applicant. It appears that to date there have not been any claims by lesbians for refugee status, which leads to the questions: why not? and what if?

All of the cases discussed in this article gloss over the question of whether similarly situated lesbians would qualify for refugee status. The use of the apparently gender neutral term 'homosexual' throughout the case law leads to an assumption that refugee status poses the same issues for lesbians as for gay men. But does it? Are lesbians 'homosexual' according to the terms of the case law? Although lesbians are almost certainly members of a social group as 'homosexuals' in the same way that gay men are, gender differences arise when one considers the requirement of persecution.

It is a common assumption that lesbians are not penalised for their sexuality to the extent that gay men are — particularly in the arena of criminalisation. In fact lesbian sex is criminalised in some jurisdictions — for example, Fiji, Zimbabwe and Iran — and lesbians have been subject to 'hooliganism' charges in China. However, there appears to be less documentation of the abuse and persecution of lesbians generally than of gay men. This could be for a number of reasons, ranging from the possibility that there is less persecution of lesbians, to less attention being paid to the persecution of lesbians by the media. It is also possible that gay men, as men, have greater or more mobilised resources to gather necessary documentation of persecution than lesbians, as women, do. As a result it is likely that a lesbian applicant who did not have evidence of specific persecution would face greater difficulties in bringing evidence of general persecution.

Women are also more likely to be abused or harassed in 'private', at the hands of family members rather than the police or militia, and there is no reason to believe that such a pattern would be different for lesbians. Such treatment does not constitute persecution for Refugee Convention purposes unless a nexus of failure of state protection can be proven. Moreover, in most societies it is expected that women be far less 'public' in their sexuality than men, and it is possible that lesbians either are more secretive than gay men about their sexuality, or are expected to be. Following from the *Chinese married man* case, the fear of many lesbian applicants may not qualify as well founded if they have done a good enough job of being 'private' thus far and so reduced their chances of persecution.

All of these comments are necessarily speculative. However, the bare fact that there are no lesbian cases suggests that either the process of application or the legal requirements for refugee status are particularly onerous for lesbians.

Conclusion

All six cases decided thus far by the Refugee Review Tribunal considering sexual orientation as a ground for refugee status accept that homosexuals form a social group for the purposes of the Refugee Convention, and thus are entitled to protection as refugees if they can prove a well-founded fear of persecution based on that group membership.

The direction that the Tribunal takes in subsequent cases involving gay men or lesbians remains to be seen. It is clear, however, that human rights jurisprudence from other jurisdictions and other arenas has had a substantial impact upon these refugee decisions by influencing what rights denials to lesbians and gay men will be seen as constituting persecution. Despite a reluctance to see the denial of liberty, privacy or freedom of expression to lesbians and gay men as human rights abuses, the majority of the Tribunal cases involved reasoning positive to the applicant, and in four of the six cases the applicant was successful.

On some occasions the Tribunal went to considerable lengths to accommodate both a rhetoric of rights denial to lesbians and gays with a finding in favour of the applicant. Although none of the decisions constitute legal precedent, it is likely that they will provide a source of reference for the Tribunal in the future. Overall they suggest a receptive atmosphere to refugee claims based upon sexual orientation, but they raise critical questions as to the limits of protection that will be afforded to lesbians and gay men.

References

1. The cases are available through on-line legal databases. They are identified by a file number only, to protect the applicant's identity. For clarity I refer to each case by the nationality and other distinguishing characteristic of the applicant. In chronological order they are: RRT N93/02240, 21 Jan. 1994 (*Iranian man*), AUSMAX library LEXIS; RRT N93/00846, 8 March 1994 (*Chinese Christian man*), AUSMAX library LEXIS; RRT BV93/00242, 10 June 1994 (*Chinese married man*), AUSMAX library LEXIS; RRT BN94/03199, 7 July 1994 (*Chinese gay activist*), AUSMAX library LEXIS; RRT BN93/00015, 28 July 1994 (*Indian Fijian man*), REFDEC library SCALE; RRT N94/06573, 7 August 1995 (*Zimbabwean man*), REFDEC library SCALE.
2. Decisions in other countries are discussed in Goldberg, Suzanne, 'Give me Liberty or Give me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men', (1993) 26 *Cornell International LJ* 605; Fullerton, Maryellen, 'A Comparative Look at Refugee Status Based on Persecution due to Membership in a Particular Social Group', (1993) 26 *Cornell International LJ* 505; and Vagelos Ellen, 'The Social Group that Dare not Speak its Name: Should Homosexuals Constitute A Particular Social Group for the Purposes of Obtaining Refugee Status?', (1993) 17 *Fordham LJ* 229.
3. UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*, Office of the UNHCR, Geneva, 1979.
4. See ref. 2 above. Vagelos notes that some countries have denied gay men refugee status on the basis that homosexuality is a behaviour, not a status, so is insufficient to found a claim to membership of a social group.
5. per Lockhart J at 416, expressed in similar terms by Black CJ at 406, with whom French J concurred.

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cases bring out the best in them . . . It creates a good feeling. If your lawyers are happier, they are more productive and they'll make more money'. Thanks Gary, just keep employing the girls with attitude.

INTERVIEW WITH JUSTICE LINDA DESSAU

In the August 1995 edition of the *Alternative Law Journal*, *Girlie* had the pleasure of announcing the transformation of Linda Dessau, Magistrate, to Justice Dessau of the Family Court. In this edition we bring you the inside story of her amazing makeover, in what is the first in a semi-regular series of interviews with Girlie-appeal legal celebrities.

1. What qualities are you most pleased to have brought to the Family Court?

That's a difficult question because it forces an immodest answer. Nevertheless, I would be delighted to be regarded as fair minded and showing commonsense. In addition, I am pleased to bring to the court a wide range of court and life experience. In this regard, my years in the Magistrates Court have exposed me to a wide range of people and a wide range of problems.

2. What would you most like to achieve during your appointment?

There is much I would like to achieve, from various perspectives. In relation to each case, I would like to be a good judge. In relation to the bigger picture, I would like to remain actively involved in court listings and delay reduction, gender awareness and mediation.

3. Have you found anything about the job that would justify the argument that there is a dearth of women qualified to fill senior judicial positions?

No. I was asked many questions along these lines on my appointment. I don't believe there is even the need for a debate about 'affirmative action'. There is no question that there are many excellent, well-qualified women for judicial appointment.

4. Have you got any tips for newlyweds?

I don't believe for one moment that just because I have become a judge of this court, I suddenly have all the answers to a successful marriage. If I ever form that view, I would be very worried that I had fallen prey to misplaced piety.

5. How does a Family Court judge wind down after a hard day on the bench?

She rushes home to attend to her own more immediate family responsibilities. The dual role of parent and professional is always onerous and involves a great deal of juggling to ensure that everyone and everything receives the requisite attention. On the other hand, the joy of involvement in family activities is a wonderful and relaxing distraction.

6. Do you miss the Magistrates Court?

Yes and no. I am enjoying the new challenge of this job, but that is not to say that I have anything but the greatest affection for the work, and respect for my former colleagues in the Magistrates Court. No other court is quite like it. After all, it's the court which touches most people in the community. Magistrates Courts are busy, thriving places which deal with every aspect of real life drama. Generally, the work is performed with great compassion, fairness and the appropriate humour. The variety of that work is wonderful.

9. What advice would you give our Girlie readers who are aspiring to a spot on the bench?

I think this is a very healthy development that people can begin to see a potential career path in the judiciary. My advice to readers is that if they do aspire to a 'spot on the bench' that they no longer need to slavishly follow a traditional path towards that end. To the great benefit of the community, judges are now being drawn from diverse backgrounds. In my view, a broad base of experience can only make someone a better judge. Lawyers should not be shy of changing career paths from time to time. They should feel confident that the exposure to different areas of practice provides not only good professional experience, but essential life experience. This includes practising in another jurisdiction. For example, I worked for almost three years in Hong Kong. I found that time invaluable to experience different people, different interests and different legal systems — working as I did with lawyers from all over the Commonwealth. Similarly, my time in America last year looking at delay reduction in criminal justice systems provided me with an opportunity to open my mind to North American court systems in a way that stimulated me to consider afresh the changes that would improve our system.

Lou Sidd

Lou Sidd is a Feminist Lawyer

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6. Hathaway, James, *The Law of Refugee Status*, Butterworths, Toronto, 1991.
7. per Toohey J at 407; see Mason CJ at 389, Dawson J at 398 and McHugh J at 429.
8. See Otto, Dianne, Morgan, Wayne and Walker, Kristen, 'Rejecting (In)tolerance: Critical Perspectives on the United Nations Year of Tolerance', (1995) 20 *MULR* 190.
9. See ref. 6 above, p.v, citing the Executive Committee of the UNHCR Program Conclusion No. 39, 1985.

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