

Refugee law in Australia

The Refugees Convention

22.5 Australia is a signatory to the Refugees Convention, the key international instrument that regulates the obligations of states to protect refugees fleeing from persecution.^[2] Article 1A(2) defines a refugee as a person who,

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

22.6 The Migration Act incorporates art 1A(2) into Australian domestic law, and gives effect to Australia's obligation of non-refoulement—not to return a person in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.^[3] Section 36(2) provides for the grant of a protection visa to a 'non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.

22.7 The term 'persecuted' in art 1A (2) is qualified by s 91R(1) of the Migration Act, which provides that art 1A (2) does not apply, unless persecution for one or more of the Convention reasons is:

- the 'essential and significant reason(s), for the persecution'; and
- the persecution involves 'serious harm' to the person; and
- the persecution involves 'systematic and discriminatory conduct'.

22.8 A non-exhaustive list of instances of 'serious harm' is provided in s 91R(2) of the Migration Act, including:

- a threat to the person's life or liberty;
- significant physical harassment of the person;
- significant physical ill-treatment of the person;
- significant economic hardship that threatens the person's capacity to subsist; and
- denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

22.9 The onshore component of Australia's Refugee and Humanitarian Program allows asylum seekers to apply for a protection visa.^[4] Primary refugee status assessments are made by a DIAC officer, as delegate of the Minister for Immigration and Citizenship. Unsuccessful applicants can seek merits review by the Refugee Review Tribunal (RRT) and, thereafter, judicial review by the courts. Under s 417 of the Migration Act, the Minister may personally consider and grant a visa on humanitarian grounds, if he or she considers it to be in the public interest.^[5] This personal intervention power is only exercisable by the Minister and only in cases where the applicant has exhausted all avenues of merits review.^[6]

Family violence and the definition of a refugee

22.10 Applicants who make asylum claims based on family violence have faced difficulties meeting the definition of ‘refugee’ in art 1A (2) of the Refugees Convention—both internationally and in Australia. While it is generally accepted that instances of family violence can constitute ‘serious harm’, two compounding and interlinking factors have historically excluded victims of family violence from protection under the Refugees Convention. These are family violence claims in the context of gender-related persecution and the public/private dichotomy.

Gender-related claims and the public/private dichotomy

22.11 First, family violence claims have tended to exist within the wider context of gender-specific harm, including: sexual violence; forced marriage; female genital mutilation; and honour killings.^[7] These types of harms—generally experienced by women—are not afforded protection, because neither gender nor sex is an enumerated Convention ground. Therefore, courts have traditionally failed to consider whether such gender-related claims may fall under the ground of particular social group, or other Convention reasons.^[8]

22.12 A more problematic distinction relates to the public/private dichotomy. As Anthea Roberts explained, the Refugees Convention is primarily aimed at protecting individuals from state or public forms of persecution, rather than intruding into the private realm of family life and personal activities.^[9]

22.13 This is most evident in the interpretation of the term ‘persecution’. The Refugees Convention contains no definition of ‘persecution’.^[10] However, the term is widely recognised as involving a certain relation between the individual and the state, whereby persecution occurs in the public sphere and the perpetrators are the state or its agents.^[11]

22.14 In *Applicant A v Minister for Immigration and Ethnic Affairs*, the High Court explained that:

Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or appears to be powerless to prevent that private persecution. The object of the Convention is to provide refuge for those groups who, having lost the *de jure* or *de facto* protection of their governments, are unwilling to return to the countries of their nationality.^[12]

22.15 As family violence tends to be perpetrated by non-state actors within private relationships, such claims have historically been construed as falling outside the bounds of the Refugees Convention, because the state cannot be implicated in the infliction of that harm.^[13]

The role of state responsibility

22.16 The issue of state responsibility—in cases where the harm is inflicted by non-state actors for a non-Convention reason—was clarified by the landmark decision of the High Court in *Khawar*.^[14]

22.17 In *Khawar*, the applicant, Ms Khawar, fled Pakistan to Australia with her three daughters, after years of escalating abuse from her husband and his family. She claimed asylum on the basis that the Pakistani authorities (the police) had systematically discriminated against her by failing to provide her protection and that this was tolerated and sanctioned by the state. Thus, it was argued her well-founded fear of persecution was based on the lack of state protection for reasons of her membership of a particular social group—‘women in Pakistan’.

22.18 The case was eventually appealed to the High Court, where Gleeson CJ defined the issues in dispute in the following terms:

The first issue is whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution of the kind referred to in Art 1A(2) of the Convention.

The second issue is whether women or, for the present purposes, women in Pakistan may constitute a particular social group within the meaning of the Convention.^[15]

22.19 In separate judgments, the majority answered both questions in the affirmative. Gleeson CJ held that persecution may result where the criminal conduct of private individuals is tolerated or condoned by the state in circumstances where the state has the duty to provide protection against harm.^[16]

22.20 Kirby J adopted the formula, ‘Persecution = Serious Harm + The Failure of State Protection’,^[17] to find that it was: ‘sufficient that there is both a risk of serious harm to the applicant from human sources, and a failure on the part of the state to afford protection that is adequate to protect the human rights and dignity of the person concerned’.^[18] He considered that ‘persecution’ is a construct of these two separate but essential elements. McHugh and Gummow JJ found that ‘the persecution in question lies in the discriminatory inactivity of the State authorities in not responding to the violence of non-state actors’.^[19]

22.21 Although the judgments took different approaches, the cumulative effect was that, where serious harm is inflicted by non-state actors for a non-Convention reason, the nexus to the Refugees Convention is met by the conduct of the state in withholding protection—in a selective and discriminatory manner—for a Convention ground.

22.22 On the issue of particular social group, McHugh and Gummow JJ held that the evidence supported a social group, that was, ‘at its narrowest, married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by members of the household’.^[20] Gleeson CJ considered that it was open on the evidence to conclude that ‘women in Pakistan’ comprise a ‘particular social group’.^[21]

Family violence claims post-Khawar

Legislative amendments

22.23 Section 91R (1) of the Migration Act requires the applicant to show that the Convention reason is ‘the essential and significant reason’ for the persecution.^[22]

22.24 Commentators have argued that s 91R has made it more difficult to sustain claims for protection on family violence grounds. Catherine Hunter argues that, in the context of gender-related claims, the ‘essential and significant’ requirement will mean that decision makers are likely to focus on aspects other than gender—such as political opinion or religion—until gender-related decisions are no longer controversial.^[23] This concern is echoed by Leanne McKay, who states that applicants have ‘difficulty articulating their claims in asylum terms that are assessable by decision makers due to shame or fear’^[24] and, therefore,

due to the restrictive terminology of s 91R ... there is now a risk that certain Refugees Convention reasons may not be identified or adequately addressed, resulting in legitimate claims going unrecognised.^[25]

22.25 Others have criticised the definition of persecution under s 91R(2) of the Migration Act for its failure explicitly to recognise psychological harm as serious harm, and the impact that this may have for victims of sexual violence and abuse.^[26] In particular, such victims can experience serious psychological trauma even where there are minimal physical injuries.^[27] Another concern is that s 91R(2) makes no

reference to the failure of state protection as being an element of persecution and thus appears to direct decision makers towards cases where persecution emanates from the state.^[28]

22.26 Throughout the Inquiry, stakeholders expressed concern that the definition of ‘serious harm’ under s 91R of the Migration Act did not specifically address the experiences of victims of family violence,^[29] and called for amendments to s 91R specifically to recognise gender-based claims,^[30] including that ‘serious harm’ may include family violence coupled with the lack of state protection.^[31]

22.27 However, the ALRC considers that substantive amendments to the Migration Act, and s 91R are not necessary, since that section does not provide an exhaustive list of types of harm that may constitute ‘serious harm’. While s 91R does not expressly acknowledge psychological harm or the failure of state protection, the ALRC considers that this is a sufficiently well established in Australian law in light of the decision in *Khawar*.^[32] The ALRC has concluded that problems arise not because of a lack of understanding that family violence claims may fall under the Convention, but in the application of the principles in *Khawar* as it relates to s 91R.

Complexity of gender-related cases

22.28 In addition to the barriers imposed by s 91R in relation to ‘serious harm’, subsequent cases post-*Khawar* suggests that the area remains complex and challenging for decision makers and applicants alike. In particular, findings of fact as to what comprises a ‘particular social group’ and whether the state has withdrawn protection for a Convention reason, require an in-depth understanding of the applicants’ claims and how it relates to country information.^[33] Complex family violence claims are often intertwined with other Convention grounds, such as political opinion and religion, making it difficult to identify the nexus between the Convention reason and the harm feared.^[34]

22.29 Applicants face particular challenges in making claims with respect to a particular social group. For example, proving that a state is withdrawing or withholding protection for a Convention reason in a selective and discriminatory manner may be difficult for those who face language barriers, lack legal representation, or lack access to current country information.^[35] Claims that define the particular social group too broadly risk a finding that the harm feared is not motivated by their membership of that particular social group. On the other hand, claims that define the particular social group too narrowly risk a finding that the group is impermissibly defined by the harm feared.^[36]

22.30 Decision makers also face challenges in making consistent decisions. The consideration of whether the applicant is a member of a particular social group is dependent on the cultural, legal, social and religious factors that must be properly understood. Decisions about whether a victim of family violence can access ‘effective state protection’ therefore depends on access to current and up-to-date country information. As Gleeson CJ emphasised in *Khawar*:

An Australian court or tribunal would need to be well-informed about the relevant facts and circumstances, including cultural conditions, before reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitudes of the authorities to the behaviour of private individuals; but if, after due care, such a conclusion is reached, then there is no reason for hesitating to give effect to it.^[37]

^[2]Convention Relating to the Status of Refugees, 189 UNTS 151 (entered into force on 22 April 1954).

^[3] The principle of non-refoulement is enshrined in the Refugees Convention art 33.

^[4] The requirements for a Protection Visa (Class XA) (Subclass 866) are found in the Migration Regulations 1994 (Cth) sch 2.

^[5] Migration Act 1958 (Cth) s 417(1) provides that ‘the Minister may substitute for a decision of the Tribunal under s 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision’.

^[6] *Ibid* s 417(3).

^[7] See A Roberts, ‘Gender and Refugee Law’ (2002) 22 Australian Yearbook of International Law 160, 164 where she draws a distinction between ‘gender-specific harm’ and ‘gender-related claims’. Roberts also notes that, while men can also be victims of family violence, the majority of asylum claims on the basis of being victims of family violence are made by women.

^[8] H Crawley, *Refugees and Gender: Law and Process* (2001), 21–26, 79–90.

^[9] A Roberts, ‘Gender and Refugee Law’ (2002) 22 Australian Yearbook of International Law 160, 161.

^[10] Though as noted above, the term ‘persecution’ is qualified by s 91R of the Migration Act 1958 (Cth) for the purposes of Australian law.

^[11] See, eg, C Yeo, ‘Agents of the State: When is an Official of the State an Agent of the State?’ (2003) 14 International Journal of Refugee Law 510, 510. The Convention grounds reflected the concerns of the drafters of the Convention to protect those fleeing state based persecution in the aftermath of World War II.

^[12] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

^[13] Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (Part 1), Report 69 (1994), 243.

^[14] *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

^[15] *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1, [5], [6].

^[16] *Ibid*, [30].

^[17] *Ibid*, [118] referring to *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 653; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 515–516.

^[18] *Ibid*, [115].

^[19] *Ibid*, [87].

^[20] *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [85].

^[21] *Ibid*, [32].

^[22]Migration Act 1958 (Cth) s 91R(1)(a). See also Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth), [19]. Section 91R was inserted due to government concerns that decisions such as *Khawar* had widened the application of the Refugees Convention ‘beyond the bounds intended’.

^[23] C Hunter, ‘*Khawar* and Migration Legislation Amendment Bill (No 6) 2001: Why narrowing the definition of a refugee discriminates against gender-related claims’ (2002) 8(1) *Australian Journal of Human Rights* 107.

^[24] L McKay, ‘Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)’ (2003) 4 *Melbourne Journal of International Law* 439, 459 referring to Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines On Gender Issues For Decision Makers* (1996).

^[25] L McKay, ‘Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)’ (2003) 4 *Melbourne Journal of International Law* 439, 459.

^[26] *Ibid*, 454.

^[27] H Crawley, *Refugees and Gender: Law and Process* (2001), 43; UNHCR *Guidelines on International Protection: Gender-related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (2002), UN Doc HCR/GIP/02/01.

^[28] L McKay, ‘Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)’ (2003) 4 *Melbourne Journal of International Law* 439, 459.

^[29] ANU Migration Law Program, Submission CFV 79; National Legal Aid, Submission CFV 75; Law Institute of Victoria, Submission CFV 74; Good Shepherd Australia New Zealand, Submission CFV 41; RAILS, Submission CFV 34; Joint submission from Domestic Violence Victoria and others, Submission CFV 33; WEAVE, Submission CFV 31.

^[30] Law Institute of Victoria, Submission CFV 74; Joint submission from Domestic Violence Victoria and others, Submission CFV 33; WEAVE, Submission CFV 31.

^[31] ANU Migration Law Program, Submission CFV 79; Good Shepherd Australia New Zealand, Submission CFV 41; Joint submission from Domestic Violence Victoria and others, Submission CFV 33.

^[32] See also, Migration and Refugee Review Tribunals, Submission CFV 31; RILC, Submission CFV.

^[33] See, eg, *AZAAR v Minister for Immigration and Citizenship* (2009) 111 ALD 390; *NAIV v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 255; *SBBK v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 117 FCR 412.

^[34] C Hunter, ‘*Khawar* and Migration Legislation Amendment Bill (No 6) 2001: Why narrowing the definition of a refugee discriminates against gender-related claims’ (2002) 8(1) *Australian Journal of Human Rights* 107.

^[35] R Bacon and K Booth, 'Persecution by Omission: Violence by Non-State Actors and the Role of the State under the Refugees Convention in *Minister for Immigration and Multicultural Affairs v Khawar*' (2002) 24 Sydney Law Review 584, 600.

^[36] Case law has established that the common characteristic of a 'particular social group' cannot be the harm feared. See eg, *Ibid*, 600, citing *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

^[37] *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [26].