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The Definition of 'Refugee' and China's One Child Policy

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Major Issues

Since September 1994, 863 'boat people' have arrived in Australia seeking recognition as refugees. Fearing Australia's refugee determination system would be overloaded, the Government moved quickly to amend the Migration Act 1958. The Government's response, has, however, been criticised for being an 'overreaction', as well as 'unnecessary and dangerous.' It has also been suggested that Australia's international reputation, particularly our reputation in the Asia-Pacific, will be damaged by our panicked response to the arrival of a 'few hundred would-be refugees from China.'

In December 1994, Senator Nick Bolkus, Minister for Immigration and Ethnic Affairs, announced that the Government would introduce legislation to ensure unauthorised arrivals cannot abuse Australian processes. The Migration Legislation Amendment Bill (No 3) 1995 is one of the measures foreshadowed by Senator Bolkus. The aim of this legislation is to overrule the Federal Court's decision in NG 327 of 1994 (name suppressed) so 'that claims for refugee status cannot be made on the basis of China's one child policy.'

It has been reported that such legislation is probably unprecedented: until now governments have allowed the courts to interpret the Convention Relating to the Status of Refugees. The proposed legislation raises complex issues of law. It is arguable that the legislation confuses, rather than clarifies, how the Convention should be interpreted.

This paper aims to supplement Bills Digest No. 29. 1995: Migration Legislation Amendment Bill (No 3) 1995, by setting out the:

- approaches of the Australian courts in implementing this definition;
- Federal Court's decision in NG 327, decided on 6 December 1994;
- overseas approach; and
- proposed amendments to the Migration Act 1958.

The 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees, defines a 'refugee' as, inter alia, a person who possesses:

a well-founded fear of being persecuted for reasons of ... membership of a particular social group.

In order to satisfy this definition, a person must show:
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- a well-founded fear of persecution; and
- that this persecution flows from membership of a particular social group.

The meaning of a 'particular social group' is complex and subject to considerable debate. It is the key issue raised by NG 327.

In determining a 'particular social group', Sackville J considered that the perceptions and responses of government (including acts of persecution) to the group may be taken into account. Thus, according to Sackville J:

If official practice in China or elsewhere identify people with one child, who wish to have another child, as the subject of a system of rewards and sanctions designed to prevent them having further children, those people in my view will be likely to form a particular social group.

This of course does not make such people automatically refugees: they must then show that they are, or are likely to be, persecuted.

The Government argues that the intention of its proposed legislation is to restore the integrity of the Convention definition by making it clear that the fertility control policies of a foreign government cannot themselves be the defining characteristic of a 'particular social group.'

However, comments by officials before the Senate Legal and Constitutional Committee, and arguments put by the Minister for Immigration and Ethnic Affairs before the Federal Court in NG 327, tend to suggest that the Government's underlying concern is to ensure that persecution itself is not used as the sole defining characteristic of a 'social group'. The proposed legislation does not directly address this issue.
Introduction

On 6 December 1994, the Federal Court handed down its decision in NG 327 of 1994 (name suppressed) upholding the Refugee Review Tribunal's grant of refugee status to a married couple at risk of forced sterilisation should they be returned to the People's Republic of China. Senator Nick Bolkus, Minister for Immigration and Ethnic Affairs, stated on 30 December 1994 that the Government would amend legislation 'to ensure that claims for refugee status cannot be made on the basis of China's one child policy.' This announcement brought the Government into conflict with representatives of civil liberties groups, some churches and elements of the legal profession. Writing in The Australian, Dr Milton Osborne noted that the granting of refugee status on the basis of the one child policy has 'added a new dimension to Australia's attraction as a destination for those seeking entry outside normal requirements for a migrant visa.' On the other hand, The Age suggested Senator Bolkus' decision to legislate was an overreaction. And, Andrew Hamilton, of the Jesuit Refugee Service described the legislation as 'unnecessary and dangerous.'

This paper aims to supplement Bills Digest No. 29. 1995: Migration Legislation Amendment Bill (No 3) 1995, by setting out the:

- approaches of the Australian courts in implementing this definition;
- Federal Court’s decision in NG 327;
- overseas approach; and
- proposed amendments to the Migration Act 1958.

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1 NG 327 of 1994 Federal Court (unreported).
5 Andrew Hamilton, Letter to The Age, 6 February 1995.
The definition of ‘Refugee’

The 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees, defines a ‘refugee’ as a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, 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.

Australia acceded to the Convention on 21 January 1954 and acceded to the Protocol on 13 December 1973. Section 36 of the Migration Act 1958 states that in assessing an application for a protection visa, a criterion is that the applicant is a non-citizen in Australia whom Australia has obligations to protect under the Convention and the Protocol.

In order to be considered a ‘refugee’ for the purposes of the Convention, an applicant must be able to show, first, that he or she possesses a ‘well-founded fear of being persecuted’ and, second, that this persecution is a consequence of inclusion in one of the five stated categories.

‘a well-founded fear of being persecuted’

According to the United Nations High Commissioner for Refugees (UNHCR) guidelines for determining refugee status, the phrase, ‘a well-founded fear of being persecuted’ is ‘the key phrase of the definition’.6 Consideration should be given to the subjective state of mind of each individual applicant for refugee status: is he or she in a state of fear? Subjective fear alone, however, is not sufficient. There must be some objective basis for the fear. Thus, a knowledge of the conditions in the applicant’s country of origin is important.7 As Lord Keith stated in R v Secretary of State, when determining refugee status consideration must be given to the actual state of affairs in the applicant’s country of nationality. ‘If that examination shows that persecution might indeed take place then the fear is well founded. Otherwise it is not.’8


7 ibid, p 12.

8 R v Secretary of State, ex parte Sivakumaran, [1988] 1 All ER 193 at 197, per Lord Keith.
The types of conduct that might amount to persecution under the *Convention* are not universally agreed. As James Hathaway, author of *The Law of Refugee Status*, notes, 'the intention of the drafters was not to protect persons against any and all forms of serious harm.' It was instead to offer protection where the 'maltreatment anticipated was demonstrative of a breakdown of national protection.' Loss of life or liberty for one of the reasons specified in the *Convention* are caught by the definition. The UNHCR *Handbook* suggests that 'other serious violations of human rights - for the same reasons - would also constitute persecution.'

Would, therefore, actions taken under the 'One Child Policy' of the People's Republic of China (PRC) amount to persecution? In its *Note on Family Planning and Persecution*, the UNHCR Headquarters, stated that:

> There is no inherent connection between family planning policies and persecution. The PRC has a significant population problem to deal with and a legitimate sovereign right and responsibility to determine for itself the policies best suited to control it.

It continued, although as a matter of policy, the PRC did not condone involuntary abortion or sterilisation, these activities are carried out by certain local officials. And, the UNHCR Headquarters observed:

> There is a strong case to be made that coerced abortion or sterilisation, as a fundamental violation of the physical integrity of an individual, constitutes persecution.

'for reasons of race, religion, nationality, membership of a particular social group or political opinion'

In addition to establishing a well-founded fear of persecution, the applicant must show that the feared persecution is a result of membership of one of the categories listed in the *Convention*. That is, for reasons of race, religion, nationality, membership of a particular social group or opinion.

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11 *ibid*, p 104.
13 *ibid*.
15 *ibid*, p 2.
It is widely accepted that the term, 'race' includes not only those members of a 'particular scientific category, but also other groups such as Jews or Gypsies whose physical or cultural distinctiveness has caused them to suffer social prejudice.' 

Often overlapping with 'race', the 'nationality' category includes, for example, those who might be persecuted because of their status as 'foreigners', or those 'denied full citizenship in their own state (such as Palestinians in Israel). ' The 'religion' ground covers religious beliefs as well as actions in consequence of those beliefs. In other words, the Convention offers protection to those who claim to be persecuted because they adhere to certain religious beliefs and/or for living in accordance with that belief. 'Political opinion' offers protection to 'those with identifiable political affiliations or roles' and to 'other persons at risk from political forces within their home country.'

'membership of a particular social group'

The concept of a 'particular social group' is, to say the least, vague. Although it may overlap with the other four categories, it must add to the definition. It is tempting to regard the term as a 'catch-all ground which would plug any gaps in the coverage of the other, more specific, grounds of persecution'. But this view has been challenged.

The drafters of the Convention sought to distinguish those who feared persecution for civil or political reasons (refugees) and those who fled their country of origin for other reasons (non-refugees).

The UNHCR Handbook states that a 'particular social group' 'normally comprises persons of similar background, habits or social status.' The definition of the term offered by the United States Board of Immigration Appeals in Matter of Acosta is also of assistance:

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16 Hathaway, op cit, p 141.
17 ibid, p 144.
18 ibid, pp 145-148.
19 ibid, p 149.
20 Given that the decision in NG 327, and the Government's proposed legislation are concerned with the category, 'particular social group', the discussion will focus on that category.
22 Hathaway, op cit, p 159.
23 UNHCR, op cit, p 19.
We interpret the phrase 'persecution on account of membership of a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.\textsuperscript{24}

In its \textit{Guidelines on the Application of Convention Article IA(2)} the UNHCR states that membership of a social group has often been raised in relation to claims based on the PRC's one child policy.\textsuperscript{25} But, in its \textit{Note on Family Planning and Persecution}, UNHCR Headquarters noted that 'serious evidentiary difficulties would have to be overcome' in order for an application based on membership of a particular social group to succeed.\textsuperscript{26} The UNHCR Headquarters considered that it was an 'open question' whether a group, for example, the members of which were people having more than one child, 'would be accepted as being distinct enough an entity in the broader society, or sufficiently definable on the basis of non-arbitrary criteria,' to constitute a group within the \textit{Convention} definition.\textsuperscript{27}

**Australian interpretations of ‘a well-founded fear of persecution for reasons of membership of a particular social group’**

The High Court accepts that the term 'well-founded fear of persecution' involves both a subjective and an objective element.\textsuperscript{28} The fear of being persecuted must not all be in the mind.\textsuperscript{29} There must be a 'real chance' that if the person returns to his or her country of origin, he or she will suffer some 'serious punishment or penalty or some significant detriment or disadvantage.'\textsuperscript{30}

\textsuperscript{24} Interim Decision 2986, March 1, 1985, quoted in Hathaway, \textit{op cit}, p 160.


\textsuperscript{26} UNHCR Headquarters, \textit{op cit}, p 3.

\textsuperscript{27} \textit{ibid}.

\textsuperscript{28} \textit{Chan Yee Kin v Minister for Immigration and Ethnic Affairs}, (1989-1990) 169 CLR 379 at p 396, per Dawson J.

\textsuperscript{29} \textit{ibid}.

\textsuperscript{30} \textit{ibid}, p 388, per Mason CJ.
In his discussion of ‘persecution’ in *Chan*, McHugh J said that the notion ‘involves selective harassment.’ Further, the threat feared need not be at the hands of the government of the country of origin:

It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution.

Nor, his Honour continued, need the harm threatened only be loss of life or liberty. ‘Measures in disregard of human dignity may, in appropriate cases, constitute persecution.’ The issue involves questions of degree. In *Lek*, for example, Wilcox J of the Federal Court, held that the necessity to pay bribes may constitute a denial of the right to earn an income and hence might amount to persecution.

The meaning of ‘a particular social group’ had been discussed in few Australian cases prior to NG 327. Indeed, in the Federal Court case of *Morato*, Black CJ suggested that the first reference to the term was in *Chan*, decided in 1989. In *Chan*, Dawson J considered that the family of the appellant in that case constituted a ‘particular social group.’

In deciding whether a person is a member of a ‘particular social group’ the investigation should focus on ‘what a person is … rather than what a person has done.’ Further, the group must be a cognisable group within a society. Although not necessary to decide the case, Black CJ noted that persecution may ‘contribute to the development of the social group.’ And, in *Morato*, Lockhart J stated that there must be ‘some common or binding element’ to constitute a social group, and that examples might include

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31 *ibid*, p 429 per McHugh J.
32 *ibid*, p 430, per McHugh J.
33 *ibid*.
34 *Lek v Minister for Immigration, Local Government and Ethnic Affairs* 117 ALR 455 at p 456.
35 *Morato v Minister for Immigration, Local Government and Ethnic Affairs* 111 ALR 417 at p 420, per Black CJ.
36 *Chan*, p 396, per Dawson J. See also *Sanchez-Trujillo v Immigration and Naturalization Service* (1986) 801 F 2d 1571 in which the United States Court of Appeals gave as an example of a particular social group, ‘the immediate members of a certain family’: quoted in *Morato*, p 430, per Lockhart J.
37 *Morato*, p 418.
38 *ibid*, p 422, per Black CJ.
39 *ibid*. 
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lawyers, novelists, farmers and members of linguistic minorities.\(^{40}\) In that case the Court considered that ‘informers’ or people ‘who have turned Queen’s evidence’ did not constitute a particular social group for the purposes of the *Convention*.\(^{41}\)

In *Lek*, Wilcox J held that ethnic Chinese living in Cambodia constitute a ‘social group’.

They are a recognisable group, notwithstanding that they may be geographically scattered and may vary in occupations, lifestyles, cultural activities and political leanings.\(^{42}\)

On the other hand, his Honour stated that the category, ‘young single women’, is too broad to meet the requirements of the *Convention*.\(^{43}\)

To sum up, ‘a well-founded fear of persecution’ involves both subjective and objective elements. The concept of a ‘particular social group’, while difficult to define, involves a consideration of various issues to see if the group is a recognisable one within society.

**The Federal Court’s decision in NG 327 of 1994**

In *NG 327 of 1994*\(^{44}\), the Federal Court upheld a decision of the Refugee Review Tribunal (RRT) granting refugee status to a married couple, nationals of the People’s Republic of China (PRC). The RRT found that the couple was at ‘risk of forcible sterilisation by reason of population control policies and practices followed in some parts of China.’\(^{45}\)

Both the husband and the wife were born in China. The husband gave evidence that he left China because he feared sterilisation under the Government’s One Child Policy. The RRT found that in implementing this policy coercive measures were sometimes used, including forced sterilisation.

\(^{40}\) *ibid*, p 432, per Lockhart J.

\(^{41}\) *ibid*.

\(^{42}\) *Lek v Minister for Immigration, Local Government and Ethnic Affairs* 117 ALR 455 at p 469.

\(^{43}\) *ibid*.

\(^{44}\) *NG 327 of 1994*, (unreported) 6 December 1994, Sackville J.

\(^{45}\) *ibid*, p 1.
and abortion. \(^{46}\) Further, the Tribunal found that 'a non-consensual procedure which altered a person's reproductive capacity' was an act of persecution. \(^{47}\)

As the Court and the Tribunal acknowledged, fear of persecution, although well-founded, is itself not a sufficient basis for a successful refugee application. \(^{48}\) The applicant must show that he or she is persecuted for a Convention reason. In this case, the RRT said the husband belonged to a particular social group, that being 'those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised.' \(^{49}\)

The RRT accepted that forced sterilisation was carried out in the husband's village and that should he be returned to China he had 'a real chance of being forcibly sterilised.' \(^{50}\) He was, therefore, granted refugee status.

In relation to the wife, the RRT found that she feared sterilisation both for herself and her husband, and that she had a real chance of being forcibly sterilised if returned to China. She was also granted refugee status.

On appeal to the Federal Court the Minister for Immigration and Ethnic Affairs argued:

- the couple was not a member of a 'particular social group' in a Convention sense, in that the defining characteristic of the group was a fear of persecution; and
- that the Tribunal did not consider whether the risk of forcible sterilisation was a consequence of government policy. \(^{51}\)

'Particular social group'

In rejecting the Minister's submissions, Sackville J said:

- the concept of a social group is not confined to groups comprising members with an associational interest;
- the perceptions and responses of government are likely, in some cases, to be crucial in determining if a particular social group exists;
- the responses of government might include persecution in a Convention sense; and

\(^{46}\) ibid, p 6.

\(^{47}\) ibid.

\(^{48}\) ibid, p 7.

\(^{49}\) ibid, p 8.

\(^{50}\) ibid, p 9.

\(^{51}\) ibid, p 11.
the group does not necessarily have to be defined by reference to innate or immutable characteristics of its members.\textsuperscript{52}

In summary, Sackville J said that:

If official practice in China or elsewhere identify people with one child, who wish to have another child, as the subject of a system of rewards and sanctions designed to prevent them having further children, those people in my view will be likely to form a particular social group.\textsuperscript{53}

But, this is not to say that all members of that social group are automatically 'refugees' under the \textit{Convention} definition. Only those members who are, or who are likely to be, persecuted as a consequence of membership of that group are 'refugees'. Whether conduct amounts to persecution will depend on the facts in each case. In \textit{NG 327} the conduct alleged - forced abortion and forced sterilisation - amounted to persecution, and hence the applicant couple was granted refugee status.

'\textit{State responsibility for persecution}’

It was accepted that persecution could occur as a result of the national government promoting or condoning forcible sterilisation or from failing to prevent local authorities from implementing such practices.\textsuperscript{54} In order to satisfy the \textit{Convention} definition, persecution need not be suffered directly at the hands of the Government. In \textit{NG 327}, the RRT observed that the one child policy had been relaxed in certain urban areas of China and that much depended on the attitudes of the local authorities.\textsuperscript{55} Although it was argued by the Minister for Immigration and Ethnic Affairs that the RRT did not consider whether forced sterilisation was a consequence of [Chinese] government policy, Sackville J held that the issue had been considered.\textsuperscript{56} Hence, the RRT had not erred in law by failing to give weight to a relevant fact.

\textsuperscript{52} \textit{Ibid.}, p 15.

\textsuperscript{53} \textit{Ibid.}, p 44.

\textsuperscript{54} \textit{Ibid.}, p 53.

\textsuperscript{55} \textit{Ibid.}, p 9.

\textsuperscript{56} \textit{Ibid.}, p 53.
Overseas approaches

Canada

In Canada similar facts to those in NG 327 were considered in Cheung v Minister of Employment and Immigration. The appellant had left China to avoid being sterilised for violating the single child policy: she had given birth to two children. The Canadian Federal Court of Appeal said that women who have more than one child and who are faced with compulsory sterilisation constitute a ‘social group’ within the meaning of the definition of Convention refugee. This is because members of the group share certain characteristics and are identified by a purpose so fundamental to their human dignity that they should not be required to alter it.

In Re Attorney-General of Canada v Ward, the Canadian Supreme Court said that in defining the term ‘particular social group’, reference should be made to the ‘general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.’ The Court stated that the tests proposed in several earlier cases, including Cheung, provided a good working rule to achieve this result. The tests identify three possible categories:

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

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57 Re Cheung v Minister of Employment and Immigration, 102 DLR (4th) p 214.
58 Equivalent to the Federal Court of Australia.
59 Re Cheung, p 215.
60 ibid. It was pointed out in Cheung that all women in China who have more than one child cannot automatically claim refugee status. There must also be a well-founded fear of persecution: see ibid, p 220. See also discussion of NG 327 above.
61 Equivalent to the High Court.
63 Ibid.
64 Ibid, pp 33-34.
The Canadian Supreme Court in *Ward* rejected the approach whereby a particular social group could be defined solely on the basis of the common victimisation of those persons claiming to be members of the group.65

Soon after *Cheung*, in *Chan v Minister for Employment and Immigration*, a panel of the Canadian Federal Court of Appeal decided that parents in China with more than one child do not constitute a particular social group.66 *Chan* is now on appeal to the Canadian Supreme Court.

**New Zealand**

*Re ZWD* was heard by the Refugee Status Appeals Authority (New Zealand) in mid 1991. The applicant, a 46 year old married man from Guangzhou in the PRC, claimed refugee status on the basis of a well-founded fear of persecution arising, *inter alia*, from his refusal to undergo sterilisation.67 The Authority stated that China’s birth control policy was, in itself, not persecutive but that ‘forced or involuntary sterilisation and abortion constitute human rights abuses and may amount to persecution.’68

After discussing the jurisprudence on the concept of a ‘particular social group’ the Authority stated that the applicant faced a ‘virtually impossible’ task in identifying a social group.69 The Authority gave some examples of how the group might be defined and concluded that a ‘coherent formulation of the group is impossible.’70 In addition, there was no evidence before the Authority that ‘Chinese society, and more importantly, the authorities of the state, identify or take notice of the individuals concerned as a social group.’71 The Authority also quoted with approval the decision of the Immigration Appeal Tribunal in *Secretary of State for the Home Department v Otchere* that the act of persecution must exist independently of the

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65 *ibid*, pp 26-27.
68 *ibid*, p 55.
69 *ibid*, p 80.
70 *ibid*, p 80-81. Examples put forward by the Authority include: ‘parents *per se*’; ‘anyone required to submit to any form of birth control whether by way of abortion, sterilisation or otherwise’; and ‘parents who have one child and would like another’.
71 *ibid*, p 82.
characteristics that define the group and that the persecution must be feared as a consequence of those characteristics. 72

The proposed amendments to the Migration Act 1958

The Migration Legislation Amendment Bill (No.3) 1995 proposes to amend the Migration Act 1958 in response to NG 327 by inserting in section 36:

(3) The fertility control policies of the government of a foreign country are to be disregarded in determining if a non-citizen is a member of a particular social group (within the meaning of the Refugees Convention as amended by the Refugees Protocol) for the purposes of considering an application for a protection visa.

(4) The fertility control policies of the Government of the People’s Republic of China are an example of the policies referred to in subsection (3).

In the Second Reading Speech, Senator Ray said that the decision in NG 327 has ‘potentially serious consequences’. Thus, the legislation is necessary. 73 The legislation intends to exclude from the definition of a ‘social group’ people with nothing in common but that they may be affected in some way by the fertility control policies of their government. 74

But, Senator Ray stressed:

This bill will not deny access to our protection to a person who seeks it as a member of a particular pre-existing social group, or on any of the other Convention grounds, who has a well founded fear of persecution because of fertility control policies. What this means is that a person from a particular village or workplace who is subjected to the rogue application of a fertility control policy in a manner which amounts to persecution could still have a claim accepted under the legislation. 75

However, Sir Ronald Wilson, President of the Human Rights and Equal Opportunity Commission, and former judge of the High Court, in a written submission to the Senate Legal and Constitutional Committee, doubted that the proposed amendments ‘could be interpreted in a manner consistent with the government’s stated intention’. 76 A person from a small village or workplace will not be protected ‘because the claimant in such a case will be unable to

72 Secretary of State for the Home Department v Ochere [1988] Imm AR 21, quoted in ibid, p 83.
73 Senate, Parliamentary Debates (Hansard), 31 January 1995, p 36.
74 ibid.
75 ibid.
establish their membership of a particular social group which exposes them to the persecution.\textsuperscript{77} This is because:

\begin{quote}
The constitution of the particular social group is a consequence of the fertility control policies of the relevant government and these policies must be disregarded.\textsuperscript{78}
\end{quote}

On the other hand, it seems that the government is suggesting that persons from a ‘particular village or workplace’ constitute a ‘particular social group’. As Mr Graham Mowbray, General Counsel to the Department of Immigration and Ethnic Affairs said before the Senate Committee ‘two parents of one child who come from a particular village’ would constitute a ‘particular social group’.\textsuperscript{79}

Is this definition actually wider than that put forward in \textit{NG 327}? As Sackville J said ‘parents with one child wishing to have more children are unlikely, without more, to constitute a particular social group.’\textsuperscript{80} But, if it can be established that a person is a parent from a particular village, the government’s test for a ‘social group’ would seem to be satisfied. If it can then be shown that persecution is a likely consequence of membership of the group (ie the local village leader demands sterilisation for parents who have one child), the requirements needed to be recognised as a refugee would appear to be met.

Further, it might be argued that all those claiming refugee status because they face forced sterilisation or abortion in China do so because of the ‘rogue application of a fertility control policy.’ Indeed, given that coercive abortion is forbidden by the Chinese government\textsuperscript{81}, it is arguable that a social group may be defined without reference to government policy at all. For example, might not a social group consist of parents who, having one child face compulsory abortion or sterilisation?\textsuperscript{82}

The Government’s statements concerning how the term ‘particular social group’ should be interpreted are clearly not law. It may be that the proposed

\begin{quote}
\textsuperscript{77} \textit{ibid}, p 176.
\textsuperscript{78} \textit{ibid}.
\textsuperscript{79} G. Mowbray, \textit{ibid}, p 152.
\textsuperscript{80} \textit{NG 327}, p 44. As discussed above the additional element needed according to Sackville J was the official policies that identify such people as targets for rewards or sanctions.
\textsuperscript{81} See Senate, Legal and Constitutional Committee, p 144.
\textsuperscript{82} It would seem that in Canada, ‘Trinidadian women subject to wife abuse’ might constitute a ‘particular social group’: \textit{Re Mayers and Minister for Employment and Immigration 97 DLR 729}.
\end{quote}
legislation 'confuses, rather than clarifies, the meaning of 'particular social group' under the *Convention*.

**Retrospectivity**

The proposed amendment is to apply retrospectively in some cases. Item 7 of the Schedule states:

(1) Subject to subitem (2), the amendment made by item 2 applies to applications that have not been finally determined at the commencement of that item.

This means that if, on the day of Royal Assent, a person has an application before the Refugee Review Tribunal or the Federal Court, that application will be subject to the amendment. For example, if *NG 327* is not finally determined at that date, it will, presumably, be subject to the amendment.

**Will the proposed legislation breach Australia's obligations under the *Convention*?**

The proposed legislation has attracted some criticism from those who consider it will place Australia in breach of its obligations under the *Convention*. For example, Sir Ronald Wilson argues that if the proposed legislation is enacted, the 'protection and access to the processes by which refugee status is determined will no longer be available to all persons who claim refugee status under the *Convention*'. 83 A person who bases his or her claim on 'fertility control policies and persecutory enforcement measures' will no longer be protected. 84

However, in evidence before the Senate Committee, Dr Balkin, Counsel, Office of International Law, Attorney-General's Department noted that, rather than tamper with the *Convention*, the amendment aims to uphold its integrity. 85 It does this, according to Mr Mowbray, by saying 'that the particular social group cannot be defined simply by reference to the act of persecution. ... The *Convention* reason for the persecution has to be because of your membership of some other pre-existing social group.' 86

83 Sir Ronald Wilson, *op cit*, p 175.
84 *ibid*.
85 Dr Balkin, Senate Committee, *ibid*, p 162.
86 Mr Mowbray, *ibid*, p 147.
Summary

In order to be recognised as a refugee under the *Convention*, as amended by the *Protocol*, a person must be able to show:

- that he or she is the victim or potential victim of persecution; and
- that this is a consequence of, *inter alia*, membership of a ‘particular social group.’

It would seem that forced sterilisation or forced abortion, being such a gross interference with personal human dignity, satisfies the *Convention* definition of persecution. Of course, persecution alone does not enable a person to claim refugee status: membership of a ‘particular social group’ must also be shown.

The term ‘particular social group’ is complex, and few cases, either in Australia or overseas, have directly considered the issue. In *NG 327*, Sackville J upheld the RRT decision that ‘those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised’ constitute a social group.

The aim of the proposed legislation is to overrule *NG 327*; a social group is not to be defined by reference to the fertility control policies of a foreign government. While the legislation clearly removes the fertility control policies of a foreign government from the consideration of what constitutes a ‘particular social group’, the practical effect of the legislation is questionable.

The Government has not ruled out refugee claims on the basis of a ‘rogue’ application of policy. Thus, it seems an applicant need only base his or her claim on the ‘rogue’ activities of a local official rather than on government policy. Moreover, suggestions by the Government that parents from a certain village or workgroup constitute a ‘particular social group’ seem to widen rather than restrict the notion of a ‘particular social group’. It is difficult, therefore, to see how the proposed legislation will meet the Government’s aim of ensuring Australia’s refugee determination process is not unnecessarily overloaded.

In short:

It makes no sense, for the sake of an unnecessary law, to appear to be condoning human rights abuses under the one-child policy, or to appear to be stepping back from Australia’s longstanding commitment to international refugee conventions.87

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