

4 PERSECUTION

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INTRODUCTION

The definition contained in Article 1A(2) of the 1951 *Convention relating to the Status of Refugees* (the Convention) stipulates that a refugee must have a well-founded fear of being **persecuted**. The Convention definition applies to applications for a protection visa made before 16 December 2014. The definition of ‘refugee’ in s.5H(1) of the *Migration Act 1958* (the Act), which applies to protection visa applications made on or after 16 December 2014, similarly refers to a person having a well-founded fear of **persecution**.¹

The term ‘persecution’ is not defined in either the Act or the Convention. However there is a significant body of domestic law on the meaning of ‘persecution’ in the Convention context. The leading cases are decisions of the High Court in *Chan Yee Kin v MIEA*,² *Applicant A v MIEA*,³ *Chen Shi Hai v MIMA*,⁴ *MIMA v Haji Ibrahim*,⁵ *MIMA v Respondent S152/2003*⁶ and *Appellant S395/2002 v MIMA*.⁷ A number of Federal Court decisions have also provided guidance.

¹ The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (SLI 2014, No. 135) amended s.36(2)(a) of the Act to remove reference to the Refugees Convention and instead refer to Australia having protection obligations in respect of a person because they are a ‘refugee’. ‘Refugee’ is defined in s.5H, with related definitions and qualifications in ss.5(1) and 5J-5LA. These amendments commenced on 18 April 2015 and apply to protection visa applications made on or after 16 December 2014: table items 14 and 22 of s.2 and item 28 of Schedule 5; *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Commencement Proclamation* dated 16 April 2015 (FRLI F2015L00543).

² (1989) 169 CLR 379.

³ (1997) 190 CLR 225.

⁴ (2000) 201 CLR 293.

⁵ (2000) 204 CLR 1.

⁶ (2004) 222 CLR 1.

⁷ (2003) 216 CLR 473.

In *Chan v MIEA* it was recognised that persecution has traditionally taken a variety of forms of social, political and economic discrimination.⁸ Justice McHugh in *Applicant A v MIEA*, observed that

Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group.⁹

It is also well established that it is not necessary that the conduct complained of should be directed against a person as an individual. Harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group which is subjected to such harassment, can amount to persecution if done for a Convention reason.¹⁰

For the purposes of Australian law, the concept of 'persecution' is not defined, but is further explained¹¹ by ss.5J(4) and (5) and 91R(1) and (2)¹² of the Act. While the terms of ss.5J(4) and 91R(1) are not identical, both provisions have the effect that a person will not meet the definition of a refugee unless:

- the **essential and significant reason** or reasons for the persecution is one or more of the following: race, religion, nationality, membership of a particular social group or political opinion; and
- the persecution involves **serious harm** to the person; and
- the persecution involves **systematic and discriminatory** conduct.

The language in which each of these conditions is expressed calls for a qualitative judgment in order to determine whether it is satisfied in any given case.¹³ As the High Court has held,

It is persecution, involving serious harm inflicted by the violation of fundamental rights and freedoms, from which the Convention and s.91R of the Act are concerned to provide asylum. Both the Convention and s.91R of the Act embody an approach which is concerned with the effects of actions upon persons in terms of harm to them. That approach is not engaged automatically upon the demonstration of any breach, or apprehended breach, of human rights in their country of nationality or former habitual

⁸ (1989) 169 CLR 379 at 430 per McHugh J.

⁹ (1997) 190 CLR 225 at 258, per McHugh J.

¹⁰ *Chan v MIEA* (1989) CLR 379 at 388 per Mason CJ, and at 429 per McHugh J.

¹¹ In *SZTEQ v MIBP* [2015] FCAFC 39 (Robertson, Griffiths and Mortimer JJ, 24 March 2015) at [62]-[63] the Court observed that rather than intending to *qualify* the concept of 'persecution' in the Convention, 'the Parliament had as its touchstone the Convention concept of persecution, as the Parliament understood that to be'. The Court went on to say that '[b]y express incorporation of the concepts of serious harm and systematic and discriminatory conduct, the Parliament intended to give more particular content to the term in the way the text of the Convention does not, to avoid what the Parliament saw as the expansion of the concept by the courts ...': at [66]. See also *SZTIB v MIBP* [2015] FCAFC 40 (Robertson, Griffiths and Mortimer JJ, 24 March 2015) and *BZAFM v MIBP* [2015] FCAFC 41 (Robertson, Griffiths and Mortimer JJ, 24 March 2015).

¹² Section 91R was introduced by the *Migration Legislation Amendment Act (No.6) 2001* (No. 131 of 2001) and commenced on 1 October 2001. The transitional provisions establish that s.91R applies in all cases where the Tribunal makes a decision after 1 October 2001, regardless of the date of the visa application: see *S273 of 2003 v MIMIA* [2005] FMCA 983 (Driver FM, 14 July 2005) at [3]; also *SZDKO v MIMIA* [2006] FMCA 28 (Mowbray FM, 18 January 2006) at [31]-[33] and cases there cited. The Revised Explanatory Memorandum to the Migration Legislation Amendment Bill (No.6) 2001 states at [1] and [3]: 'Over recent years the interpretation of the definition of a "refugee" by various courts and tribunals has expanded the interpretation of the definition so as to require protection to be provided in circumstances that are clearly outside those originally intended' and that the purpose of the amendments was to 'restore the application of the Convention ... in Australia to its proper interpretation'.

¹³ *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610 per French CJ, Kiefel, Bell and Keane JJ at [35], Gageler J agreeing.

residence.¹⁴

As such, the requirements in ss.5J(4) and 91R(1) do not stand alone, but must be considered, respectively, with the definition of refugee in s.5H(1) and ss.5J-LA in the Act, or Article 1A(2) of the Convention.

For the purpose of the refugee definition in s.5H(1) of the Act, the compound concept of 'well-founded fear of persecution' is further qualified by a number of other requirements, also contained in s.5J of the Act. These are applicable to protection visa applications made on or after 16 December 2014 and are discussed in detail in Chapters 3, 5 and 8 of this Guide. Similarly, the Article 1A(2) Convention definition, applicable to applications made prior to that date, is further qualified by ss.91R(3) and 91S, discussed respectively in Chapters 3 and 5 of this Guide.

This chapter focuses on the elements 'serious harm' and 'systematic and discriminatory conduct'. Although the requirement of 'essential and significant reason' forms part of the statutory concept of persecution, it is not discussed in detail in this chapter. As it overlaps with the 'for reasons of' requirement, it is considered in Chapter 5.

The following matters have also been the subject of judicial consideration and are discussed later in this chapter:

- Agents of persecution;
- Persecution in the context of the enforcement of a law;
- Discriminatory failure of state protection as persecution; and
- Persecution on cumulative grounds.

It is somewhat artificial to separate the concept of persecution from the 'for reasons of' requirement¹⁵ and this has only been done in the Guide for the purposes of ease of discussion. Because the element of 'motivation' is an essential part of both 'persecution' and 'for reasons of' some of the issues discussed in this chapter overlap with those in Chapter 5. Reference can also be made to Chapter 11 for examples of specific situations in which some of the principles discussed here have been applied - for example, 'laws of general application' (including conscription laws), personal and family relationships, and suppression of opinion, beliefs, or identity, although that Chapter applies primarily to the Convention refugee definition.

In enacting s.5J(4) and (5), it was the intention of Parliament that the requirements in ss.91R(1) and (2) form part of the new statutory framework, and any difference in text was

¹⁴ *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610 per French CJ, Kiefel, Bell and Keane JJ at [71], Gageler J agreeing.

¹⁵ See, for example, *SZNCK v MIAC* [2009] FMCA 399 (Driver FM, 28 May 2009).

not intended to change their meaning.¹⁶ As such, although the case law discussed in this chapter has developed in the context of the Article 1A(2) Convention definition of persecution and ss.91R(1) and (2), it will generally be applicable to the definitions in ss.5H(1) and 5J.

SERIOUS HARM

Under ss.5J(4)(b) and 91R(1)(b) of the Act, persecution must involve ‘serious harm’ to the person. Sections 5J(5) and s.91R(2) set out a non-exhaustive list of the type and level of harm that will meet the serious harm test. These provisions do not define ‘serious harm’ but provide instances of the serious harm referred to in ss.5J(4)(b) and 91R(1)(b) by way of an aid to their application.¹⁷ The following are listed as instances of ‘serious harm’:

- (a) a threat to the person’s life or liberty;
- (b) significant physical harassment of the person;
- (c) significant physical ill-treatment of the person;
- (d) significant economic hardship that threatens the person’s capacity to subsist;
- (e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;
- (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.

With the exception of ss.5J(5)(a) and 91R(2)(a), each of the other paragraphs describe an instance of ‘serious harm’ by reference to an adjectival or circumstantial qualification (‘significant’ or ‘threatens capacity to subsist’). Despite any such express qualification in paragraph (a), the High Court confirmed in *MIBP v WZAPN* that that paragraph also requires a qualitative judgment, involving the assessment of matters of fact and degree.¹⁸ The text of s.91R is concerned with serious harm, and in its context implementing the Convention, it is intended to protect against persecution involving serious harm inflicted by the violation of fundamental rights and freedoms.¹⁹

In *MIBP v WZAPN*, the High Court rejected the Federal Court’s finding that under s.91R(2)(a), any loss of liberty, regardless of its duration, would amount to serious harm.²⁰

¹⁶ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014, pp.174-175 at [1198] and [1203].

¹⁷ *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610 per French CJ, Kiefel, Bell and Keane JJ at [48], Gageler J agreeing. Although the Court was considering ss.91R(1)(b) and (2), its reasoning appears equally applicable to ss.5J(4)(b) and (5), given their similar wording.

¹⁸ *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610 per French CJ, Kiefel, Bell and Keane JJ at [41], Gageler J agreeing. That detention can, but will not always, constitute serious harm is consistent with earlier authority such as *Applicant M256/2003 v MIMIA* [2006] FCA 590 (Gray J, 19 May 2006) where the Court held that the prospect of imprisonment for up to 45 days was capable of involving a threat to liberty, and *SZSXY v MIBP* [2014] FCCA 5 (Judge Driver, 10 July 2014), observing that as a matter of general principle, whether a ‘relatively brief’ period on remand in prison constitutes ‘serious harm’ or falls within the forms of harm the definition of ‘significant harm’ was a judgment of fact and degree for the Tribunal: at [24].

¹⁹ *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610 per French CJ, Kiefel, Bell and Keane JJ at [48]-[51] and [71], Gageler J agreeing. See also *SZTEQ v MIBP* [2015] FCAFC 39 (Robertson, Griffiths and Mortimer JJ, 24 March 2015) at [66]-[70]. In *DJO16 v MIBP* [2017] FCCA 944 (Judge Cameron, 15 May 2017) the Federal Circuit Court observed in light of these authorities that, in considering s.5J(5), in order to determine whether conduct or circumstances amount to serious harm, a qualitative assessment is necessary, having regard to the gravity of the harm likely to be suffered: at [25].

²⁰ *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610 overturning *WZAPN v MIBP* [2014] FCA 947 (North J, 3 September 2014). The Federal Court judgment in *WZAPN* was the subject of some criticism (see *MZAPO v MIBP* [2015] FCCA 96 (Judge Street, 13 January 2015) at [27]-[35] and *SZWAW v MIBP* [2015] FCCA 199 (Judge Street, 29 January 2015) at

The High Court held that the question of whether the likelihood of detention in any case rises to the level of serious harm instanced by s.91R(2)(a) invites a consideration of the circumstances and consequences of that detention and an evaluation of the nature and gravity of the loss of liberty.²¹ In doing so, it endorsed the reasoning of the Full Federal Court in *SZTEQ v MIBP*, which held that a threat to ‘liberty’ in s.91R(2)(a) was not synonymous with the possibility of a person being held briefly on remand or detained for a short time for questioning, as ‘liberty’ is a nuanced concept which takes its meaning from its context, namely the requirement in s.91R(1) that the persecution involve serious harm.²²

However, brief periods of detention may nonetheless amount to serious harm. The High Court observed in *obiter* that temporary detentions of a person fall naturally within the description of physical harassment and so readily within s.91R(2)(b). A determination of whether temporary detention amounts to *significant* physical harassment for the purpose of that subsection will require the decision-maker to consider the gravity and frequency of the incidents in which harassment is said to have occurred, a task of fact and degree.²³ Given their near-identical terms, the Court’s interpretation of ss.91R(2)(a) and (b) is also applicable to the s.5J(5) equivalent.²⁴

A number of the instances of harm in ss.5J(5) and 91R(2) are expressed in terms of ‘threat’. A ‘threat’ for the purposes of ss.5J(5) or 91R(2) would not normally be constituted by a mere declaration of intent. Rather, those sections contemplate that a person’s livelihood or well-being will be jeopardised in a material way.²⁵ A threat to subsistence as referred to in

[31]) and was distinguished in those and a number of other cases on the basis that the tests in s.91R(1)(a) and (c) were not satisfied. See, for example, *SZSPT v MIBP* [2014] FCA 1245 (Rares J, 3 November 2014); *SZSXY v MIBP* [2014] FCA 1183 (Robertson J, 5 November 2014); *MZZUO v MIBP* [2014] FCA 1267 (Pagone J, 24 November 2014); *SZSRU v MIBP* [2014] FCA 1252 (Katzmann J, 21 November 2014); *SZTUL v MIBP* [2014] FCA 1427 (Logan J, 26 November 2014); *AZAEK v MIBP* [2014] FCA 1415 (White J, 22 December 2014); *BZAEK v MIBP* [2014] FCCA 2975 (Judge Jarrett, 23 December 2014); *MZAPO v MIBP* [2015] FCCA 96 (Judge Street, 13 January 2015); *SZTKE v MIBP* [2015] FCCA 103 (Judge Driver, 13 February 2015).

²¹ *MIBP v WZAPN*; *WZARV v MIBP* (2015) 254 CLR 610 per French CJ, Kiefel, Bell and Keane JJ at [45], Gageler J agreeing.

²² *MIBP v WZAPN*; *WZARV v MIBP* (2015) 254 CLR 610 per French CJ, Kiefel, Bell and Keane JJ at [5]; *SZTEQ v MIBP* [2015] FCAFC 39 (Robertson, Griffiths and Mortimer JJ, 24 March 2015) at [59]. See also *SZTIB v MIBP* [2015] FCAFC 40 (Robertson, Griffiths and Mortimer JJ, 24 March 2015) and *BZAFM v MIBP* [2015] FCAFC 41 (Robertson, Griffiths and Mortimer JJ, 24 March 2015). These judgments had overturned the reasoning of the Federal Court in *WZAPN v MIBP* [2014] FCA 947 (North J, 3 September 2014).

²³ *MIBP v WZAPN*; *WZARV v MIBP* (2015) 254 CLR 610 per French CJ, Kiefel, Bell and Keane JJ at [51], Gageler J agreeing.

²⁴ In a separate judgment agreeing with the majority in *WZAPN*, Gageler J observed that the question of construction arising under s.91R(2)(a) continues to arise under s.5J(5)(a): *MIBP v WZAPN*; *WZARV v MIBP* (2015) 254 CLR 610 at [84].

²⁵ In *MIMIA v VBAO of 2002* (2004) 139 FCR 405, Marshall J held that threats in the form of declarations of intent cannot *prima facie* on their own constitute ‘serious harm’ within the meaning of s.91R. His Honour held at [41] that ‘serious harm’ contemplates that a person’s livelihood or well-being will be jeopardised in a material way, adding that this is not to deny that threats in the form of declarations of intent can never constitute serious harm, but they do not of themselves automatically qualify for that description: at [40]-[41], followed in *VBAS v MIMIA* (2005) 141 FCR 435 and *SZAYT v MIMIA* [2005] FCA 857 (Wilcox J, 24 June 2005). Dismissing an appeal from *VBAO*, the High Court held that the occasion for considering the issue did not arise on the facts; nevertheless, they did consider the issue, essentially agreeing with Marshall J. Chief Justice Gleeson and Kirby J stated that in s 91R(2)(a), ‘threat’ means a likelihood of harm, and not simply a communication of an intention to harm. A past communication of an intention to harm a person might be some evidence of a likelihood of future harm to the person’s life or liberty, but the question for the decision-maker is whether there is such a likelihood. The decision-maker is to decide the risk of future harm, not the risk of future communications: *VBAO v MIMIA* (2006) 233 CLR 1 at [1]-[3]. The reasons of Gummow J, and Callinan and Heydon JJ are to similar effect. Although these observations may be regarded as strictly *obiter*, they do confirm the prevailing view in the Federal Court and have been applied in *BRGAA of 2007 v MIAC* (2007) 164 FCR 381 in which Collier J at [28] considered that, although the High Court’s comments in *VBAO* were in relation to the meaning of word ‘threat’ as an instance of serious harm in s.91R(2)(a), the findings extend to the concept of threat as ‘serious harm’ within s.91R(1)(b).

ss.5J(5)(d)-(f)/91R(2)(d)–(f) must be at a level that challenges the ability of the individual to continue to exist or remain in being.²⁶ The reference to a denial of a person’s capacity to earn a livelihood in ss.5J(5)(f)/91R(2)(f) is not limited to denial of ‘legal’ capacity to earn a living.²⁷

While the examples of serious harm in ss.5J(5)/91R(2) each involve a physical dimension, or threat to subsistence, the list is not exhaustive.²⁸ The Revised Explanatory Memorandum to the legislation which introduced s.91R emphasised that the serious harm test does not exclude serious mental harm, such as harm caused by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection.²⁹

That Explanatory Memorandum explains that this definition of ‘persecution’:

... reflects the fundamental intention of the Convention to identify for protection by member states only those people who, for Convention grounds, have a well founded fear of harm which is so serious that they cannot return to their country of nationality, or if stateless, to their country of habitual residence. These changes make it clear that it is insufficient ... that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia.³⁰

²⁶ ‘Subsistence’ in s.91R(2) denotes ‘the ability to continue to exist or remain in being’ (*SZBQJ v MIAC* [2005] FCA 143 (Tamberlin J, 28 February 2005) at [11]) such that ‘the level of threat must be such as to challenge the ability of the individual to continue to exist or remain in being’: *SZIGC v MIAC* [2007] FCA 1725 (Greenwood J, 8 November 2007) at [23]. Furthermore, the hardship must be such that it would *actually* threaten the applicant’s capacity to subsist: see *MZYYPB v MIAC* [2012] FMCA 226 (Turner FM, 30 March 2012) at [13] where the Court rejected the applicant’s argument that s.91R(2)(d) only required him to demonstrate a *threat* to his capacity to subsist (in that case because his business as a taxi driver would be diminished by the need to take more circuitous routes so as to avoid Taliban-controlled roads) and not an actual outcome of a reduction in his capacity to subsist. In *DZABS v MIAC* [2012] FMCA 297 (Lindsay FM, 17 April 2012) at [90] the Court commented, by way of example, that s.91R(2)(d) could conceivably encompass punitive taxation.

²⁷ *SZQZT v MIAC* [2012] FMCA 640 (Cameron FM, 1 August 2012) at [40]. However, even where there are legal restrictions (e.g. laws prohibiting employment without a permit) the mere existence of such laws does not necessarily constitute persecution for the purposes of s.91R of the Act. In *SZPZI v MIAC* [2011] FMCA 530 (Smith FM, 22 July 2011) at [37] the Court held that it is open to a decision-maker to assess the practical as well as the legal effects of such laws, including the claimant’s past history in relation to employment without a permit, and to conclude – if the evidence allows – that there is no real chance that a claimant lacking a work permit will not be able to obtain unlawful employment which will afford an acceptable livelihood. See also *MZYVD v MIAC* [2013] FCCA 607 (Judge O’Dwyer, 24 June 2013) at [16]-[20] where the Court found that the Reviewer did not apply the wrong test in considering the claimant’s significant history of unlawful employment, and the evidence did not support a conclusion that his right to subsist was ‘threatened’ by a requirement that he work unlawfully.

²⁸ It would be legally wrong to approach the statutory test in s.91R(1)(b) on the basis that the examples in s.91R(2) were exhaustive, and such an approach to ss.5J(4) and (5) would be equally incorrect: see e.g. *VTAO v MIMIA* [2004] FCA 927 (Merkel J, 19 July 2004), *NBFP v MIMIA* [2005] FCAFC 95 (Kiefel, Weinberg and Edmonds JJ, 31 May 2005) and *Applicant M93 of 2004 v MIMIA* [2006] FMCA 252 (McInnis FM, 24 February 2006). In *WZAPN v MIAC* [2013] FMCA 6 (Lucev FM, 31 January 2013) at [90] the Federal Magistrate held that the Reviewer did not adopt s.91R(2) as an exhaustive code, and suggested that it may be an error not to have regard to the guidance in s.91R(2) in assessing whether claimed detriment amounts to serious harm (the appeals were silent in relation to this observation: *WZAPN v MIBP* [2014] FCA 947 (North J, 3 September 2014) and *MIBP v WZAPN*; *WZARV v MIBP* (2015)254 CLR 610).

²⁹ Revised Explanatory Memorandum to Migration Legislation Amendment Bill (No.6) 2001 at [25]. This is consistent with the principle that severe harm to a member of an applicant’s family can amount to persecution of the applicant: see *El Merhabi v MIMA* (2000) 96 FCR 375. Referring to that case, in *NBCY v MIMIA* [2004] FCA 922 (Tamberlin J, 16 July 2004) at [25], Tamberlin J held that both in principle and on authority ‘persecution’ in the sense of serious detriment or harm to a person could arise from a threat to a person’s family and those to whom the person is strongly attached by bonds of kinship, love, friendship or commitment. *El Merhabi* and *NBCY* both concerned circumstances where the claimed harm to the family members arose from their relationship to the applicant. However, in *MZZNF v MIBP* [2015] FCCA 1792 (Judge Riley, 30 June 2015) the Court, while relying on those cases, appeared to extend this principle to harm that arose from the family members’ own circumstances rather than their connection to the applicant (at [29]). Harm arising from interference with family relationships, such as mental harm caused by forced separation from family, may also potentially amount to persecution in some circumstances. In *MIAC v SZQOT* (2012) 206 FCR 145 the majority expressed a view that the respondent’s claim of separation from his family as constituting persecution was not necessarily incapable of giving rise to protection obligations under the Convention, if there was some Convention basis for the separation such as widespread discrimination against couples on racial or religious grounds making it impossible for them to live together without fear of harassment (per Marshall J at [64], Yates J at [77]).

³⁰ Revised Explanatory Memorandum to Migration Legislation Amendment Bill (No.6) 2001, at [25].

This description of the statutory ‘serious harm’ test is reflective of the concept of persecution under international law as interpreted by the High Court of Australia.³¹ Although those cases were decided prior to the introduction of s.91R, they remain helpful.

In *Chan v MIEA*, Mason CJ held that serious punishment or penalty, or the imposition of some significant detriment or disadvantage, for a Convention reason will amount to persecution and that harm short of interference with life or liberty may still amount to persecution. His Honour stated 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 ... Obviously harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason. The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm ...³²

In the same case, McHugh J stated:

...to constitute “persecution” the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute “persecution” for the purposes of the Convention and Protocol. Measures “in disregard” of human dignity may, in appropriate cases, constitute persecution.³³

...the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason.³⁴

In *MIMA v Haji Ibrahim* McHugh J emphasised the degree of harm that would be required to constitute persecution. His Honour explained:

The Convention protects persons from persecution, not discrimination. Nor does the infliction of harm for a Convention reason always involve persecution. Much will depend on the form and extent of the harm. Torture, beatings or unjustifiable imprisonment, if carried out for a Convention reason, will invariably constitute persecution for the purpose of the Convention. But the infliction of many forms of economic harm and the interference with many civil rights may not reach the standard of persecution. Similarly, while persecution always involves the notion of selective harassment or pursuit, selective harassment or pursuit may not be so intensive, repetitive or prolonged that it can be described as persecution.³⁵

While noting that it would be impossible to frame an exhaustive definition, his Honour described persecution for the purpose of the Convention as, ordinarily:

³¹ Some Federal Court cases, prior to the introduction of s.91R, adopted a significantly lower threshold than the ‘serious harm’ test in s.91R. For example, in *Kord v MIMA* [2001] FCA 1163 (Hely J, 24 August 2001), his Honour held that unjustifiable and discriminatory conduct, officially tolerated, directed at an applicant for a Convention reason, is persecution ‘unless the impact of that conduct on the applicant is trivial or insignificant’. However, on appeal the Full Federal Court held that this proposition appeared to be inconsistent with numerous observations made by the High Court: *MIMIA v Kord* (2002) 125 FCR 68 at [34].

³² *Chan v MIEA* (1989) 169 CLR 379 at 388, per Mason CJ. In *SZTEQ v MIBP* [2015] FCAFC 39 (Robertson, Griffiths and Mortimer JJ, 24 March 2015) the Court opined that, rather than suggesting that any deprivation of liberty is within the concept of ‘being persecuted’, it is clear the High Court in *Chan* understood the Convention term ‘persecution’ to require conduct of a certain level of seriousness or intensity, taking into account that threats to life or freedom are more readily characterised as having the necessary quality of seriousness or intensity of harm: at [99]-[100]. See also *SZTIB v MIBP* [2015] FCAFC 40 (Robertson, Griffiths and Mortimer JJ, 24 March 2015) and *BZAFM v MIBP* [2015] FCAFC 41 (Robertson, Griffiths and Mortimer JJ, 24 March 2015).

³³ *Chan v MIEA* (1989) 169 CLR 379 at 430, per McHugh J.

³⁴ *Chan v MIEA* (1989) 169 CLR 379 at 431, per McHugh J.

³⁵ *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [55].

- unjustifiable and discriminatory conduct directed at an individual or group for a Convention reason
- which constitutes an interference with the basic human rights or dignity of that person or the persons in the group
- which the country of nationality authorises or does not stop, and
- which is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight from, or refusal to return to, that country is the understandable choice of the individual concerned.³⁶

It should be observed that McHugh J's fourth dot point suggests a threshold that is arguably higher than the statutory 'serious harm' test under ss.5J(4)(b)/91R(1)(b) as elucidated in ss.5J(5)/91R(2).

Clearly, depending upon the circumstances, the denial of fundamental human rights may constitute persecution within the meaning of ss.5J(4)(b)/91R(1)(b), as well as under the Convention.³⁷ Furthermore, persecution is not limited to actual punishment for exercising such rights, but may take the form of a threat of punishment or a prohibition on the exercise of them.³⁸

Thus, for example, a person faced with a threat of persecution for exercising his or her rights may take steps to avoid the persecutory conduct or to mitigate harm flowing from it. The applicant may choose to conceal personal attributes (such as religion, or sexual orientation) from his/her persecutors by being discreet. In those circumstances, as the High Court has stated, 'persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action'.³⁹ It would be erroneous to require an applicant to take steps, reasonable or otherwise, to avoid offending his or her persecutors, or to modify some attribute or characteristic to avoid persecution.⁴⁰

Under the Convention, requiring an applicant to live discreetly is wrong and irrelevant to the task of determining refugee status. Where an applicant has acted in the way he or she did only because of the *threat* of harm, the well-founded fear of persecution held by the

³⁶ *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [65]. See also [61]-[62]. McHugh J has restated this fourth dot point in the following terms: in *MIMA v Respondent S152/2003* (2004) 222 CLR 1 at [73] '...for the purpose of the Convention, the feared harm will constitute persecution only if it is so oppressive that the individual cannot be expected to tolerate it so that refusal to return to the country of the applicant's nationality is the understandable choice of that person'; and in *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 (in joint judgment with Kirby J) at [40] '[w]hatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it'.

³⁷ The Department of Home Affairs' PAM3 'Refugee and humanitarian - Refugee Law Guidelines', section 11.4, as re-issued 1 July 2017 advise decision-makers to apply a similar standard to those contained within s.5J(5) (for example, 'significant' denials or denials that 'threaten the person's capacity to subsist') when considering whether a denial of human rights amounts to serious harm.

³⁸ *Chan v MIEA* (1989) 169 CLR 379 at 431, per McHugh J. See also *Woudneh v MILGEE* (unreported, Federal Court of Australia, Gray J, 16 September 1988), and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, per McHugh and Kirby JJ at [40].

³⁹ *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 per McHugh and Kirby JJ at [40].

⁴⁰ *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 per McHugh and Kirby JJ at [40] and per Gummow and Hayne JJ at

applicant is the fear that unless he or she acts to avoid harmful conduct, he or she will suffer harm. In these cases, it is the *threat* of serious harm with its implications that constitutes the persecutory conduct. To determine the issue of real chance in such a case without determining whether the modified conduct was influenced by the threat of harm is to fail to consider the issue properly. To properly deal with the question of persecution the decision-maker will need to consider why an applicant has acted or will act discreetly; and what would happen to the applicant if s/he did not act discreetly.⁴¹

However, the mere fact that a particular right is denied is not necessarily enough to establish refugee status. Rather, it will generally also be important to ascertain the importance that the asylum-seeker places upon the exercise of that particular right.⁴² Justice Madgwick's description of the circumstances in which a denial of political expression might constitute persecution under the Convention appears to be consistent with the level of harm required under s.91R(1)(b):

... a denial of such civil rights would amount to persecution when that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity. It is not fatal to such a claim of persecution that the claimant fails to show that he or she is a leading exponent of a claim to, or the wish to, exercise such rights ... The Convention aims at the protection of those whose human dignity is imperilled, the timorous as well as the bold, the inarticulate as well as the outspoken, the followers as well as the leaders in religious, political or social causes... But, of course, the Convention did not aim at providing a universal right to change countries for every inhabitant of every oppressively ruled society on earth, however important civil and political rights may, as a matter of mere intellectual persuasion, be to such an inhabitant. The Convention was intended to relieve against actual or potentially real suffering.⁴³

These principles relating to behaviour modification and the exercise of 'rights', were developed under the Refugees Convention definition of refugee. While these also appear relevant to the consideration of 'well-founded fear of persecution' for the purpose of the refugee definition in s.5H(1), s.5J(3) of the Act provides for circumstances in which a decision-maker *can* require an applicant to live discreetly. The behaviour modification provision in s.5J(3) is discussed in Chapter 3 of this Guide.

Apart from the matters listed in ss.5J(5)/91R(2), ss.5J(4) and 91R do not impose or imply the relevance of any particular standard or test by which a decision-maker is to arrive at a conclusion that any given circumstance amounts to serious harm.⁴⁴ Whether particular conduct rises to the level of persecution in the relevant sense is a question of degree, to be

[80].

⁴¹ See the section in Chapter 11 headed 'Self expression and suppression of opinions, beliefs and identity' for further discussion of this issue.

⁴² *Win v MIMA* [2001] FCA 132 (Madgwick J, 23 February 2001) at [15].

⁴³ *Win v MIMA* [2001] FCA 132 (Madgwick J, 23 February 2001) at [20].

⁴⁴ *SZQZT v MIAC* [2012] FMCA 640 (Cameron FM, 1 August 2012) at [21]. However, decision-makers should ensure to apply a test of 'serious harm' and not some other standard. In *SZQOT v MIAC* [2012] FMCA 84 (Driver FM, 10 February 2012) at [21]-[22] Driver FM held that by adopting a test of 'severe harm' rather than 'serious harm', there was an implication that the Reviewer was erroneously applying a different (more stringent) test of harm. On appeal, the Full Federal Court upheld the Federal Magistrate's judgment on a different basis and provided no clear ratio as to whether 'severe harm' is the same as 'serious harm': *MIAC v SZQOT* (2012) 206 FCR 145. However, contrast *MZZCC v MIAC* [2013] FCCA 427 (Judge Riley, 11 June 2013) where the Court clarified that 'severe harm as a matter of normal English usage, is worse than serious harm', but found, in that case, that the Tribunal's use of that term did not amount to error given that it had accurately described the test of serious harm elsewhere, and had ultimately concluded that there was no real chance of harm of any description: [21]-[22]. The judgment was upheld on appeal in *MZZCC v MIMAC* [2013] FCA 858 (Marshall J, 20 August 2013).

determined by applying the statutory 'serious harm' test to the facts as found. While statements of the Courts in the context of the case before them are helpful, they should not be relied upon as substitutes for the term 'persecution' in the language of the Convention or the Act.

The relevance of an applicant's personal attributes

In some circumstances, comparatively lesser forms of harm could have a more detrimental impact on the victim than on others as a result of personal attributes or circumstances such as age or frailty. For example, a degree of physical exertion or distress may result in serious harm to one who is old and frail even if it would not in respect of a person who is young and strong. In determining whether the harm resulting from discriminatory conduct meets the required threshold of severity, a question may arise as to the extent to which personal attributes or circumstances that are unrelated to the reasons for the harm can be taken into account.

It is clear that a strong subjective fear on the part of an asylum seeker does not convert non-persecution into persecution.⁴⁵ Similarly, the prospective psychological impact of past persecution, such as the stress associated with non-persecutory monitoring and questioning on return to a country, does not elevate monitoring and questioning into persecutory conduct.⁴⁶ However this does not resolve the broader question as to whether mild forms of discrimination can be regarded as 'serious harm' when the severity of impact is largely because of personal circumstances.

However, when assessing whether discrimination faced by an applicant amounts to 'serious harm', all the relevant circumstances must be taken into account, including personal circumstances such as the applicant's age and frailty.⁴⁷

⁴⁵ See *Prahastono v MIMA* (1997) 77 FCR 260 at 269, 271. In *SZALZ v MIMIA* [2004] FMCA 275 (Raphael FM, 18 May 2004), Raphael FM held that where a fact-finder concludes that conduct is 'not sufficiently serious [as] to constitute persecution' in that it does not amount to serious harm, 'that finding cannot be changed because of the more serious affects that it had on the applicant than it might have had on another person' at [8]. His Honour noted that the test of serious harm is an objective one. His Honour relied upon *Prahastono* but the decision in *SZALZ*, on one reading, appears to go further than *Prahastono* which focussed on subjective fear, rather than the effect on a claimant.

⁴⁶ *WAKZ v MIMIA* [2005] FCA 1065 (French J, 2 August 2005) at [45]-[49].

⁴⁷ In *AGA16 v MIBP* [2018] FCA 628 (Moshinsky J, 9 May 2018) the Court accepted the appellant's proposition (undisputed by the Minister) that in assessing the seriousness of harm, it is necessary to have regard to personal attributes such as age and frailty, as well as personal vulnerabilities: at [35]. It found that this proposition was consistent with the observations of the Full Federal Court in *SZTEQ v MIBP* (2015) 229 FCR 497 at [153], where it was emphasised that an evaluation of 'serious harm' will be a question of fact and degree, often complicated and quite specific to the individual concerned. See also *SZBQJ v MIMIA* [2005] FCA 143 (Tamberlin J, 28 February 2005), where the Court stated at [21] that 'it is obvious that the impact and circumstances surrounding the application of a national policy may impact differently on different persons so that in one instance the impact may constitute persecution but in other cases the impact may not be so substantial as to amount to Convention persecution'. In *SZBBP v MIMIA* [2005] FMCA 5 (Driver FM, 18 January 2005) the Court held at [35] that in concluding that harm in the form of threats did not constitute serious harm, the Tribunal had erred in failing to take into account the applicant's age and frailty. While the High Court has held that verbal threats do not constitute 'serious harm': *VBAO v MIMIA* (2006) 233 CLR 1, the Court's reasons do not disturb the proposition that matters such as age and frailty should be taken into account when considering whether a future risk amounts to 'serious harm' in the relevant sense. The instances of 'serious harm' set out in s.91R(2) and s.5J(5) support this view. For example, an applicant's personal circumstances would be relevant to whether the forms of economic harm or denial to services mentioned in those sections '[threaten] the person's capacity to subsist'.

SYSTEMATIC AND DISCRIMINATORY CONDUCT

Under ss.5J(4)(c) and 91R(1)(c) of the Act, persecution must involve systematic and discriminatory conduct.

The requirement for systematic and discriminatory *conduct* appears to fit in with the overall concept of well-founded fear of persecution. An applicant may or may not have experienced persecution in the past, however, to meet the definition of refugee the applicant must face a real chance of being persecuted for one of the five grounds set out in the Convention and the Act, in the reasonably foreseeable future.⁴⁸ The inclusion of the element of systematic and discriminatory conduct in the concept of persecution appears to have the effect that the mere impact of circumstances which an applicant may face in the future, even if arising from past persecution, would not constitute persecution for the purposes of ss.5J(4)/91R(1) unless those future circumstances include some systematic and discriminatory conduct by another person or persons.⁴⁹

This aspect of the statutory test is not further explained, either in the provisions of the Act, or in the Explanatory Memoranda to the Bills inserting ss.5J(4) and 91R. There has been little judicial consideration of s.91R(1)(c), however the case law on the concept of persecution provides some guidance in relation to the terms ‘systematic’ and ‘discriminatory’.

‘Systematic...’

The reference to ‘systematic... conduct’ in ss.5J(4)(c)/91R(1)(c) reflects judicially developed law as to the meaning of persecution.

In *Chan v MIEA*, McHugh J stated:

The notion of persecution involves selective harassment ... [It is not] a necessary element of “persecution” that the individual should be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as **part of a course of systematic conduct** directed for a Convention reason against that person as an individual or as a member of a class, she is “being persecuted” for the purposes of the Convention.⁵⁰ (emphasis added)

⁴⁸ The concept of ‘well-founded fear’ and the role of past persecution are explored in Chapter 3 of this Guide.

⁴⁹ See for example *WAKZ v MIMIA* [2005] FCA 1065 (French J, 2 August 2005) at [49]. His Honour’s discussion does not refer specifically to s.91R(1)(c), however, the distinction that is drawn between ‘persecutory action on the part of the government or any other agencies’ and the impact of ‘non-persecutory questioning’ on an applicant’s fragile mental state appears consistent with the consideration of the requirements of s.91R(1)(c). Contrast *SZJLM v MIAC* [2007] FMCA 287 (Scarlett FM, 2 April 2007), in which the Tribunal was found to have erred in failing to consider the cumulative impact of the applicant’s mother’s claims of Convention-related persecution, where the applicant son was the only refugee claimant before the Tribunal. The Court’s reasoning appears to assume that if the mother faced persecution for a Convention reason, then the impact of that harm on the applicant would suffice to amount to persecution and did not consider the requirements of s.91R(1)(c) or s.91R(1)(a).

⁵⁰ *Chan v MIEA* (1989) 169 CLR 225, per McHugh J at 429-430. His Honour supported this proposition by reference to *Periannan Murugasu v MIEA* (1987) 217 ALR 17, where Wilcox J had stated at 23 ‘[t]he word “persecuted” suggests a course of systematic conduct aimed at an individual or at a group of people. It is not enough that there be fear of being involved in incidental violence as a result of civil or communal disturbances’.

Since then, a body of case law has developed around his Honour's use of the expression 'systematic conduct' in that case.⁵¹ These cases have made it clear that in the Convention context the expression should be used with care.

In *MIMA v Haji Ibrahim*, McHugh J explained that his use of the expression 'systematic conduct' in *Chan* was not intended to mean that there can be no persecution for the purposes of the Convention unless there is a systematic course of conduct by the oppressor; rather it was used as a synonym for non-random.⁵² His Honour held that:

It is an error to suggest that the use of the expression "systematic conduct" in either *Murugasu* or *Chan* was intended to require, as a matter of law, that an applicant had to fear organised or methodical conduct, akin to the atrocities committed by the Nazis in the Second World War. Selective harassment, which discriminates against a person for a Convention reason, is inherent in the notion of persecution. Unsystematic or random acts are non-selective. It is therefore not a prerequisite to obtaining refugee status that a person fears being persecuted on a number of occasions or "must show a series of coordinated acts directed at him or her which can be said to be not isolated but systematic".⁵³

The question of whether certain conduct is 'systematic' is distinct from the qualitative assessment which is required to determine whether conduct amounts to 'serious harm'. In *VSAI v MIMIA* Crennan J stated that where conduct shown to be serious harm falls to be assessed as to whether it is 'systematic conduct' for the purposes of s.91R(1)(c), it would be wrong to require the applicant to show anything more than that it is deliberate or premeditated, that is, motivated. It would not be necessary to show that the conduct is widespread or frequently recurring. However, her Honour observed that frequency or regularity may be relevant to determining whether conduct amounts to 'serious harm' if the isolated incidents can be described as involving minimal or low level harm.⁵⁴ Similarly, the Full Federal Court observed in *SZTEQ v MIBP* that 'systematic' is used in s.91R(1)(c) in the same way that 'discriminatory' is used – to direct the decision-maker's attention to the motivation of the alleged persecutor. It conveys deliberate behaviour on the part of the persecutor, rather than behaviour that is random or accidental.⁵⁵

The statutory test in ss.5J(4)(c)/91R(1)(c) does not displace the general proposition that a single act may suffice, as long as it is part of a course of systematic (in the sense of non-

⁵¹ See for example *Mohamed v MIMA* (1998) 83 FCR 234, *Abdalla v MIMA* [1998] FCA 1017 (Burchett, Tamberlin and Emmett JJ, 20 August 1998), *Chopra v MIMA* [1999] FCA 480 (Lee, Whitlam and Weinberg JJ, 23 April 1999), *Haji Ibrahim v MIMA* (1999) 94 FCR 259 at [25], *MIMA v Hamad* (1999) 87 FCR 294. In *MIMA v Hamad*, the Full Federal Court stated at [17]: 'The phrase "systematic conduct" can be, and often is, used in two senses – either to refer to the motive, or evidence revealing the motive for the acts of the perpetrator or alternatively to refer to a number of acts or the volume of acts which are necessary before persecution is established.' The Court stated that McHugh J had used the phrase in the first sense in *Chan*. In *Haji Ibrahim*, the Full Federal Court similarly observed at [25] that the word 'systematic' may be used in two alternative senses: 'One sense is that of deliberate or premeditated or intended conduct, of acting or carrying out actions with a premeditated intent. The other sense is that of habitual behaviour according to a system, regular or methodical. Where those words have been used to indicate the former sense, there will be no error of law. Where those words have been used to indicate a requirement that it is necessary to show a series of incidents or a course of conduct over time involving persecution, so that persecution will not be shown to exist if there is only an isolated incident, it will demonstrate an error of law on the part of the Tribunal'. This analysis was not disturbed on appeal to the High Court: *MIMA v Haji Ibrahim* (2000) 204 CLR 1.

⁵² *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [95].

⁵³ *MIMA v Haji Ibrahim* (2000) 204 CLR 1 at [99].

⁵⁴ *VSAI v MIMIA* [2004] FCA 1602 (Crennan J, 8 December 2004) at [53].

⁵⁵ *SZTEQ v MIBP* [2015] FCAFC 39 (Robertson, Griffiths and Mortimer JJ, 24 March 2015) at [72]. See also *SZTIB v MIBP* [2015] FCAFC 40 (Robertson, Griffiths and Mortimer JJ, 24 March 2015) and *BZAFM v MIBP* [2015] FCAFC 41 (Robertson, Griffiths and Mortimer JJ, 24 March 2015). Note that these comments are *obiter*.

random) conduct. While *Haji Ibrahim* predates the enactment of both s.91R and s.5J, it remains law insofar as the meaning of ‘systematic’ is concerned.⁵⁶ The term ‘systematic’ in ss.5J(4)(c)/91R(1)(c) should therefore be taken to mean ‘non-random’ in the sense of being deliberate, pre-meditated or intended. It is not necessary that conduct be regular, organised or methodical.

‘... and discriminatory’

It is well established that ‘persecution’ within the meaning of the Convention involves a discriminatory element. The reference to ‘discriminatory conduct’ in ss.5J(4)(c)/91R(1)(c) clearly reflects and incorporates this aspect of the judicially developed law. In *Applicant A v MIEA*, Brennan CJ stated:

... the feared persecution must be discriminatory. The victims are persons selected by reference to a criterion consisting of, or criteria including, one of the prescribed categories of discrimination (“race, religion, nationality, membership of a particular social group or political opinion”) mentioned in Art 1(A)(2).⁵⁷

In the same case, McHugh J said:

When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group. ...

Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group.⁵⁸

Courts have consistently held that the discriminatory element of persecution involves an element of motivation on the part of the persecutor. In the well-known passage in *Ram v MIEA*, cited with approval by the High Court and Federal Court on a number of occasions, Burchett J said:

Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.⁵⁹

Thus, the element of motivation is implicit in the idea of ‘persecution’ itself and is expressed in the phrase ‘for reasons of’ that appears in both the Convention and codified definitions of a refugee. Where the harm feared is not directed at the applicant, or a group to which the applicant belongs, for reasons of race, religion, nationality, membership of a particular social

⁵⁶ *VQAD v MIMIA* [2003] FMCA 481 (Scarlett FM, 16 October 2003) at [32]. See also *VSAI v MIMIA* [2004] FCA 1602 (Crennan J, 8 December 2004) at [53] and *SBWD v MIAC* [2007] FMCA 1156 (Lindsay FM, 20 July 2007) at [38].

⁵⁷ (1997) 190 CLR 225 at 233.

⁵⁸ *Applicant A v MIEA* (1997) 190 CLR 225 at 233 at 258. See also *MIMA v Respondent S152/2003* (2004) 222 CLR 1 at [73].

⁵⁹ (1995) 57 FCR 565 at 568.

group or political opinion, no ‘persecution’ is apparent for the purposes of the Convention or the Act.⁶⁰

Although persecution necessarily involves an element of motivation on the part of the persecutor, and will often be motivated by enmity,⁶¹ it is wrong to require an attitude of ‘enmity’ or ‘malignity’ before persecution can be made out.⁶² In *Chen Shi Hai v MIMA* the High Court agreed with both the trial judge⁶³ and the Full Federal Court⁶⁴ that antipathy, although commonly present, was not a necessary component of persecution. The joint judgment stated:

Persecution can proceed from reasons other than “enmity” and “malignity”. Indeed, from the perspective of those responsible for discriminatory treatment, it may result from the highest of motives, including an intention to benefit those who are its victims. And the same is true of conduct that amounts to persecution for a Convention reason.⁶⁵

Nevertheless, although it would be wrong to impose a requirement of ‘enmity and malignity’, there remains a need to show that the persecution is motivated by one or more of the five grounds.⁶⁶

OTHER ISSUES

Sections 5J(4) and 91R(1) of the Act address three specific aspects of persecution: the nexus between the harm and the reason for the harm, the level of harm, and the ‘systematic and discriminatory’ element. However, neither of these sections purport to address all aspects of the concept of persecution.⁶⁷ There are a number of related matters which may

⁶⁰ The expression ‘for reasons of’ is explored further in Chapter 5 of this Guide. Note, in particular, that under ss.5J(4)(a) and 91R(1)(a) of the Act the reason or reasons must be the ‘essential and significant’ reason or reasons for the persecution. For specific circumstances in which motivation is particularly relevant, refer to Chapter 11.

⁶¹ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 per McHugh J at [72].

⁶² *Chen Shi Hai v MIMA* (2000) 201 CLR 293 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [33]-[35], per Kirby J at [60]-[61]. While the words ‘enmity’ and ‘malignity’, or ‘hostility’, appear in some dictionary definitions of persecution (see for example the Oxford English Dictionary (2nd edition, 1989, vol 11), as cited by Gummow J in *Applicant A v MIEA* (1997) 190 CLR 225 at 284; also the Australian Concise Oxford Dictionary (Oxford University Press, 3rd edition, 1997), and the New Oxford Dictionary of English (Clarendon Press: Oxford, 1998), these notions have not been carried forward into some of the modern dictionaries (for example the Macquarie Dictionary (Macquarie Library, Revised 3rd edition, 2001)). Indeed, Kirby J, although acknowledging his own reliance on dictionaries in *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at 312, has cautioned against using dictionary definitions of the word ‘persecuted’ in the Convention definition: see *MIMA v Khawar* (2002) 210 CLR 1 at [108].

⁶³ *Chen Shi Hai by his next friend Chen Ren Bing v MIMA* (unreported, Federal Court of Australia, French J, 5 June 1998).

⁶⁴ *MIMA v Chen Shi Hai* (1999) 92 FCR 333.

⁶⁵ *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at [35], confirmed in *Applicant S v MIMA* (2004) 217 CLR 387 per Gleeson CJ, Gummow and Kirby JJ at [38]. See also *Chen Shi Hai* at [63] where Kirby J agreed with the primary judge that: ‘the attribution of subjective emotions such as “enmity” and “malignity” to governments and institutions accused of persecution “risks a fictitious personification of the abstract and the impersonal”. Some of the most fearsome persecutions of people on the grounds of race, sex, religion, sexuality and otherwise have been performed by people who considered that they were doing their victims a favour. Persecution is often banal.’

⁶⁶ See the Full Federal Court’s discussion of *Chen Shi Hai* in *MIMA v Khawar* (2000) 101 FCR 501 at [141] per Lindgren J, Mathews J agreeing, and at [26], [71] and [77] per Hill J. See also *Hagi Mohamed v MIMA* [2001] FCA 41 (Stone J, 5 February 2001) at [15].

⁶⁷ In *VBAS v MIMA* (2005) 141 FCR 435, Crennan J at [18] made it clear that s.91R does not replace the Convention test of ‘persecution’ with the statutory test, and that it remains necessary to establish a well-founded fear of ‘persecution’ within the meaning of Art 1A(2) of the Convention, and also to establish that such persecution involves (among other things) ‘serious harm’. Although in *VBAO v MIMA* (2006) 233 CLR 1 per Callinan and Heydon JJ at [27] it was stated that s.91R of the Act ‘defines “persecution” for the purposes of Australian law’, this did not appear to reflect consideration of the limits of what would constitute persecution. In *SZTEQ v MIBP* [2015] FCAFC 39 (Robertson, Griffiths and Mortimer JJ, 24 March 2015) at [53], the Full Federal Court confirmed that s.91R(1) is not a statutory definition, but a prescription of attributes which the treatment or conduct a person claims to fear must have. Similarly, whereas the meaning of ‘well-founded fear of

arise for consideration. These include the involvement of the state - whether in inflicting harm, punishing an applicant under its laws, or providing or withholding protection from harm - and the potential for a number of 'lesser' types of harm to amount to persecution when considered together. As discussed below, judicial elucidation of these aspects of the concept of persecution as developed under the Convention remains relevant and helpful.

Agents of persecution

The agent of persecution is traditionally the state or an agent of the state. However, the state need not itself be the agent of harm. This is the case under both the Convention definition of refugee and the statutory definition in the Act.

The High Court has confirmed that 'although the paradigm case of persecution contemplated by the Convention is persecution by the state or agents of the state, it is accepted in Australia, and in a number of other jurisdictions, that the serious harm involved in what is found to be persecution may be inflicted by persons who are not agents of the state'.⁶⁸

Depending upon the circumstances, it may be enough under the Convention that the state has failed or is unable to provide effective protection from persecution.⁶⁹

However, persecution by private individuals or groups does not bring a person within the Convention unless the state either encourages or is or appears to be powerless to prevent that private persecution. In *Applicant A v MIEA*, the High Court stated:

A person ordinarily looks to "the country of his nationality" for protection of his fundamental rights and freedoms but, if "a well-founded fear of being persecuted" makes a person "unwilling to avail himself of the protection of [the country of his nationality]", that fear must be a fear of persecution by the country of the putative refugee's nationality or persecution which that country is unable or unwilling to prevent.... Thus the definition of "refugee" must be speaking of a fear of persecution that is official, or officially tolerated or uncontrollable by the authorities of the country of the refugee's nationality.⁷⁰

The Convention is primarily concerned to protect those racial, religious, national, political and social groups who are singled out and persecuted by or with the tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return. Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or is 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.⁷¹

A majority of the High Court has held that the willingness and ability of the state to protect its citizens may be relevant to whether the conduct giving rise to the fear amounts to

persecution' is set out in s.5J of the Act for the purpose of the definition in s.5H, the terms of s.5J do not purport to exhaustively define the term 'persecution'. See also *SZTIB v MIBP* [2015] FCAFC 40 (Robertson, Griffiths and Mortimer JJ, 24 March 2015) and *BZAFM v MIBP* [2015] FCAFC 41 (Robertson, Griffiths and Mortimer JJ, 24 March 2015).

⁶⁸ *MIMA v Respondent S152/2003* (2004) 222 CLR 1 at [18] per Gleeson CJ, Hayne and Heydon JJ, following *MIMA v Khawar* (2002) 210 CLR 1. See also McHugh J in *Respondent S152* at [75] and Kirby J at [116].

⁶⁹ *Chan v MIEA* (1989) 169 CLR 379 per McHugh J at 430.

⁷⁰ *Applicant A v MIEA* (1997) 190 CLR 225 at 233, per Brennan CJ, referred to with approval in *MIMA v Respondent S152/2003* (2004) 222 CLR 1 at [19].

⁷¹ *Applicant A v MIEA* (1997) 190 CLR 225 at 257-8 per McHugh J. Note that in *MIMA v Khawar* (2002) 210 CLR 1, Gleeson CJ and Kirby J adopted a broadly similar view. However, Gummow and McHugh JJ appear to suggest a slightly different view on this issue.

persecution for the purposes of the Convention.⁷² In *MIMA v Respondent S152/2003*, Gleeson CJ, Hayne and Heydon JJ cited with approval the House of Lords decision of *Horvath v Secretary of State for the Home Department*,⁷³ where a majority found that the adequate level of state protection available to the applicant meant that the harm feared did not amount to persecution.⁷⁴

Thus, under the Convention, although the agent of persecution need not be the state, the persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality.

The refugee definition in s.5H of the Act similarly does not restrict the concept of 'persecution' to conduct carried out by state agents. It is, however, subject to qualifications regarding the availability of protection, as discussed in Chapter 8 of this Guide.

Laws and law enforcement

In certain circumstances, state persecution may take the form of enforcement of laws. This may occur, for example, if the law in question is discriminatory or is applied in a discriminatory way towards a person or a group of persons for a refugee reason. Under the Convention, it is well-established that whether or not the discriminatory treatment constitutes 'persecution' depends on whether the treatment is appropriate and adapted to achieving some legitimate object of the country concerned.⁷⁵ A legitimate object will ordinarily be an object that needs to be pursued in order to protect or promote the general welfare of the state and its citizens. As such, a law or its purported enforcement will be persecutory if its real object is not the protection of the state but the oppression of the members of a race, religion, nationality etc. For a more detailed discussion of these issues see Chapter 11 of this Guide.

This concept was developed in consideration of the refugee definition in Article 1A(2) of the Convention but also appears applicable to the concept of 'persecution' in ss.5H(1) and 5J of the Act. The Explanatory Memorandum to the Bill which introduced those sections does not suggest an intention to displace the principle, and the Department of Home Affairs' 'PAM3:

⁷² *MIMA v Respondent S152/2003* (2004) 222 CLR 1 at [21]-[23]. The availability and efficacy of State protection can also be a relevant question in establishing whether an applicant has a well-founded fear of persecution.

⁷³ [2001] 1 AC 489.

⁷⁴ *MIMA v Respondent 152/2003* (2004) 222 CLR 1 at [21]. The Court at [20] made it clear that this should not be confused with the distinct question of whether the claimant is unable or unwilling to avail himself of State protection. Justice McHugh at [64] disapproved of *Horvath*, finding that it does not represent the law in Australia. His Honour also disagreed with the reasoning of Gleeson CJ, Hayne and Heydon JJ, concluding at [65] that the absence of State protection is not relevant to whether the conduct amounts to persecution. On State protection generally, see Chapter 8 of this Guide.

⁷⁵ *Applicant A v MIEA* (1997) 190 CLR 225, at 258 per McHugh J; *Chen Shi Hai v MIMA* (2000) 201 CLR 293 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [28]; *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 per McHugh and Kirby JJ at [45]. In *Applicant S v MIMA* (2004) 217 CLR 387, Gleeson CJ, with Gummow and Kirby JJ held that as a matter of law to be applied in Australia, these criteria are to be taken as settled.

Refugee and Humanitarian – Refugee Law Guidelines’ clearly indicate the Department’s view that these principles continue to apply in the context of assessing s.5J(4)(a) and (c).⁷⁶

Discriminatory failure of state protection as persecution

Failure of state protection can also, in some circumstances, constitute persecution within the meaning of the Convention, where such failure is itself for a Convention reason.

The question of whether an applicant has been persecuted by reason of a failure of state protection for a Convention reason has frequently arisen in the context of women fleeing domestic violence from their husbands, but is equally relevant where harm occurs in the context of other personal relationships. In many cases, the initial harm does not appear to be Convention related because it is solely connected to or motivated by the personal relationship. However, if the state is aware of the harm and does not act to prevent it or protect the victim, an issue can arise as to whether this failure on the part of the state of itself constitutes persecution for a Convention reason.⁷⁷

This principle arose in the context of the Convention definition, but is also relevant to s.5H(1). While s.5J(2) of the Act provides that a person does not have a well-founded fear of persecution if certain effective protection measures, set out in s.5LA, are available, a discriminatory failure of state protection may not meet the necessary protection threshold.

Importantly, for both definitions, ss.5J(4)(c) and 91R(1)(c) refer to systematic and discriminatory **conduct**. Mere inaction would not suffice - however *discriminatory* inaction would not amount to mere inaction. This is also the position under the Convention as interpreted by Australian Courts.⁷⁸

⁷⁶ Department of Home Affairs, PAM3 – ‘Refugee and Humanitarian – Refugee Law Guidelines’, section 11.6, as re-issued 1 July 2017. Note that Ministerial Direction No. 56, made under s.499 of the Act, requires the Tribunal to have regard to those Guidelines, where relevant (for further discussion, see Chapter 12 of this Guide).

⁷⁷ Whether the issue of discriminatory failure of state protection arises for consideration will depend upon the circumstances of the case and the claims advanced by the applicant. For example, in *DZAAZ v MIAC* [2012] FMCA 39 (Brown FM, 25 January 2012) at [122]-[129] the Court found that the applicant had claimed only that the authorities were inept and unable to protect him, and had not squarely raised the issue of the absence or otherwise of state protection for any Convention reason, and accordingly there was no error in the Reviewer failing to consider whether there was any Convention nexus arising from a failure of state protection (upheld on appeal: *DZAAZ v MIAC* [2012] FCA 1128 (Dowsett J, 18 October 2012) although this point was not considered on appeal). A similar finding was made in *MZYOS v MIAC* [2012] FMCA 422 (O’Dwyer FM, 23 May 2012) at [60]. However, contrast *SZQLV v MIAC* [2012] FMCA 337 (Barnes FM, 24 April 2012) at [77]-[87] where the Court found that the applicant’s claims and submissions and the facts accepted by the Reviewer sufficiently raised the issue that the Iraqi state may condone or tolerate the persecution that he feared from his relatives, such as to oblige the Reviewer to deal with the issue of whether the Iraqi state would do so for a Convention reason. Similarly, in *MZYLR v MIAC* [2011] FMCA 633 (Riley FM, 14 September 2011) the Reviewer rejected that the claimant would need protection from the state for the reasons he claimed, but in the process of doing so, made findings that the roads around the town in which the applicant lived were prone to robbery and violence. The Court held at [33]-[34] and [37] that as the applicant had expressly claimed that he would be denied police protection because of his ethnicity and religion, the Reviewer’s own findings provided a factual substratum (the risk of violence) which required consideration of that claim.

⁷⁸ See *MIMA v Khawar* (2000) 101 FCR 501 at [10], [129]. At [10] Hill J stated that ‘Persecution involves the doing of a deliberate act, rather than inaction. The decision of the High Court in *Chen Shi Hai v MIMA* (2000) 201 CLR 293 might, at first blush, suggest otherwise in that, the persecution held to exist consisted of the denial by the State of access to food, education and health beyond a basic level. Denial of basic human needs is, however, positive inaction, not inaction. State complicity in the ill-treatment may likewise be distinguished from mere inertia’. In *MIMA v Khawar* (2002) 210 CLR 1, Gleeson CJ stated that conduct may include inaction. However, this will depend upon the circumstances and whether there is a duty to act. See below for further discussion of this issue.

The leading case on this point is *MIMA v Khawar*.⁷⁹ The claimant in that case claimed a fear of persecution from her abusive husband and members of her husband's family, and that police refusal to enforce the law against such violence or otherwise offer her protection was part of systematic discrimination against women which was both tolerated and sanctioned by the state. The Full Federal Court upheld Branson J's view at first instance,⁸⁰ that the refusal or failure of state law-enforcement officers to take steps to protect members of a particular social group from violence was itself capable of amounting to persecution within the meaning of the Convention.⁸¹

The High Court upheld the Full Federal Court decision, confirming that the Convention test may be satisfied by the selective and discriminatory withholding of state protection for a Convention reason from serious harm that is not Convention related.⁸² The judgments provide somewhat different analyses of the interrelated concepts of persecution and state protection.

The Chief Justice was of the view that persecution *may* result from the combined effect of the criminal conduct of private individuals and the state or its agents; and that a relevant form of state conduct may be tolerance or condonation of the inflicting of serious harm in circumstances where the state has a duty to provide protection against such harm.⁸³ According to his Honour:

I do not see why persecution may not be a term aptly used to describe the combined effect of conduct of two or more agents; or why conduct may not, in certain circumstances, include inaction.

Whether a failure to act amounts to conduct depends upon whether there is a duty to act. It depends upon the circumstances; and a relevant circumstance might be what would ordinarily be expected, or whether the person who remains silent has a legal or moral duty to speak. Similarly, the legal quality of inaction in the face of violence displayed by one person towards another might depend on whether there is a duty to intervene.⁸⁴

His Honour considered that it would not be sufficient to show maladministration, incompetence, or ineptitude, by the local police, but if an applicant could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then persecution may be made out.⁸⁵

According to Kirby J persecution *necessarily* involves two distinct elements: serious harm and a failure on the part of the state to afford adequate protection. Adopting the formula 'Persecution = Serious Harm + The Failure of State Protection',⁸⁶ his Honour concluded that

⁷⁹ (2002) 210 CLR 1.

⁸⁰ *Khawar v MIMA* [1999] FCA 1529 (Branson J, 5 November 1999).

⁸¹ (2000) 101 FCR 501 per Hill J at [10], [76], and per Mathews and Lindgren JJ at [121], [123]-[124], [160]. Although Hill J dissented in the outcome, his views on the issue of State complicity were not in conflict with majority.

⁸² *MIMA v Khawar* (2002) 210 CLR 1, per Gleeson CJ, McHugh, Gummow and Kirby JJ with Callinan J dissenting.

⁸³ *MIMA v Khawar* (2002) 210 CLR 1 at [30] per Gleeson CJ.

⁸⁴ *MIMA v Khawar* (2002) 210 CLR 1 at [28] per Gleeson CJ.

⁸⁵ *MIMA v Khawar* (2002) 210 CLR 1 at [26] per Gleeson CJ. See also *MIAC v SZONJ* (2011) 194 FCR 1 at [31]-[32] where the Court reiterated that, in the context of whether a Convention nexus has been established, it must be shown that the failure on the part of the state or state agents to prevent the relevant conduct is the result of toleration or condonation, not simply inability to prevent it.

⁸⁶ *MIMA v Khawar* (2002) 210 CLR 1 at [118] per Kirby J, referring to *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 per Lord Hoffmann at 653 and *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 per Lord

persecution is a construct of the two separate but essential elements of serious harm and failure of protection.⁸⁷

Essentially, Gleeson CJ and Kirby J held that where the persecution consists of the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the Convention nexus is satisfied either by the motivation of the criminals or the state.⁸⁸

By contrast, McHugh and Gummow JJ identified the persecution in question as the discriminatory inactivity of state authorities in not responding to the violence of non-state actors.⁸⁹ Their Honours held that it would be an error to inject the notion of internal protection into the ‘well-founded fear of persecution’ element of Article 1A(2).⁹⁰ On this analysis, the persecutory harm was constituted solely by the selective denial of a fundamental right otherwise enjoyed by nationals, namely access to law enforcement authorities to secure a measure of protection against violence to the person. It was related to, but not constituted by, the violence.⁹¹ Their Honours emphasised that the reason for the persecution must be found in one or more of the five Convention attributes. Thus, it would not be sufficient that the reason for a systemic failure of enforcement of the criminal law lay in the shortage of resources by law enforcement authorities.⁹²

Although the judgments differ, the result will probably be the same in a context such as that in *Khawar* where the conduct of the private individuals was found to be criminal in nature and unrelated to any of the five Convention, or equivalent statutory, grounds. On each analysis, regardless of how the ‘persecution’ is categorised, the critical issue in these circumstances will be whether the conduct of the state in withholding protection was selective and discriminatory. A mere inability to prevent persecution is insufficient to establish the required nexus.⁹³

Clyde at 515-516.

⁸⁷ *MIMA v Khawar* (2002) 210 CLR 1 at [120], agreeing with *Refugee Appeal No 71427/99*, NZ Refugee Status Appeals Authority, 16 August 2000 at [112]. Justice Kirby referred to this formula again in *MIMA v Respondent S152/2003* (2004) 222 CLR 1 at [100]. His Honour stated that while the test may reflect an oversimplified approach, it is consistent with the theory of ‘persecution’ espoused under the ‘protection theory’. See further discussion of the ‘protection theory’ in Chapter 8.

⁸⁸ *MIMA v Khawar* (2002) 210 CLR 1 at [120] per Kirby J, and at [31] per Gleeson CJ. As to the level of protection which victims are entitled to expect, in *MIMA v Respondent S152/2004* (2004) 222 CLR 1 at [26]–[28], Gleeson CJ, Hayne and Heydon JJ held that citizens are entitled to expect a level of protection expected to be accorded by international standards, including an appropriate criminal law and a reasonably effective and impartial police force and justice system.

⁸⁹ *MIMA v Khawar* (2002) 210 CLR 1 at [84]–[87].

⁹⁰ *MIMA v Khawar* (2002) 210 CLR 1 at [66]. The High Court in *MIMA v Respondent S152/2004* (2004) 222 CLR 1 at [19], [63], [109] confirmed that ‘protection’ in Article 1A(2) refers to external protection. For further discussion of this issue see Chapter 8.

⁹¹ *MIMA v Khawar* (2002) 210 CLR 1 at [76], [84]–[85], [87] per McHugh and Gummow JJ. The reference to “denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned” is to *Chan v MIEA* (1989) 169 CLR 379 at 388 per Mason CJ; see also at 431, per McHugh J.

⁹² *MIMA v Khawar* (2002) 210 CLR 1 at [84], per McHugh and Gummow JJ. Similarly, in his dissenting judgment, Callinan J at [155] held that for persecution to have occurred there needed to be elements of deliberation and intention on the part of the State which involve, at the very least, a decision not to intervene or act. The distinction between inability or ineptitude and the discriminatory withholding of protection was also highlighted by the Full Federal Court in *MIAC v SZONJ* (2011) 194 FCR 1 at [31]–[32]. See also *DZAAZ v MIAC* [2012] FMCA 39 (Brown FM, 25 January 2012) at [122]–[129] (upheld on appeal: *DZAAZ v MIAC* [2012] FCA 1128 (Dowsett J, 18 October 2012), although this point was not considered on appeal).

⁹³ *MIAC v SZONJ* (2011) 194 FCR 1 at [31]–[34].

The indirect role of the state in otherwise indiscriminate harm has also been considered in a series of cases involving the mistreatment in detention of Tamils legitimately detained under state security measures aimed at combating terrorism in Sri Lanka.⁹⁴ In those matters the Tribunal had found that although Tamils were detained for a Convention reason (such as their Tamil ethnicity), the torture and other mistreatment in detention was a result of 'indiscriminate cruelty'. In each case the Court held that the Tribunal's approach was legally incorrect. The leading case on this issue is *Paramanathan v MIMA*,⁹⁵ which is conveniently summarised in *Nagaratnam v MIMA*, where Lee and Katz JJ (Moore J agreeing) held that:

When, in accordance with some law or government policy, persons are selected for detention upon a ground which equates to one of the Convention reasons, the act of detaining such persons may or may not amount to persecution for a Convention reason, depending upon the circumstances in which the law or government policy is being implemented. It may be implemented, for instance, in circumstances of war, whether foreign or domestic. If so and the criterion of selection of persons for detention is seen as appropriate and adapted to the successful prosecution of that war, then the act of detention will not be persecution for a Convention reason. However, when those who detain such persons in accordance with such law or government policy are aware that the probable consequence of such detention will be the physical mistreatment of those detained, even though those detained will not be selected for such physical mistreatment by those who administer that physical mistreatment upon a ground which equates to one of the Convention reasons and even though those selecting the detainees are unwilling that such physical mistreatment should occur, then those who detain such persons will be taken to have caused such physical mistreatment.

As such persons have been selected for detention upon a ground which equates to one of the Convention reasons, the act of detaining such persons will amount to persecution for a Convention reason.⁹⁶

It is apparent from this line of cases that it is not necessary to show a *direct* causal connection between physical mistreatment and a discriminatory reason: it may be sufficient to show that persons are selected for detention for one of the five Convention / statutory reasons, and those who detain such persons are aware that the probable consequence of detention will be physical mistreatment of those detained.

Persecution on cumulative grounds

An assessment of refugee status requires the decision maker to have regard to the totality of the circumstances. For example, the cumulative effect of a number of 'lesser' harms, which of themselves do not constitute persecution, may lead to the conclusion that the combined effect of the harm is sufficiently serious to constitute persecution.⁹⁷

The Revised Explanatory Memorandum to s.91R(1)(b) and (2) expressly recognises this possibility where it is stated:

⁹⁴ See *Paramanathan v MIMA* (1998) 94 FCR 28; *Perampalam v MIMA* (1999) 84 FCR 274; *Nagaratnam v MIMA* (1999) 84 FCR 569.

⁹⁵ (1998) 94 FCR 28.

⁹⁶ *Nagaratnam v MIMA* (1999) 84 FCR 569 at 579.

⁹⁷ For example, in *S1891 of 2003 v MIMA* [2005] FMCA 1069 (Smith FM, 20 July 2005), the Tribunal accepted that a 59 year old housewife had lived in a home environment where the neighbourhood local shop was regularly looted, the local Hindu temple and local homes were stoned, and people of the applicant's community were afraid to go out. The Court held that upon those factual findings, one would expect a consideration of whether the applicant living in this condition of insecurity resulting from racially based harassment was encountering an affront to human dignity which she could not be expected to tolerate and return to: at [30]-[31].

... serious harm can arise from a series or number of acts which, when taken cumulatively, amount to serious harm of the individual.⁹⁸

The cumulative effect of multiple harms becomes critical where the decision maker finds that an applicant will be subject to harm but each form of harm, taken alone, is not sufficiently severe to amount to persecution. The decision maker may then need to consider whether the combined effect of each of the harms will amount to persecution (though different forms of discriminatory or prejudicial conduct will not necessarily have a cumulative effect⁹⁹). In an assessment of persecution on cumulative grounds, the decision-maker must consider whether each of the harms feared is directed at the applicant for one or more of the five grounds; and secondly, whether the combined and sustained effect of the harm *so directed*, amounts to 'serious harm'.¹⁰⁰ These considerations are equally relevant to the refugee definition in the Convention and that in the Act.

⁹⁸ Explanatory Memorandum to Migration Legislation Amendment Bill (No.6) 2001, at [25].

⁹⁹ In *BZADW v MIBP* [2014] FCA 541 (Dowsett J, 26 May 2014) the Court observed in obiter that the effects of mild discrimination in employment cannot necessarily be combined with the effects of mild limitations on political expression to produce a combined result which can be recognized as serious or significant harm: at [31].

¹⁰⁰ For example, in *SCAT v MIMIA* [2003] FCAFC 80 (Madgwick, Gyles and Conti JJ, 30 April 2003) at [23], [25] a majority of the Full Federal Court held that a claim of considerable discrimination including highly offensive treatment was apparent and the Tribunal had a legal duty to consider it, including whether cumulatively such treatment might produce serious psychological harm. In *SBAU v MIMIA* [2002] FCA 1076 (Mansfield J, 13 September 2002) at [56] it was held that the Tribunal overlooked or understated many claims of general discrimination or persecution in reaching the conclusion that the discrimination suffered did not amount to persecution.