

# AFFECTIVE DISPLACEMENTS

## Understanding emotions and sexualities in refugee law

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*How do you deal with things you believe, live them not as theory, not even as emotion, but right on the line of action and effect and change?*

Audre Lorde, *Sister Outsider*

Determining what counts as sexuality and persecution within the terms of international refugee law is fraught with challenges. Many decisions that seek to discern if a refugee was or was not homosexual, rely on discourses of sexuality that privilege the authentic from the inauthentic (ie the 'confused' or 'experimental' sexual experience from the 'genuine' sexual identity). What these analytic and moralising terms gesture to is that some sexual orientations are more valid than others. Using international jurisprudence commenting on the *Convention Relating to the Status of Refugees 1951* (UN) ('*Refugee Convention 1951*')<sup>1</sup> and subsequent interpretations of this Convention in administrative law in Australia, it is clear that the policy and legal structure seeks to codify the 'refugee' in the terms of a discrete persecuted characteristic. Authenticating refugees on the basis of sexuality relies on a causal narrative — suturing stereotypes of 'functioning' sexuality to incidents of persecution. Emotion, desire and feeling are obscured by a largely ethnocentric administrative method of verification, a narrative process which produces a caricatured, stereotyped and overdetermined legal trope of the gay or lesbian asylum seeker. Refugee voices become mute within the colonising space in which they seek asylum. Such an approach raises broader questions as to why the law continues to construe identity and experience within objectifying representations of legitimate sexual practices or violent experiences. While the 'queer refugee' has no currency in international law, I use it as an analytic term to encompass individuals who experience persecution framed in terms of their (perceived) 'queerness'. Queerness as it relates to refugees is not confined to a particular sexual identity or identification, but rather articulates sexual and cultural difference(s). It is a discursive and affective subject position which emerges through how a refugee experiences and negotiates their sexual attachments, persecution, displacement and intimate practices. Focusing on spatial and embodied difference(s), rather than a quest for universal (fixed) identity, this article considers legal representations in a relational context, alongside experiences of emotion, to frame sexuality and persecution in heterogeneous ways.

### Locating the queer refugee subject in law

To claim valid refugee status, a prospective applicant must demonstrate persecution on the basis of a protected characteristic. Under art 1A(2) of the *Refugee Convention 1951* there are no categories for persecution on the basis of sexuality. In order to seek asylum, individuals need to claim refugee status under a 'well founded fear of persecution' based on ethnicity, nationality, religion, particular social group or political opinion.<sup>2</sup> In Australian law, sexuality, or specifically 'homosexuality', has been protected under the category of 'particular social group'.<sup>3</sup> These definitions have been incorporated into Australian law under the *Migration Act 1958* (Cth). *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) ('*Chan*') establishes the two-tiered test for such a determination: a subjective characterisation of 'fear' and whether such fear has an objective reality so to be understood as 'well founded'.<sup>4</sup> Justice Toohey explicates in *Chan* that 'well founded' is defined as a 'real chance' of harm which is not remote or insubstantial.<sup>5</sup> Moreover, asylum seekers must be unwilling or unable to seek protection from their country of origin due to those fears.

To situate some of the broader theoretical difficulties in defining the queer refugee, it is important to consider the current scope of refugee legal scholarship. Connecting sexuality and refugee subject positions in the law is an emerging area of jurisprudence. Historically, the legal system (particularly in criminal law) has approached the homosexual body as a threat to the impermeable and bounded structure of (male) bodily integrity.<sup>6</sup> Legal theorist Ngaire Naffine adds that the homosexual male body is both 'liminal and dangerous': the act of penetration and the pleasure engendered from it undermine the assumption that (male) bodies are discrete and closed surfaces.<sup>7</sup> While Ben Golder's analysis concentrates on the criminal justice formulations of the 'homosexual advance defence', his argument is illustrative of the way sexuality is understood in the law through tropes of agency, penetration and invasion.

Refugee subjects, however, occupy a distinctly different position in the law. Rather than framed as threatening, the genuine refugee is a perpetual victim, displaced from a violent (typically non-Western) country in need of protection by liberal democracies. Unlike the discursive position of the aggressive homosexual, the refugee subject in the law is rendered in sympathetic and vulnerable terms, as former Minister for

### REFERENCES

1. *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 ('UNTS') 150 (entered into force 22 April 1954).
2. Article 1(a), *Refugee Convention 1951*.
3. *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401.
4. *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.
5. *Ibid* 407.
6. Ben Golder, 'The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform' (2004) 11(1) *E Law: Murdoch University Electronic Journal of Law* 1, 5.

Immigration Philip Ruddock termed 'those in need', whom we have obligations to protect.<sup>8</sup> There is a troubling disjunction in how the law constructs the queer body and the refugee body differently, which manifests in paradoxical terms in Refugee Review Tribunal ('RRT') decisions.

### Emotional (re)orientations

The critical jurisprudence outlined above raises a number of broader discursive questions when attempting to represent the subject position of a queer refugee in a set of parochial legal narratives that have divergent understandings of homosexuality and refugee status. To understand how diasporic movement, experience and space reshape sexual subjectivity gestures we must go beyond discursive accounts. Refugee law acknowledges this by placing emotion as a legal requirement for granting asylum. A 'well-founded fear' of persecution must be established in order to be granted asylum under the *Refugee Convention 1951*. Negotiating affect in the law, however, is complex. Extending the postcolonial analytic, this article examines the uses of emotion as a focal point for thinking about incommensurable and 'moving' bodies. Nicola Lacey identifies the problematic of affect as central to debates in feminist jurisprudence: affect in the law is ambivalently positioned between offering constant critique and identifying a subject position to assert a rights claim.<sup>9</sup> In exploring this tension further in refugee law, it is necessary to explore the relationship between space, movement, consumption and the 'particular social group' definition in refugee law.

Framing Lacey's problematic in the context of asylum law, there is greater possibility for thinking about how diasporic desire, sexuality and violence can be experienced in different social locations. In the following RRT case, *1000152* (2010), the applicant from Lebanon recounts his desire to lead an 'open gay lifestyle', however, this is met with some social difficulties:

As to whether he had been anywhere in Australia where homosexual men, whether Arabic-speakers or not, socialised, he said that he had gone 2–3 times to Place E but nowhere else. He said he was not used to the atmosphere there.<sup>10</sup>

Moreover, the applicant notes:

As to whether he had had any contact with homosexual men in Australia, he said he had not met anybody. He added that 'I don't like the system here — the way they dress'.<sup>11</sup>

While the asylum seeker in this case comfortably articulates a desire to be free from persecution, it does not necessarily follow that living as a 'gay man' is without problems. As the applicant notes, despite frequenting a particular social venue, as he was 'not used to the atmosphere', his social and sexual agency is limited. However, the applicant also demonstrates his own erotic agency by refusing to engage in sexual or intimate relationships with men in Australia. Identifying queer sexual culture in Australia as a peculiar sartorial 'system', he distances himself from it. Desires are both articulated (in the case of living an 'open' life) and fractured (in his lack of sexual desire for the men and his inability to engage in the available

social 'atmosphere'). Using this asylum seeker's narrative, we can trace the complex movement of sexual attachment in Australia and discern the plurality of sexual orientation.

Queerness, as an orientation, is malleable. In exploring the complex spatial and historical transformations of sexual subjectivity, consider the following RRT response in case of the Lebanese applicant's claims:

Indeed the applicant's oral evidence to the Tribunal was that he had had no relationship with anyone who shared his sexual orientation since he left school — a period of over 20 years, spanning his entire adult life to date — either in Lebanon or in Australia. He does not claim ever to have spoken to a homosexual since then. He asks the Tribunal to accept that this was because he was, as he has said, a 'closet gay'. In my view this is implausible, and is far more consistent with his being heterosexual.<sup>12</sup>

The applicant also adds,

I tried to fight this inside of me. I was trying to change myself. I asked myself why I was different to everyone.<sup>13</sup>

Lack of intimate contact (with those of 'shared sexual orientation') for over 20 years in this testimony is understood as making him 'more consistent with ... being heterosexual'. The (sexual) history of the body is made relevant and the lack of social relations in public (or private) space refuses the 'plausibility' of his 'homosexual' orientation. However, as Sara Ahmed reminds us, spatial orientations, defined as relations of proximity and distance, are affected by other positions such as race, gender and class.<sup>14</sup> While dismissive of the 'closet' and the way sexual shame limits bodily/sexual mobility, the tribunal situates non-heterosexual bodies as capable of extending in social space the same way as heterosexuals. In this particular case, the applicant situates his desire as something 'different' and attempts to 'fight this' in order to 'change' and to fit in 'line' with the assumed heterosexual others (implied in the reference to 'everyone'). By becoming a queer object, being effected by the bodily extension 'everyone' else, the applicant loses his sense of bodily privilege or integrity in space.

However, the reasoning in this case problematically concentrates on sexual practices as the sole basis of determining sexuality. The RRT imply that the applicant's history is 'consistent' with being heterosexual because he lacks (deviant) sexual experiences with other 'homosexuals' who 'shared his sexual orientation'. History and space only become relevant where it can be quantified or rendered public as deviations to a 'normal' (invisible) heterosexual orientation. Emotion, in this case, anxiety over one's desire, is crucial to the formation of particular identities. Ahmed's argument applies to the way in which pain or injury is transformed into a fetish identity. That is, the perceived pain or suffering is removed from its history of production, and commodified into a discrete entity with no spatial or temporal character.<sup>15</sup> In producing this paradox of sexual (in)visibility, the management of sexual visibility in a heterosexual space: passing renders the queer refugee subject as

7. Ibid.

8. Jane Stratton and Siobhan McCann, 'Staring into the Abyss — Confronting the absence of decency in Australian refugee law and policy development' (2002) 8(1) *Australian Journal of Human Rights* 141, 157.

9. Nicola Lacey, *Unspeaking Subjects: Feminist Essays in Legal and Social Theory* (1998) 168.

10. 1000152 (2010) RRTA 223 (19 March 2010) at 57.

11. Ibid 54.

12. Ibid 81.

13. Ibid 49.

14. Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (2006) 12.

15. Ibid 32.

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inauthentic, and to the RRT is considered indicative of probable heterosexuality.

Examining neo-liberal ideas of consumption further, refugee bodies are produced as discrete objects in an administrative and judicial process of determining persecution. Commodities become both the transformation of labour and the form of that labour. In the context of queer refugee narratives, this transformation of labour is reflected in the 'scripting' of testimony where applicants are forced to account for their experiences within a mould of a colonising or stereotypical conception of sexual identity. Specifically, this is constructed as the active participation in sexual publics. The narrative of genuine sexuality for the RRT relies on forms of consumption, such as visible (read: 'out') presence in a 'scene' or community. In the case of 0907630 (2010), an Indian asylum seeker elaborates how his sexuality is not commensurate with going to clubs or consuming pop culture:

The DIAC delegate stated in the decision record that I had very limited knowledge of and no interaction with the gay subculture in India and that she was not satisfied that I am a homosexual. In India, I was too afraid of seeking out the gay subculture. I had already been threatened and harassed and did not want to place my life in any more danger. I was not even aware that there was a gay subculture as it is not widely advertised. There were no gay publications such as magazines and books available in newsagents where I lived, that I could just buy and find out about gay events. Just because I did not try to engage in that culture does not mean that I am not homosexual.<sup>16</sup>

Knowledge of sexual cultures is crucial to the authenticity of this claim. In situating the queer refugee body in a particular national location, the Department of Immigration and Citizenship ('DIAC') decision-maker generates the notion of a 'gay subculture'. Without specifying the parameters of what this means, the applicant is refused credibility because of his lack of 'interaction' with it. Placing the body in a space of subculture, the history of the body, its arrival in a space, is erased. It does not matter how the body occupies this space.<sup>17</sup> Rather, it is the mere presence of the body that makes it valuable (as a source of sexual authenticity). While the vague presumption of a 'subculture' fails to consider the way sexualities are negotiated in non-consumer or public zones, it also assumes bodies are capable of universal access to these zones. As the applicant points out in his statement, such a culture, if existing, 'is not widely advertised'. He notes that 'there were no gay publications' in his home to negotiate those kinds of interactions. By producing

the queer refugee as a static object that must be connected to particular kinds of public social space, the cultural differences between disparate sexual identities are fetishised or erased.

The way questions of public consumption or 'scene' participation preoccupies the legal reasoning of the decision-maker, reflects the orientation of the RRT to a discourse of sexuality that privileges both whiteness and the middle class. Relations of power, including whether one is 'public' about one's sexuality, are closely tied to economic structures and the organisation of labour. Queer subjects in asylum law are, however, understood as 'equal' insofar as they are understood to have equitable access to representing their desires, regardless of their socio-economic background. Asylum seekers are understood by the RRT in terms of how they take up space in places of consumption. Questions range from the purchase of publications to participation in a club scene. While whiteness brings certain objects into reach, failing to understand the cultural and historically distinct position (and history) of non-white bodies, the RRT expects sexuality to be a codified property, reproduced in public institutions. By rendering public 'interactions' (read: consumption) in terms of clubbing, gay media or social networking, these habits of questioning shape the legal discourse as one which equates sexuality with consumer capital. If a queer body is not a habitual clubber or consumer, it risks expulsion from a legal and administrative system which has made consumption habitual to authentic (homo)sexual identities.

In tribunal testimony, accounting for violence is disrupted by experiences of disassociation and trauma. Shame, pain or trauma has a corrosive effect on narratives, often distancing the experience from the cognitive grasp of the subject.<sup>18</sup> Feeling, rather than symptomatic of a particular experience, becomes a way of constructing or knowing it. These points become clearer in the case of N02/42894 (2003), where a Lithuanian female asylum seeker discusses the concept of 'lesbian' sexuality through a negotiation of physical and emotional pain:

As the eldest child in my family I was brought up with my father being a severe alcoholic. My household was subjected to constant abuse. I was constantly beaten by him. At the age of [age deleted] I was raped and [details deleted]... This event placed scars on me and psychiatrists worked to restore my mental health. From this horrific past I became fearful of Lithuanian men. Girls at the age of 16 begin to go to dances but I was never driven by the male species[,] as I was a lesbian. I got involved with a girlfriend.<sup>19</sup>

16. 0907630 (2010) RRTA 133 (29 January 2010) at 37.

17. Ahmed, above n 14, 42.

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

19. N02/42894 (2003) RRTA 1093 (14 November 2003) at 5.

In this account, the asylum seeker connects an experience of sexual violence with an orientation that 'moves away' from men. In placing the violence within a domestic space of repeated abuse and rape, the asylum seeker articulates the pain in physical and emotional terms: 'constantly beaten by him ... event placed scars on me ... [and] my mental health'. There is a link between this and sexual orientation: 'I became fearful of Lithuanian men ... and I was never driven by the male species'. Braidotti and Ahmed's arguments disrupt the notion of a fixed ontological (atomistic) subject that 'moves' and experiences emotion. Not only does the emotional rhetoric of fear and pain shape sexual desire, it is a source of movement in space (evident in the reference to 'driven'), not simply a fixed identity. Locating this within a (heterosexual) social space of a dance, the asylum seeker distinguishes her desire from that of other 'girls at the age of 16'. Lauren Berlant problematises the rhetoric and discourse utilised by political (or in this case legal) systems that suggest feeling is an 'authentic' bodily experience, which presupposes an ontological and fixed subject.<sup>20</sup> In this particular case, the applicant frames sexual orientation or being a 'lesbian' as consequent to the pain and fear of sexual violence (perpetrated by men), an event 'that placed scars on me'. By problematising the evidence used to express trauma or pain, Berlant suggests that it is necessary to engage in a reflexive approach to 'commonsense' feeling.<sup>21</sup> The queer asylum seeker does not necessarily have a sexual identity or ahistorical sexual feelings prior to the experience of relating the formation of desire through spaces and histories of action. The feeling of pain and fear of being with men

operates to construct how the asylum seeker orients herself towards particular kinds of sexual attachments. Pain and fear operate disparately to the previous cases discussing same-sex attracted men. That is, queer female sexual identities emerge in this instance through histories of (hetero/patriarchal) sexual violence.

Emotions also become political zones of movement and attachment. The case of 0907630, of the Indian asylum seeker discussed above, elaborates on this proposition. His erotic encounters are grounded in spatial terms and social relations rather than vivid quantitative accounts of sexual penetration:

I met [Person N] in [year], when I was 19 years old. He went to the same gym that I went to...He told me on several occasions when I saw him at the gym that I should come by his house whenever I was free. One day I dropped by his house and...He was watching a pornographic movie, a 'blue film' as it is called in India... I began watching it with him and then we started to engage in sexual activity with each other. After that day, we began a relationship... We tried to avoid going out in public because we were scared of what, would happen to us if we were caught.<sup>22</sup>

Experiences of what is 'sexual' in this testimony is characterised by the social relations between the applicant and his gym partner. Instead of delineating sexual identity through vivid descriptions of penetration, the testimony references the gym, television and home as crucial to the formation of erotic attachments. The applicant notes the repetition of pornographic 'homosexual scenes' and the subsequent 'interest' he physically displayed stimulated the 'sexual activity' he participated in. In this particular recount, the sexual is oriented in the private space

20. Lauren Berlant, 'The Subject of True Feeling: Pain, Privacy, and Politics' in Austin Sarat and Thomas Kearns (eds), *Cultural Pluralism, Identity Politics, and the Law* (1999) 56.

21. Ibid 58.

22. 0907630 (2010) RRTA 133 (29 January 2010) at 44.



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of the home and marked in relation to pornographic objects (such as the 'blue film'). Public space, however, is counterposed as a space of risk and danger; there is anxiety and fear over 'what would happen to us if we were caught'. Eroticism is marked away from public boundaries and it 'sticks' queer refugee bodies into the private. Focusing on feeling is crucial to distinguish between the way sexuality and persecution operates in this moment. Noting the way anxiety is annexed to the public, while pleasures are marked as private, persecution the 'social group' category blurs the categorical distinctions. Moreover, this case blurs the public/private distinction by foregrounding the competing, and often inconsistent, discourses that determine authentic sexuality. Rather than frame consumer agency as a privilege of the West, the relationship between pornography and recreational activity in these circumstances can be considered paradigmatic of a consumer culture. Combining two distinctive readings of the applicant's claims indicates that queer refugee subjectivity is a trope of orientation that 'sticks' to a particular space or object, rather than a stable site of public identification for either Western or non-Western sexual subjects.

Violence, moreover, is productive in terms of how individuals experience their identities as a result of (the symbolic threat of) injury. This becomes particularly relevant when considering how violence was not only enacted towards the Indian claimant, but also the communities that he was oriented towards, such as his family:

Whilst I was in [Country C], a group of people came to my family's home and forced their way in, breaking the door down. My parents said they were KCYM people. They broke my parents' glass cabinets. They grabbed my father by the neck and said that, if I came back to India, they would kill him. I think they went to my family's house because they knew that I was in [Country C] and they did not want me to come back, so they wanted to threaten me through my family.<sup>23</sup>

Locating violence within a locus of bodies, spaces and objects is crucial to dislodge the notion that sexuality-based persecution is necessarily a physical assault oriented towards a single body. In the above testimony, the home space is not only invaded, but the bodies within that space, who have a connection to the queer body (such as the applicant's father), are subject to violence. The threat is mobilised against the home and the family, and subsequently the applicant himself: 'if I came back to India, they would kill him'. In the case above, bodies do not simply act in space; rather

spatial relations (or territories) are produced through actions. The intrusion of 'breaking the door down' and the fact they 'broke my parents glass cabinets' reflects how the home space is redefined as a site of threat and risk if the queer body returns. The family becomes the violated object as a means of severing the connection between the applicant and his home. Persecution becomes broader than simple public/private distinctions focused on the individual.

23. Ibid 48.

## Conclusion

This article confronts some of the affective and theoretical frustrations in relation to how queer refugees are constructed within the terms of the law. While the law currently offers some protection for refugee sexual minorities, there is room for significant improvement. Evoking some of the problematic assumptions of sexual identity as a caricature of quantitative genital acts, and persecution as visible public injuries, invites ongoing critical attention to the way the queer refugee subject is delineated in fixed terms within the law. Ethical modes of representation can emerge then, by contesting these foundational terms. For asylum law, this begins by shifting the legal vocabularies of 'gay', 'lesbian' or 'homosexual' to an analytic use of the term 'queer', to avoid the essentialising or ethnocentric tendencies of the law. Erotic attachments and experiences of violence must be contextualised in terms of their contingencies and emotions rather than understood as a universally fixed identity.

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