



THE WINSTON CHURCHILL MEMORIAL TRUST OF AUSTRALIA

*Protecting the Persecuted:  
Sexual Orientation and Gender Identity  
Refugee Claims*

Senthorun Sunil Raj  
August 2013

**THE WINSTON CHURCHILL MEMORIAL TRUST OF AUSTRALIA**



**Report by Senthoran Sunil Raj**

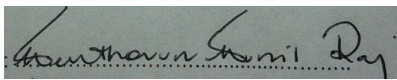
**2012 Churchill Fellow**

***Protecting the Persecuted: Sexual Orientation and Gender Identity Refugee Claims***

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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*

## **ACKNOWLEDGMENTS**

This project would not have been possible without the generous funding from the Winston Churchill Memorial Trust of Australia.

I would like to thank all the organisations and individuals who spoke with me, who allowed me the opportunity to observe some of their work, and facilitated my research further in both the United Kingdom and the United States.

I want to express my gratitude to Timothy Maybury for proofreading the report and providing insightful comments.

I dedicate this report to the volunteers at the Amnesty International Australia Refugee Casework Team. My internship with them during 2007-08 inspired my research and advocacy in this area.

**Senthorun Sunil Raj**  
**August 2013**



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## EXECUTIVE SUMMARY

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There is no simple solution to addressing the innumerable challenges facing lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) asylum seekers. However, the research I conducted as part of my Churchill Fellowship emphasised one crucial point: **a holistic and interdisciplinary approach to casework and advocacy is the most effective way to ensure the proper adjudication of sexual orientation and gender identity refugee claims.**

In order to help achieve this in Australia, 15 recommendations have been identified and should be pursued:

- I. Open-ended interviews are needed to allow LGBTIQ asylum seekers the opportunity to share their unique narratives.
- II. Training must be provided to all translators, advocates, and caseworkers.
- III. Evidentiary requirements must be clearly circumscribed.
- IV. Legal and counselling support should be made available.
- V. Detention should only be used as a matter of last resort.
- VI. Applications requiring discussion of sexual orientation or gender identity must not be expedited.
- VII. Guidelines must be developed to explicitly address sexual orientation and gender identity claims without relying on abstract stereotypes.
- VIII. All decision-makers (including judicial officers) must be provided with LGBTIQ sensitivity training.
- IX. Sound merits review decisions should be published and used as a persuasive or precedential guide for primary decision-makers.
- X. Judicial and administrative review must be accessible to all asylum seekers to guarantee procedural fairness.
- XI. Data and decisions relating to sexual orientation and gender identity asylum claims must be collected and reviewed.
- XII. Sur place claims should be considered.
- XIII. Further research on intersex claims is needed.
- XIV. Peer support networks should be facilitated.
- XV. Funding should be made available to community organisations to develop specific programs to address the needs of LGBTIQ asylum seekers.



(San Francisco LGBT Pride, Market Street, San Francisco)



## INTRODUCTION

Lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people are subject to discrimination, violence and harassment in all parts of the globe. Whether in the developing or developed world, homophobia and transphobia remains a pernicious and pervasive problem. In a legislative context, 78 countries criminalise consensual same-sex sexual activity and seven countries have capital punishment for such “offences.”<sup>1</sup> Thousands of LGBTIQ people flee from these systemic human rights abuses to seek protection from other countries.

Australia is one of an increasing number of countries around the world that recognise sexual orientation and gender identity as valid grounds to claim asylum. While this is promising, a lack of consistency in decision-making combined with an inability to understand the unique identities and experiences of sexual and gender minorities has led to numerous claims for asylum being improperly decided or litigated. The systemic lack of clarity and nuance in decision-making and advocacy is exacerbated by the limited specialist casework and advocacy being pursued in this highly specific field of law, administration and public policy in Australia.

My project addresses some of these challenges by investigating the way LGBTIQ claims are being pursued in the US and UK. In order to do so, I have conducted interviews with lawyers, advocates, organisations and caseworkers. Specifically, I have investigated several key casework and advocacy processes involved in making an asylum application: the initial screening and interviewing of asylum seekers; the development of litigation in response to asylum claims; the bureaucratic decision-making context; and the pursuit of political advocacy and law reform. In exploring both institutions and individuals it became clear that any discussion of LGBTIQ specific claims must be contextualised within the broader features of a country’s refugee policy and the particular needs of the claim being pursued. As this report focuses on the refugee status determination of LGBTIQ asylum seekers, my analysis does not examine the challenges of resettlement and broader humanitarian assistance offered to LGBTI refugees.

My fellowship paper does not seek to provide an exhaustive analysis of all asylum advocacy or casework arising under the broad “LGBTIQ” rubric. Indeed, one of the key findings of my project is that there is no universally satisfactory approach for dealing with disparate sexual orientation and gender identity claims. Rather, my research emphasises the need for an interdisciplinary approach that blends law, policy, social work, counselling, and grassroots training when pursuing LGBTIQ asylum claims. With both Anglophone and non-Anglophone countries recognising sexual orientation and gender identity-based asylum claims, this area of work continues to expand and evolve.

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<sup>1</sup> ILGA, ‘State Sponsored Homophobia – A world survey of laws: Criminalisation, protection and recognition of same-sex love’ (May 2013), [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2013.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf) (accessed 25<sup>th</sup> May 2013), p. 5.

As I have stated, this research focuses on the UK and USA, two countries with developed advocacy and casework in this area. I note, however, that time constraints combined with the fact I was unable to interview all relevant advocates and organisations means that this paper does not canvass every possible perspective.

Moreover, while many of the organisations interviewed are self-described as LGBT or LGBTI, their caseloads and advocacy strategies varied considerably. In particular, it is worth emphasising that despite the increased specialist work being undertaken on sexual and gender minority asylum issues, there still remains a paucity of critical research, casework support, and advocacy on intersex asylum claims. Additionally, same-sex attracted, bisexual, and lesbian women remain underrepresented within “sexual orientation” refugee claims.

In response to these conceptual and methodological challenges, I have endeavoured to provide a wide-ranging account of how advocates and caseworkers seek to support LGBTIQ asylum seekers in the US and UK and what Australia can glean from this. In particular, my research reiterates that there is no ‘one size fits all’ model that can be applied to every context of casework and advocacy.

Instead of overly technocratic prescriptions, we need to develop approaches that value respect, empathy, reflexivity, cultural sensitivity and dialogue to ensure principled advocacy, casework and adjudication. One point, however, is clear: we need to embrace a cross-disciplinary approach when pursuing LGBTIQ asylum advocacy and casework. Making a just decision at first instance is the most humane and cost effective approach when processing sexual orientation and gender identity claims for protection.

It is my hope that many of the ‘conclusions’ arising from this study may provide springboards into further areas for research by advocates, academics, activists, bureaucrats and community organisations.

## PROGRAMME



(Churchill Statue, Trafalgar Square, London)

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London, UK

**Monday 15<sup>th</sup> April – Friday 19<sup>th</sup> April 2013**

Jasmine O'Connor  
International Officer  
Stonewall UK

Paul Dillane  
Refugee Researcher  
Amnesty International UK

Erin Power  
Executive Director  
UK Lesbian and Gay Immigration Group



Calo Giametta  
Asylum Support Officer  
UK Lesbian and Gay Immigration Group

**Monday 22<sup>nd</sup> April – Friday 26<sup>th</sup> April 2013**

Russell Blakely  
Partner  
Wilson Solicitors LLP  
Trustee UK Lesbian and Gay Immigration Group

S Chelvan  
Barrister  
No5 Chambers



(Thames River, London)



(High Line, West Village, New York)

---

New York, USA

**Wednesday 1<sup>st</sup> May – Friday 3<sup>rd</sup> May 2013**

Victoria Neilson  
Legal Director  
Immigration Equality

Clement Lee  
LGBT Asylum Attorney  
Immigration Equality

Stephen Silva  
Paralegal  
Immigration Equality



Ariel Shidlo  
Executive Director  
Research Institute Without Walls

**Monday 6<sup>th</sup> May – Friday 10<sup>th</sup> May 2013**

Yiftach Milo  
Research Consultant  
Hebrew Immigrant Aid Society

Andreas Schwarz  
Executive Assistant  
International Gay and Lesbian Human Rights Commission

Brian Tofte-Schumacher  
Communications Associate  
International Gay and Lesbian Human Rights Commission

Blakeley Decktor  
Fellow, Program Officer- Documentation and Advocacy  
International Gay and Lesbian Human Rights Commission

Hossein Alizadeh  
Middle East & North Africa Program Coordinator  
International Gay and Lesbian Human Rights Commission

**Monday 13<sup>th</sup> May – Friday 17<sup>th</sup> May 2013**

Michael Battista  
Organiser  
All Out

Hayley Conway  
Campaign Manager  
All Out

Rebecca Heller  
Director  
Iraqi Refugee Assistance Project

Leah Weinzimer  
Program Director  
Libertas Center for Human Rights

Walter Fendrich  
Clinical Social Worker  
Libertas Center for Human Rights

Elizabeth McInnes  
Case Manager  
Libertas Center for Human Rights

Gina DelChiaro  
Leon Levy Fellow, Refugee Protection Program  
Human Rights First

**Monday 20<sup>th</sup> May – Friday 24<sup>th</sup> May 2013**

Andres Hoyos  
Adjunct Lecturer and Consultant  
New York University

Elijah Nealy  
Adjunct Lecturer and Clinical Social Worker  
Columbia University

Chanel International  
Community-Based Counselor and Advocate  
The New York City Anti-Violence Project



(Gay Street, Greenwich Village, New York)



(Castro Street, Castro, San Francisco)

---

San Francisco, USA

**Monday 3<sup>rd</sup> June – Friday 7<sup>th</sup> May 2013**

Ming Wong

Attorney

National Center for Lesbian Rights

Kathy Drasky

Advocate

Out4Immigration

Kevin Lo

Director of Advocacy and Legal Services

Organisation for Refuge Asylum & Migration

Leila Roberts

Director of Development and Communications

Organisation for Refuge Asylum & Migration

Steven Heller  
James E. Tolan Legal Fellow  
Organisation for Refuge Asylum & Migration

**Monday 10<sup>th</sup> June – Friday 14<sup>th</sup> June 2013**

Cara Jobson  
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Wiley and Jobson

Lance Toma  
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Asian & Pacific Islander Wellness Center

Chelsea HayleyNelson  
Partner  
HayleyNelson & Heilburn LLP

Leti Volpp  
Robert D. and Leslie Kay Raven Professor of Law in Access to Justice  
Berkeley Law, University of California

**Monday 17<sup>th</sup> June – Friday 21<sup>st</sup> June 2013**

Blaine Bookey  
Associate Director and Staff Attorney  
Center for Gender and Refugee Studies

Noemi Caljone  
Immigration Project Director  
National Center for Lesbian Rights

Neil Grungas  
Executive Director  
Organisation for Refuge Asylum & Migration

**Monday 24<sup>th</sup> June – Friday 28<sup>th</sup> June 2013**

Masen Davis  
Executive Director  
Transgender Law Center

Illona Turner  
Legal Director  
Transgender Law Center



Matthew Wood  
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Transgender Law Center

Tracey Garza  
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Transgender Law Center

Anne Tamar-Mattis  
Executive Director  
Advocates for Informed Choice

Mani Bruce Mitchell  
Counsellor and Board Director  
Advocates for Informed Choice



(Vanguard Magazine, GLBT History Museum, San Francisco)

## **LIST OF ORGANISATIONS**

### **Stonewall UK**

Stonewall is the leading lobbying, campaigning, and advocacy organisation on lesbian, gay, and bisexual issues in the UK.

### **Amnesty International UK**

Amnesty International is a movement that aims to protect and promote human rights worldwide through research, activism and advocacy.

### **UK Lesbian and Gay Immigration Group**

UKLGIG is an organisation that supports LGBTI immigrants and asylum seekers in the UK through political advocacy, social groups, and legal representation referrals.

### **Immigration Equality**

IE is a national organisation that advocates for equality under US immigration law for lesbian, gay, bisexual, transgender, and HIV-positive individuals.

### **Research Institute Without Walls**

RIWW is the first global NGO focusing on training and research related to the mental health needs of persons who face persecution based on their sexual orientations and gender identities.

### **Hebrew Immigrant Aid Society**

HIAS provides research and advocacy about persecuted groups around the world who seek asylum.

### **International Gay and Lesbian Human Rights Commission**

IGLHRC undertakes international human rights advocacy and capacity building for people experiencing abuse on the basis of their sexual orientation, gender identity and expression.

### **All Out**

All Out facilitates international grassroots activism on urgent LGBT issues around the world.

### **Iraqi Refugee Assistance Project**

IRAP provides legal referrals for Iraqi refugees seeking resettlement in the US.

### **Libertas Center for Human Rights**

LCHR provides counselling and social support services for survivors of torture and trauma.

### **Human Rights First**

HRF advocates and lobbies on disparate human rights issues within the US.

### **The New York City Anti-Violence Project**

The NYC AVP provides support for survivors of homophobic and transphobic violence and documents such incidents of violence.

### **National Center for Lesbian Rights**

NCLR undertakes litigation, public policy advocacy, and public education to support LGBT families in the US.

### **Out4Immigration**

O4I is a grassroots volunteer-based advocacy organisation that raises awareness on the inequalities faced by binational same-sex couples in the US.

### **Organisation for Refuge Asylum & Migration**

ORAM is the only global LGBTI refugee organisation that undertakes international advocacy, provides legal referrals for asylum seekers, and engages in capacity building for local refugee NGOs around the world.

### **Asian & Pacific Islander Wellness Center**

A&PI Wellness Center advances the health and wellbeing for sexual and gender minorities (including people living with HIV) from different racial and cultural backgrounds.

### **UC Hastings Center for Gender and Refugee Studies**

The CGRS provides technical legal assistance, case law data, policy research, advocacy, and human rights documentation relating to gender, LGBTIQ, and children's asylum claims.

### **Transgender Law Center**

The TLC works to change law, policy and attitudes that impinges on the rights of individuals to live free from discrimination on the basis of their gender identity or expression.

### **Advocates for Informed Choice**

AIC undertakes strategic litigation and public policy advocacy to further the civil rights of infants born with variations in reproductive or sexual anatomy.

## METHODOLOGY

My project drew from organisational fieldwork and interviews in order to analyse and evaluate casework and advocacy strategies used to pursue individual LGBTIQ asylum claimants and broader legal or administrative reforms. The primary source of material in this report is the information gathered from the semi-structured conversations I conducted in the US and UK. In order to provide a more comprehensive analysis of the individual conversations, my discussion is furnished with considerations of relevant judicial and administrative decisions, organisational reports, academic papers and policy documents.

The 44 people I spoke to included a range of advocates and caseworkers who work in a private capacity, as well as those who work within a broader organisational context. Additionally, since ‘casework’ and ‘advocacy’ are broadly defined to include the varied forms of assistance offered in the pursuit of an asylum claim, the interviews were drawn from individuals from varied law, policy, activist, psychology and community service backgrounds. While each interview was adapted to suit the specific individual, I drafted a range of generic questions relating to both substantive and procedural considerations to assist in framing the broad casework and advocacy issues I was eager to explore (see below).

### Interview Questions

#### Overview

1. Could you outline your work with LGBTIQ asylum seekers? In what capacity do you undertake this work?
2. How did you begin your work in this area?
3. Has your work changed over time? If so, how and why?
4. What have you found remains consistent in your work? Why?
5. What do you consider is particularly useful or important about the work you do?

#### Processes and Practices

6. How would you characterise the processes that you are involved in when assisting sexual and gender minorities seeking asylum?
7. What do you find promising about these processes?
8. What are the major challenges have arisen when providing assistance to asylum seekers?
9. How have you responded to these challenges?
10. Do you find your work in this area is sustainable? Why or why not?
11. What do you think is necessary for sustaining your work in this area?

#### Recommendations

12. What would you suggest is crucial (or even desirable) for improving your work in this area (i.e. policy change, law reform, shifting bureaucratic practices etc)?



## TERMINOLOGY

The notion of identity is elusive and challenging to define. Political scientist Georgia Warnke argues that identity cannot be reduced to a biological reality.<sup>2</sup> Rather, identity should be considered as a historically and culturally contingent phenomenon. Understanding identity requires an appreciation of bodies as being textual surfaces on which social, legal, and biological meaning is inscribed and understood. Identity is a means by which individuals understand themselves and their relationships to others.

Given the political and legal demands for fixed representations, such fluidity can be difficult for adjudicators to recognise. ‘Queer’ is often posited as an umbrella term or position to articulate social identities or practices that challenge binary gender (i.e. male/female) and the assumption that heterosexuality is natural.<sup>3</sup> The *Yogyakarta Principles* (2007), being the most seminal, unifying statement on sexuality and gender identity to date declare a need for a holistic account of sexual and gendered personhood that recognises the disparate emotional attachments, psychological identifications, biological variations and social practices of all people.<sup>4</sup>

Broadly speaking, international law uses the terms gay, lesbian and homosexual to describe individuals who identify as same-sex attracted or those who have intimate experiences, attractions or romantic relationships with persons of the same sex or gender. Bisexuality is used to refer to individuals who have intimate experiences and relationships with both or more sexes or genders.<sup>5</sup> Many people who are same-sex attracted, however, do not use terms like gay, lesbian, bisexual or homosexual to describe their sexual orientation.

In contradistinction, ‘gender identity’ is used as a broad term to refer to transgender, transsexual and other gender variant persons. For example, transgender persons may exhibit characteristics of a gender that may not necessarily correspond to their assigned sex. ‘Transsexual’ is often cited as a more specific term to refer to individuals who have undergone some form of medical, hormonal or surgical intervention to affirm their chosen sex or gender identity. Gender identity also incorporates those who may not identify with any particular gender role or sex.<sup>6</sup> This term is often contested, however, and some prefer the use of ‘gender diversity’ to capture their non-conforming gender expressions and identifications which does not subscribe to a specific psychological or social sense of identity.

<sup>2</sup> Georgia Warnke, *After Identity: Rethinking Race, Sex and Gender* (2007), p. 87.

<sup>3</sup> Francisco Valdes, “Queering Sexual Orientation: A Call for Theory as Praxis” in M. Albertson Fineman, J. E. Jackson and A. P. Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (2009), p. 107.

<sup>4</sup> International Commission of Jurists, *The Yogyakarta Principles: Principles On The Application Of Human Rights Law In Relation To Sexual Orientation and Gender Identity* (2007), [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm) accessed 5 June 2012.

<sup>5</sup> *Ibid.*

<sup>6</sup> Judith Butler, *Undoing Gender* (2004), pp. 85-7.

Unlike the psychological identifications that underscore sexual orientation and gender identity, 'intersex' refers to individuals who possess non-binary specific and/or atypical sex characteristics. This often refers to chromosomal, hormonal or anatomical differences in sex.<sup>7</sup> While some individuals use intersex as a political label, it is not generally regarded as a matter of identity, but is understood as a congenital feature of biological difference.<sup>8</sup>

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<sup>7</sup> Anne Fausto-Sterling, *Sexing The Body: Gender Politics and the Construction of Sexuality* (2000), p. 8. Since the focus of the Churchill Fellowship was to specifically examine sexual orientation and gender identity refugee claims, intersex cases are not dealt with in comprehensive detail in this paper and further research on these issues is encouraged.

<sup>8</sup> OII Australia, 'Welcome to OII Australia' (2012), <http://oii.org.au/19853/welcome/> (accessed 4<sup>th</sup> July 2013).



(The Stonewall Inn, Greenwich Village, New York)

## REFUGEE CASEWORK AND ADVOCACY

In order to understand the position of LGBTIQ asylum seekers, it is necessary to understand the broader international refugee protection system. Protection obligations arising under the *1951 Convention Relating to the Status of Refugees* and its subsequent *1967 Protocol*, make clear the obligations on states to grant asylum to those who are outside their country of residence and, owing to race, nationality, religion, political opinion or membership of a particular social group, have a well-founded fear of persecution that is causally related to one of the Convention grounds. Once recognised, refugees must not be returned to the country in which their life or liberty would be threatened.

Australia (1992), the US (1994) and the UK (1999) have all committed to recognising sexual orientation and gender identity as valid grounds of persecution arising under the ‘particular social group’ category. Despite this encouraging evolution of refugee law, the substantive scope of such a ‘social group’ and the methods for recognising who belongs to this group remains a site of policy and legal contest.

While refugees are often casually discussed in the context of immigration policy, such conversations confuse the peculiar nature of asylum. Refugees are forcibly displaced by reasons outside their control, while migrants make voluntary decisions to relocate. Refugee law academic James Hathaway notes that the grant of refugee status is a temporally specific human rights remedy sourced under international law, one which operates (at least theoretically) independently of a country’s domestic immigration laws.<sup>9</sup> Such a distinction is important to labour, given the politicisation of asylum seekers, particularly those arriving on boats in Australia, as “illegals” or “queue jumpers.”

While refugee status determination decisions and appeals vary between countries, those in common law Anglophone jurisdictions generally involve the following stages: (i) an asylum seeker lodges a claim for protection; (ii) immigration officers interview the applicant to determine the veracity of the claim; (iii) if the claim is unsuccessful it may be appealed to a tribunal (either administrative or judicial) that reviews the merits of the decision; (iv) if the tribunal errs in making a decision, an asylum seeker may seek judicial review of misapplication of the law; (v) once the administrative and judicial avenues have been exhausted, an applicant may seek to appeal to the relevant minister to exercise executive discretion to grant them protection. Advocates and caseworkers can provide assistance to asylum seekers at all stages of the refugee decision-making process.

If an asylum seeker is found to be a genuine refugee, pending health and security checks they are granted either a temporary or permanent protection visa to remain in the country. If unsuccessful in their appeal for asylum, they are usually deported to their country of origin. It is possible that stateless individuals may be detained indefinitely.<sup>10</sup>

<sup>9</sup> James Hathaway, *The Law of Refugee Status* (1996), pp. 1-28.

<sup>10</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.



Depending on the country, asylum seekers may be detained in immigration facilities while their claims are being processed.

While no single report could attempt to canvass all the judicial and administrative decisions relating to sexual orientation and gender identity, my study identifies recurring themes that underpin casework, decision-making and advocacy in this area.

Specifically, the processes of credibility assessment, gathering and presentation of evidence, determinations of what constitutes identity, and the search to quantify a well-founded fear of persecution are questions fraught with insecurity and inconsistency in both administrative and judicial decision-making. In response to these challenges, there has been a concerted effort in the UK and the US to address these problems in order to do justice to the lives of sexual and gender minorities subject to forced displacement and other human rights abuses. My research addresses the problematic nature of decision-making by focusing on the processes of casework and advocacy undertaken to pursue LGBTIQ asylum applications. In doing so, I hope to advance more nuanced strategies for assisting those who are in urgent need of protection from persecution.

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## Part I: Literature Review

The recognition of human rights relating to sexual and gender minorities remains a contested space under international law. No specific convention or treaty recognises the human rights of gay, lesbian, bisexual, transgender and intersex persons. Despite this, human rights discourse has increasingly evolved to recognise the ongoing violence, harassment and discrimination faced by people on the basis of their sexual orientation and gender identity. On 15 June 2011 the United Nations Human Rights Council (HRC) passed a historic resolution expressing grave concerns at the human rights violations committed globally against individuals based on their sexual orientation and gender identity.<sup>11</sup> In doing so, the HRC emphasised the principles of human dignity, equality and non-discrimination that underscore the *Universal Declaration of Human Rights 1948* (UDHR), the *International Covenant on Civil and Political Rights 1966* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR).

Acknowledging the human rights of LGBT(I) people in international legal and policy fora is an emerging phenomenon. In 2007 the *Yogyakarta Principles* were drafted by the International Commission of Jurists to promote international human rights obligations in relation to sexual orientation and gender identity. These international principles act as persuasive interpretations of binding human rights treaties and relate to gay, lesbian and transgender people (though intersex is a notable omission from the document).<sup>12</sup>

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<sup>11</sup> Human Rights Council, 17<sup>th</sup> Session, Agenda Item 8, *Human Rights, sexual orientation and gender identity*, 15 June 2011, Un Doc. A/HRC/17/L.9/Rev.1.

<sup>12</sup> International Commission of Jurists, *The Yogyakarta Principles: Principles On The Application Of Human Rights Law In Relation To Sexual Orientation and Gender Identity* (2007), [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm) accessed 5 June 2012.

In the context of asylum, Article 23(A) of the *Yogyakarta Principles* identifies an obligation on States to:

*Review, amend and enact legislation to ensure that a well founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum.*<sup>13</sup>

Under Article 1A(2) of the *Convention Relating to the Status of Refugees* (*Refugee Convention 1951*) there are no categories for persecution on the basis of sexual orientation or gender identity specifically. In order to seek asylum, persons must be outside their country of origin, and must face a well-founded fear of persecution owing to their ethnicity, nationality, religion, particular social group or political opinion.<sup>14</sup>

Despite the statutory variations relating to the grant of asylum in the US, UK and Australia, sexual and gender identity has been accepted in the common law as a peculiar characteristic fundamental to human conscience that should be protected. However, clearly delimiting sexual orientation and gender identity within the definition of a particular social group remains problematic. As cultural theorist Greg Mullins cautions, the ongoing emphasis on the need to find a common, reducible characteristic that is immutable to all those who identify as non-heterosexual obscures the complex identities and experiences of sexual and gender minorities who flee persecution.<sup>15</sup> The challenge becomes conceptualising queer refugees that do not occlude their complex identities and experiences.

Legal scholars Catherine Dauvergne and Jenni Millbank argue that much of the jurisprudence in this area focuses upon sexuality by understanding the ‘social’ as a universal characteristic innate to particular bodies.<sup>16</sup> What this obscures is the way the body is discursively constructed within the legal system.<sup>17</sup> That is, queer bodies are not ontologically fixed (see Appendix I). Failing to acknowledge the diasporic, non-Western position of the queer refugee body effaces sexual heterogeneity and the mediation of homophobic violence through different cultural and social relations. Sexuality is not reducible to a script of genital penetration, sexual object choice, or incidence of partners, but is rather an embodied response or process of orientation that manifests in particular locations.<sup>18</sup>

<sup>13</sup> International Commission of Jurists, *The Yogyakarta Principles: Principles On The Application Of Human Rights Law In Relation To Sexual Orientation and Gender Identity* (2007), [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm) accessed 5 June 2012.

<sup>14</sup> Article 1A(2), *Convention Relating to the Status of Refugees 1951* (28 July 1951), <http://www2.ohchr.org/english/law/refugees.htm> accessed 6 August 2012.

<sup>15</sup> Greg Mullins, ‘Seeking Asylum: Literary Reflections of Sexuality, Ethnicity and Human Rights’ (2003) 28(1) *MELUS* 145, p. 146.

<sup>16</sup> Catherine Dauvergne and Jenni Millbank. ‘Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh’ (2003) 6 *Sydney Law Review* 1, p. 3.

<sup>17</sup> Ben Golder, ‘The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform’ (2004) 11 *E Law: Murdoch University Electronic Journal of Law* 1, p. 2.

<sup>18</sup> Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (2006), p. 54.

Irrespective of this, however, administrative tribunals and primary decision-makers utilise stereotypical assumptions about what constitutes 'legitimate' sex or 'proper' relationships to recognise queer refugees from different national contexts.<sup>19</sup>

In addition, as barrister S Chelvan argues, the connection between difference, stigma, shame and harm make disclosure about one's sexual orientation or gender identity difficult for applicants who live beyond the strict prescriptions of a heterosexual life and/or binary gender.<sup>20</sup> Legal scholar Toni Johnson observes that adjudicators often fail to grasp the emotional 'tells' of oral testimony because they refuse to imagine experiences of sexuality or gender identification that contests their pervasive stereotypes of what being 'gay' looks/sounds like.<sup>21</sup> Instead of understanding the reasons for silence, decision-makers use it as a marker to impugn an asylum seeker's credibility.

Claims for gender-diverse applicants, however, need to be distinguished. La Forest J in the Canadian case *Canada v Ward* (1993) provides an instructive starting point when categorising the 'particular social group' as: groups defined by an innate or unchangeable characteristics; groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the associated; and groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>22</sup>

Drawing determinative conclusions or trends on how to map precedents in relation to sexual orientation and gender identity-based refugee claims is undesirable, if not impossible, given the limited accessibility to primary and administrative review decisions. Additionally, the complex transitional and disparate identifications and expressions of some gender-diverse persons, with no historical permanence (i.e. undergoing sex affirmation/reassignment surgery) or innate qualities (i.e. identification with a different gender from birth) make categorising such refugee claims in immutable or intransigent terms counterintuitive.

While there are no published cases on intersex claims in Australia, the US or the UK, intersex advocacy organisation OII Australia notes that intersex people face persecution in several countries. Specifically, persecution is experienced from early childhood through risk of infanticide, coercive surgical procedures, destitution and a lack of legal or familial recognition because of their physical sex differences.<sup>23</sup>

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<sup>19</sup> The Refugee Review Tribunal is an administrative body which reviews applications for refugee status in Australia. Since it is not a legal body, it is not bound by precedent and have wide-ranging powers as specified by the *Migration Act*. Tribunal members are appointed by the government (not necessarily lawyers).

<sup>20</sup> S Chelvan, 'From Silence to Safety: Protecting the Gay Refugee?' (2013) May 2013 *Counsel* 26, p. 27. See also S Chelvan, 'Put Your Hands Up (If You Feel Love)' (2011) 25(1) *Journal of Immigration, Asylum and Nationality Law* 56, p. 60.

<sup>21</sup> Toni Johnson, 'On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings' (2011) 20(1) *Social & Legal Studies* 57, p. 70.

<sup>22</sup> *Ward v Attorney-General (Canada)* (1993) 2 SCR 689 at 739 (La Forest J).

<sup>23</sup> OII Australia, 'Refugees and asylum' (2011), <http://oii.org.au/category/research/refugees-and-asylum/> (accessed 11<sup>th</sup> June 2013).

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## Part II: Casework Advice and Litigation

*“Back home you live in a box, you’re locked away. You learn to be invisible. You have to deny who you are and what you want. It’s like you’re leading a double life, it’s Jekyll and Hyde.”<sup>24</sup>*

- Marisha

### Interviews

Stonewall UK’s report *No Going Back* (2010) highlights that a critical challenge for advocates is exploring the intimate and traumatic experiences of asylum seekers – aspects that have been repressed. Often interviews undertaken by lawyers to help prepare a case attempt to secure a clear, coherent and comprehensive narrative that fits within the legal ‘boxes’ that define particular social group, well-founded fear of persecution, and the connection between the two.

Psychologist Ariel Shidlo from the US Research Institute Without Walls (RIWW) identifies that such probing interview techniques ignore the sensitivities of trauma and the ways sexual and gender identification shifts with time. Shidlo and collaborator Joanne Ahola add that the asylum process relies on the asylum seeker lodging a prompt claim while disclosing a clear and coherent narrative. Reflecting on their clinical work, they argue these demands ignore the impact of post-traumatic stress disorder, internalised shame or secrecy, and depression faced by many applicants. Indeed, recounting a history of persecution is a retraumatising act.<sup>25</sup>

In order to mitigate some of these problems, Shidlo suggests that interviewers and caseworkers seek to act as facilitators to allow asylum seekers to tell their stories. For Shidlo, the key to exploring these issues is focusing on questions of attraction, fantasy, disclosure and social networks rather than intensely personal interrogations about sexual practices and labels. Instead of seeking fixed or chronological determinations of a person’s identity or the harm they have experienced, open questions offer greater opportunity for an asylum seeker to share their story and enable an adjudicator to better assess the quality and depth of a narrative (see Appendix II).

Legal Director Illona Turner from the Transgender Law Center (TLC) adds that for transgender applicants in asylum cases, there are slippages between sexual orientation and gender identity. While the terms are conceptually different, translating the way asylum seekers express either their sexual or gender identity in their own language can be challenging when their narratives blur the two.

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<sup>24</sup> Stonewall UK, ‘No Going Back: Lesbian and Gay People in the Asylum System’ (May 2010), <http://www.stonewall.org.uk/other/startdownload.asp?openType=forced&documentID=2213> (accessed 17 May 2013), p. 6.

<sup>25</sup> Ariel Shidlo and Joanne Ahola, ‘Mental health challenges of LGBT forced migrants’ (2013) 42 *Forced Migration Review* 1, p. 9.



Such difficulties were ably illustrated in the US case *Hernandez-Montiel v Immigration and Naturalization Service* (2000) where the Ninth Circuit Court considered an applicant to be a “gay man with a female sexual identity.”<sup>26</sup> Turner adds that caution must be taken when considering the preferred identification(s) of transgender or gender non-conforming applicants. When an asylum seeker uses the terms sexual and gender identity interchangeably or mixes the two, this should not be seen as impugning credibility. Rather, it should be noted that such slippages in language evince the difficulties in expressing sex, gender, sexuality, desire or identity in a manner that is legible to decision-makers.

Executive Director Anne Tamar-Mattis of Advocates for Informed Choice (AIC) argues that intersex people often have their medical histories erased or misrepresented to them. Interviewers should recognise these difficulties and that medical documentation may make no reference to intersex variation.

Barrister Chelvan elaborates that a way of framing open questions for LGBTIQ asylum seekers is using the difference, stigma, shame and harm (DSSH) model. Instead of seeking a chronological or linear account of sexual or gender identity, Chelvan suggests we should focus on when the applicant identified as different, how this difference was stigmatised by others, how the stigma generated self-shame and the extent to which the shame and stigma resulted in harm.<sup>27</sup>

Executive Director Erin Power from UK Lesbian and Gay Immigration Group (UKLGIG) notes that interviews must work to enable applicant’s to narrate and write their own ‘life stories’. Such narratives should avoid generic tropes as the ‘believability’ of a claim arises from its individuality. Power evinces that there is a connection between thinking and feeling: emotion gives impetus to personal stories. Such narratives are rarely linear, but open questions can enable asylum seekers to provide greater information for their claims. Specifically, this includes letting an asylum seeker share a story with minimal interruption.

Power and Shidlo both suggest that caseworkers should act as facilitators, not interrogators, by encouraging reflection and empathy for both the asylum seeker and caseworker themselves. Shidlo acts that asylum seekers do not have ‘end points’ to their experiences and this should be reflected in questions that explore the ‘developmental’ and evolving aspects of identity. This approach then allows caseworkers to draft an asylum claim in a way that does justice to the unique stories of an asylum seeker while making it intelligible to a bureaucratic system that assess such narratives.

**Open-ended interviews are needed to allow asylum seekers the opportunity to share their unique narratives.**

<sup>26</sup> *Hernandez-Montiel v Immigration and Naturalization Service* (2000) 225 F.3d 1084.

<sup>27</sup> Chelvan, see above n20, p. 28.

### Training and Translation

One of the key challenges for asylum seekers is navigating both attitudinal and linguistic barriers of the institutions that are trying to assist them. In an international survey of NGOs supporting asylum seekers, ORAM identified that even where no hostility existed towards LGBTI asylum seekers, the absence of outreach, the climate of silence and the lack of organisational knowledge on sexual orientation and gender identity issues limited their ability to provide support.<sup>28</sup> Even where organisations express support for LGBTI refugees, their perceived or actual moral discomfort over sexuality and gender diversity make it difficult for asylum seekers to access such services.

For example, translators play a key role in facilitating communication between the asylum seeker and their advocates. However, a number of interview participants expressed concern at the lack of training given to translators and the visible discomfort some express (usually through non-verbal cues) when discussing sensitive aspects of sexual and gender identity.

Much of the professional deficiency is compounded by a common hesitation on the part of an asylum seeker to fully disclose intimate details of their lives. This is often due to shame, embarrassment and fear that what is disclosed will become ‘gossip’ (as the translator may be from their local community) and will get back to their families or friends. Power argues that translators should be provided with a code of conduct and training specifically targeted to issues relating to sex, sexuality, gender identity and gender expression within their relevant linguistic and cultural contexts.

The Libertas Center for Human Rights (LCHR) and Research Institute Without Walls (RIWW) establishes that lawyers, social workers and psychologists must work together to better understand disclosure challenges facing sexual and gender minorities. Affidavits are necessary for the presentation of an asylum claim. However, thematising disparate emotion and cultural experiences into labels that fit a predetermined social group or definition of persecution obscure the disparate cultural and emotional lives of asylum seekers. Essentially, this results in contrived testimony (i.e. when asylum seekers are told to present narratives that are stereotypical) that can impugn an applicant’s credibility.

Inadequate training on LGBTI cultural sensitivities may make asylum seekers less likely to disclose their reasons for seeking protection. Advocates at ORAM and the UK Lesbian and Immigration Group expressed concern that when lawyers or caseworkers were perceived as hostile to LGBTI issues, asylum seekers would present alternative claims (i.e. political opinion). If they eventually felt comfortable disclosing their identity, their initial hesitancy or application is seen to undermine their credibility.

<b>Training must be provided to all translators, advocates, and caseworkers.</b>
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<sup>28</sup> ORAM, ‘Opening Doors: A Survey of NGO Attitudes Towards LGBTI Refugees and Asylum Seekers’ (June 2012), <http://www.oraminternational.org/images/stories/PDFs/oram-opening-doors.pdf> (accessed 7th June 2013), p. 3.

## Evidence

One of the key challenges for LGBTIQ asylum seekers is the lack of evidentiary safeguards to ensure quality assessment and the limited consistency when it comes to determining the burden of proof. Many of the interviewees evinced a tendency for decision-makers to rely on outdated country information reports, tourist guides, emails and even in some instances pornographic material.<sup>29</sup>

Refugee researcher Paul Dillane from Amnesty International UK argues that while the standard of proof is low, the burden remains on asylum seekers to prove their claim. Increasing disbelief with respect to a person's identity has pushed some advocates to consider producing pornographic material of their client or urging them to become sexually active in order to prove their sexual practices. One Nigerian applicant in the UK notes:

*I feel the Home Office is forcing people to have sex when they're not ready. I was just sixteen but I had to force myself to prove and to save myself. I had no choice. The pressure was too much.*<sup>30</sup>

Given the propensity of decision-makers to authenticate sexual identity through sexual activity, asylum seekers sometimes feel coerced by the system to supplement their oral testimony with photographic or video evidence of their relationships. Dillane suggests that the skepticism towards personal testimony when discussing community ties and sexual activities has presented an enormous evidentiary burden for asylum seekers. Solicitor Russell Blakely adds that the asylum process is geared towards 'positive' forms of evidence, such as corroborating witness or documentary evidence. This, however, is not always possible. As the asylum seeker from Nigeria notes, individuals who identify as same-sex attracted and/or gay may pursue their first sexual experience only for the purposes of satisfying a bureaucratic expectation.

Power argues that evidentiary demands should not be insurmountable. While it is necessary to properly assess claims, decision-makers must recognise the peculiar challenges LGBTIQ asylum seekers often face when asked to provide collaborating evidence. Specifically, in a context of sexual orientation or gender expression – two intensely intimate features of a person's identity that are subject to policing in both public and private spheres – asylum seekers must navigate feelings of shame, demands for privacy, and a history of secrecy. Asylum seekers are often asked to 'come out' and provide evidence of participation in a local community or previous/current relationships. Such evidentiary demands, however, ignore the compound reality of shame and stigma that coerces many asylum seekers into avoiding public spaces/situations where they could be identified. Alternatively, if they were in a relationship or in a community group, they could not disclose it to others for fear of violence or harassment.

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<sup>29</sup> See Jenni Millbank, 'Imagining Otherness: Refugee Claims On The Basis Of Sexuality In Canada and Australia', (2002) 26(7) *Melbourne University Law Review* 144.

<sup>30</sup> Stonewall UK, 'No Going Back: Lesbian and Gay People in the Asylum System' (May 2010), <http://www.stonewall.org.uk/other/startdownload.asp?openType=forced&documentID=2213> (accessed 17 May 2013), p. 16.

Once asylum seekers are able to establish their sexual orientation or gender identity, they must be able to demonstrate that a well-founded fear of persecution arises on that basis. Country information reports provide the most significant evidentiary basis on which country conditions are assessed to determine risk of persecution. Reports should be updated and clearly distinguish between lesbian, gay, bisexual, transgender and intersex experiences. This is crucial if decision-makers are to avoid conflating experiences. Tamar-Mattis, notes, for example, that country condition reports often only reference ‘LGBT’ experiences with no mention of intersex people. This must not be considered indicative of an absence of persecution, but rather evidence of the secrecy and stigma that surrounds the identification of intersex differences. Expert testimony should be used wherever possible to supplement evaluation of country conditions. Unlike country information reports, which are drafted at a more generic or broad level to cover a range of issues, expert testimony can be tailored to the asylum seekers’ particular claims.

While the conditions surrounding the acceptance or inclusion of diverse sexualities and gender identities is improving in many countries, legal academic Nicole LaViolette cautions against accepting isolated events (i.e. allowing a gay pride march) as indicative of broader cultural change.<sup>31</sup> In particular, any legal reforms or policy changes to address homophobia or transphobia in one area should be assessed carefully against broader state practice. This is especially important given that progress may be transitory or transitional and such reforms can easily be reversed.

Self-identification should be treated as indicative of a person’s orientation/identity. As international refugee law evinces, applicants should be given the “benefit of the doubt”.<sup>32</sup> Given the enormous social stigma and harassment that attaches to being ‘out’ as an LGBTI person, even in asylum countries, it is highly unlikely that such an asylum seeker would fabricate their claim.

Where medical evidence is required to support an intersex asylum claim, such evidence should not require invasive testing and should be conducted by endocrinologists or other specialists with a careful understanding of sex variation.

<b>Evidentiary requirements must be clearly circumscribed.</b>
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<sup>31</sup> Nicole LaViolette, ‘Sexual Orientation, Gender Identity, and the Refugee Determination Process in Canada’ (2013), p. 8 and 32, [http://academia.edu/3431684/Sexual\\_Orientation\\_Gender\\_Identity\\_and\\_the\\_Refugee\\_Determination\\_Process\\_in\\_Canada](http://academia.edu/3431684/Sexual_Orientation_Gender_Identity_and_the_Refugee_Determination_Process_in_Canada) (accessed 9th July 2013).

<sup>32</sup> Nicole LaViolette, ‘UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary’ (2010) 22(2) *International Journal of Refugee Law* 173, p. 193.

### Applicant Support

All interviewees expressed concern at the lack of psychological support offered to LGBTIQ asylum seekers. Social workers at the US Libertas Center for Human Rights noted that asylum seekers require support to navigate their own experiences of trauma and displacement, irrespective of the status determination process. Program Director Leah Weinzimmer argues that social workers act as an interface between asylum seekers and their lawyers and decision-makers. Rather than focus on ‘authenticating’ a sexual orientation or gender identity claim, the Center provides a space for asylum seekers to engage in their own process of self-discovery.

By documenting these conversations, clinical psychologists and social workers are able to corroborate asylum narratives (i.e. provide affidavits) for decision-makers. While lawyers can be pressed (due to limited time) to pursue strictly legal questions and demand potentially traumatic disclosure, caseworkers can help mitigate these pressures by acting as an interface.

The RIWW metric (see Appendix II) demonstrates that LGBTIQ asylum seekers often find their own language to articulate their feelings, desires and expressions. Many will come to identify as gay or transgendered through an ongoing personal dialogue. Caseworkers focus on affective rather than quantitative elements of a claim: disparate wants, desires, and thoughts.

Legal support is crucial to ensuring successful claims. Lawyers Russell Blakeley and Paul Dillane assert that legal aid assists asylum seekers in drafting a claim, navigating the bureaucratic and judicial review processes, and ensuring procedural fairness for applicants. UK LGIG and Organisation Asylum Refuge & Migration (ORAM) emphasise that the lack of information provided to asylum seekers about their rights and avenues of appeal make legal representation critical to a successful outcome.

Community and peer support groups provide spaces for LGBTIQ asylum seekers to socialise and network. While many asylum seekers find it difficult to connect with others, even LGBTIQ communities in the asylum country, LGBTIQ asylum specific networks provide a unique space for solidarity and community building. UK LGIG runs a support group for asylum seekers, facilitated by a peer, which works to enable asylum seekers to share their stories and build their social networks. There are no demands to disclose information or identify with a LGBTIQ identity. Peer support groups can assist asylum seekers in navigating their own emotional and intellectual understandings of their displacement and identities.

<b>Legal and counselling support should be made available.</b>
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## Detention

Under international law, detention of asylum seekers should be seen as a last resort: where asylum seekers pose a substantiated threat to the community. All forms of detention should be proportionate and reviewable. Increasingly, the politicisation of refugee issues combined with an attempt to ‘deter’ asylum arrivals has facilitated widespread use of detention. Australia, for example, was until very recently the only country to have mandatory detention of asylum seekers. In the UK and US, detention is not statutorily required, but is often used where there are no other meaningful housing alternatives.

Despite the object of detention to be ‘protective’ rather than punitive,<sup>33</sup> LGBTIQ asylum seekers consistently find themselves subject to solitary confinement. Attorney Clement Lee at Immigration Equality argues that in the US, queer asylum seekers, particularly those who are transwomen, are subject to homophobic and transphobic violence, vilification and harassment when detained with other asylum seekers. Such punitive sanction is enhanced by the fact that many asylum seekers are detained, albeit separately, in local jails (in addition to specific immigration detention centres). Power adds that in the UK, the isolation and seclusion of LGBTI people punishes them for being subject to abuse (i.e. akin to ‘victim blaming’).

Rather than seek out alternatives to detention, such vulnerable asylum seekers are often kept in solitary confinement for their own ‘protection’. Shidlo, however, argues that detention works to undermine the physical and mental health of such individuals and further stigmatise already marginal groups.

Detention facilities also limit the ability of asylum seekers to access legal, social and psychological support. For example, the preliminary findings of the *New York Immigrant Representation Study* (2011) note that those who were detained with legal representation had an 18 per cent success rate, while those without any representation had only a three per cent success rate.<sup>34</sup> This compared to 74 percent who had access to legal representation and were never detained and 13 per cent for those living in the community without legal aid. Legal fellow Gina DelChiaro from Human Rights First added that legal representation is crucial for asylum seekers. Detaining them (sometimes in locations far from their local communities or advocates) not only undermines their psychological and physical integrity, but also greatly reduces the success of having their claim recognised.

**Detention should only be used as a matter of last resort.**

<sup>33</sup> *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

<sup>34</sup> Katzmman Immigration Representation Study Group, ‘The New York Immigrant Study: Preliminary Findings’ (May 2011), <http://graphics8.nytimes.com/packages/pdf/nyregion/050411immigrant.pdf> (accessed 5th June 2013).

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Part III: Administrative Decision-Making and Judicial Review

*Adjudicators expect coherent, consistent and sequential accounts of persecution. But a person's survival of persecution sometimes necessitates amnesia and denial of the impact and severity of traumatic events. Memories of trauma may be stored as fragments – images, sounds, smells and physical sensations – rather than as a verbal narrative, and this poses challenges to recounting a history of persecution. Furthermore, repeated retelling of a history of persecution can be re-traumatising for the forced migrant and cause secondary trauma to advocates and adjudicators.*

35

– Ariel Shidlo and Joanne Ahola

Primary Decisions

One of the critical challenges facing decision-makers is determining a person's sexual orientation or gender identity. All interviewees expressed that identity and identification is an elusive and fluid concept, interpretation of which is more an art than a 'science'. Shidlo and Chelvan identify, in therapeutic and legal contexts respectively, that the vocabulary used by asylum seekers to describe their sexual orientation or gender identity is rarely about a fixed identity that is capable of being self-actualised in a single disclosure. Indeed, Shidlo argues that asylum seekers will often provide fragmented narratives, often moving between discussions of fantasies or sexual experiences, rather than providing a chronological list of events of when they realised they were same-sex attracted or gender non-conforming. Sexual identity is not linear or aggregative: it involves a complex negotiation of different aspects of personhood – including, but not confined to, sex, gender, ethnicity, religion, culture, geography, disability, HIV status and age.<sup>36</sup>

Emotion gives impetus to asylum narratives. Power notes that decision-makers should be willing to explore the fragments of feeling and experience, rather than simply focusing on defining sexual orientation or gender identity through a linear chronology. Disclosure of a collective set of experiences or feelings becomes central to the asylum narrative. It is more than just about an identity or discrete act (see Appendix I).

The International Gay and Lesbian Human Rights Commission's (IGLHRC) Hossein Alizadeh argues that many LGBTIQ asylum seekers are rarely willing to disclose their experiences to officials given a history of persecution by state actors. If they do, they feel they need to present a 'spectacular' or exaggerated claim of violence in order to satisfy the threshold of persecution. Such testimony is rendered incredible, and is unnecessary. Persecution directed at queer minorities, as Shidlo and Alizadeh both note, operate in banal or domestic locations (i.e. family home, school, workplaces etc).

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<sup>35</sup> Ariel Shidlo and Joanne Ahola, 'Mental health challenges of LGBT forced migrants' (2013) 42 *Forced Migration Review* 1, p. 9.

<sup>36</sup> See LaViolette, see above n31, p. 20.



Blakeley argues that lawyers have to ‘market’ clients to meet the preconceptions of judicial or administrative ‘consumers’. From engagement with local community spaces to sartorial aesthetics, asylum seekers are often required to comport their behavior, bodies or identities in particular ways to be believed by decision-makers. The UK case *SW (Jamaica)* (2011) provides an example of how the outward appearance of a lesbian judicial review applicant was subjected to a critical administrative gaze.<sup>37</sup> Alternatively, some queer or bisexual applicants problematise the notion of an immutable sexual orientation that exclusively desires a single sex, preferring to identify with more fluid accounts of identity and sexuality.<sup>38</sup>

The ‘fast tracking’ of asylum claims poses significant burdens for legal representatives and applicants. Dillane and Power argue that in the UK, asylum seekers who have their claims processed under fast track procedures usually have two weeks from lodging their claim to exhausting all appeals processes before they are deported if their claim is unsuccessful.

While the bureaucracy views this process as an efficiency mechanism, given the aforementioned difficulties in seeking advice, navigating identity and disclosing intimate details in the context of trauma, LGBTIQ asylum seekers are disproportionately disadvantaged. In *Failing the Grade* (April 2010), UK LGIG identified that between 98-99 per cent of gay and lesbian asylum claims were being refused at the primary stage (compared to a 73 per cent rejection rate of other protection claims).<sup>39</sup> Given the cuts to legal aid funding and the increasing pool of applicants requiring legal advice, fast track claims work to deny procedural fairness and limit access to legal advice.

Alternatively, in the US, the one-year filing deadline for asylum applications statutorily bars asylum claims unless exceptional and compelling circumstances prevail. Executive Director Rebecca Heller from the Iraqi Refugee Assistance Project and DelChiaro argue that the arbitrary deadline has barred many valid asylum applications.

Shidlo argues that sexual and gender identity is an ongoing negotiation for asylum seekers and that ‘coming to terms’ with their feelings can take enormous time. Clinical psychologist Elijah Nealy that for transitioning gender identities, comfortable self-identification can take many years (with or without surgical interventions). When asylum seekers realise they are able to lodge a protection claim on the basis of being LGBTI they are statutorily barred from doing so. Immigration reform is currently being undertaken in the US, and it is envisaged that such temporal requirements will likely be removed.<sup>40</sup>

<sup>37</sup> *SW (Jamaica) v Secretary for the Home Department* (2011) CG UKUT 00251.

<sup>38</sup> See Sean Rehaag, ‘Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada’ (2008) 53 *McGill Law Journal* 59, pp. 91-3.

<sup>39</sup> UKLGIG, ‘Failing The Grade: Home Office initial decisions on lesbian and gay claims for asylum’ (April 2010), <http://uklgig.org.uk/docs/publications/Failing%20the%20Grade%20UKLGIG%20April%202010.pdf> (accessed 21 April 2013), p. 2.

<sup>40</sup> Marc Jason Climaco (Human Rights First), ‘Immigration Bill Includes Asylum Reform, Moves to a Full Senate Vote’ (22<sup>nd</sup> May 2013), <http://www.humanrightsfirst.org/2013/05/22/immigration-bill-moves-to-a-full-senate-vote-includes-asylum-and-refugee-protection/> (accessed 5<sup>th</sup> June 2013).



Attorney Chelsea Hayley Nelson identifies an increasing sensitivity surround transgender applications. She notes that internal administrative guidelines (including for asylum and immigration officers) have provided important procedural notes on how to manage transgender clients. For example, this includes the appropriate use of a client's name, respecting their preferred pronouns, and recognising any relevant surgical or hormonal therapies.

ORAM's Legal Director Kevin Lo emphasises the need for fair and timely decisions. However, as Power and Dillane establish, this must be balanced against the need to allow advocates time to gather relevant evidence in order to prepare an asylum seeker's case.

**Applications requiring discussion of sexual orientation or gender identity must not be expedited.**

#### Merits Review

Administrative review mechanisms provide the basic means by which the law and fact-finding undertaken by immigration officers can be reviewed, affirmed, invalidated or varied.

In the UK, the Immigration and Asylum Tribunal (IAT) adopts a tiered structure: the First-tier Tribunal involves judges reviewing bureaucratic decisions (including non-legal members of the tribunal) while the Upper Tribunal acts as a superior court and focuses on jurisdictional or legal questions (as distinct from fact finding or credibility matters). Dillane argues that the judicial structure of merits review, as a specialist court, ensures more consistent decision-making.

Unlike the UK, and in a similar vein to Australia, the US adopts a more clearly demarcated administrative review process. Immigration judges (non-judicial officers) and the Bureau of Immigration Appeals (BIA) act as non-legal avenues of appealing factual findings or errors of law that arise in the primary decision. However, unlike the Refugee Review Tribunal (RRT) in Australia, decisions of such BIA have precedential value on other Department of Homeland Security officers and immigration judges unless modified by executive orders or judicial decisions. Given the need for greater consistency within the administrative decision-making process, publishing sound judicial and/or administrative decisions for precedent-setting purposes would greatly assist primary decision-makers adjudicating conceptually or evidentially similar asylum claims.

**Sound merits review decisions should be published and used as a persuasive or precedential guide for primary decision-makers.**

### Judicial Appeals

All legal advocates and organisations interviewed agreed that judicial review plays a key role in ensuring transparent and accountable decision-making. Specifically, judicial safeguards ensure that asylum seekers are able to access procedural fairness and to prohibit decision-makers from making decisions that go beyond the law.<sup>41</sup> For example, in the UK, over 25 per cent of initial asylum refusals are overturned on appeal.<sup>42</sup>

Lawyers Dillane, Blakeley, Chelvan and Cara Jobson note that courts provide a necessary safeguard over capricious or politically motivated decision-making by focusing on jurisdictional questions which often focus on the scope and definition of the term ‘well-founded fear of persecution’.

In the landmark appellate decision *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* (2010), a case in which both Chelvan and Blakely acted as advocates, the UK Supreme Court rejected the notion of discretion. All the justices reiterated that asylum seekers should not be required to mitigate their sexual orientation in order to avoid persecution. In reference to the applicants from Cameroon and Iran, Lord Rodger asserted that a sexual minority seeking asylum does not need to demonstrate that:

*...His homosexuality plays a particularly prominent part of his life. All that matters is that he has a well-founded fear that he will be persecuted because of that particular characteristic which he either cannot change or cannot be required to change.*<sup>43</sup>

In a unanimous decision, the Court invalidated a trend in decision-making to suggest that where an asylum seeker had lived a “closeted” or “discreet” life; they could be returned and required to do so without attracting persecution. Such logic, as the justices in the case emphasised (with slightly different reasoning), effectively undermines the spirit of the *1951 Refugee Convention*. Indeed, the social and/or legal climate of homophobia which requires individuals to remain hidden, to avoid violence or harassment, may amount to persecution in itself.<sup>44</sup>

Australia, fortunately, ruled such discretion requirements unlawful back in 2003, though the decision was by bare majority.<sup>45</sup> In both the UK and Australia, judicial review (through strategic litigation) has been used effectively to protect the rights of LGBTIQ refugees.

<sup>41</sup> See Mary Crock and Laurie Berg, *Immigration Refugees and Forced Migration* (2011).

<sup>42</sup> Amnesty International, ‘A question of credibility: why so many initial decisions are overturned on appeal in the UK’ (April 2013),

[http://www.amnesty.org.uk/uploads/documents/doc\\_23149.pdf](http://www.amnesty.org.uk/uploads/documents/doc_23149.pdf) (accessed 11th June 2013), p. 4.

<sup>43</sup> *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* (2010) UKSC 31 at 79 (Rodger LJ).

<sup>44</sup> *Id.*, at 84.

<sup>45</sup> *S395/2002 and S396/2002 v MIMLA* (2003) 203 ALR 112.

While the US has not entertained the ‘discretion’ test in its jurisprudence, the concept of ‘social visibility’ is often invoked to limit recognition of discreet sexual minorities.<sup>46</sup> In a similar vein to Chelvan and Blakely, Immigration Equality’s Legal Director Victoria Neilson argues that judicial review in the US plays a key role in providing clarity on what counts as persecution.

However, this can be problematic. For example, in the US case *Castro-Martinez v Holder* (2010), the Ninth Circuit Court held that failure to report a history of childhood sexual abuse amounted to a failure to seek state protection.<sup>47</sup> The gay HIV-positive Mexican applicant in that case was denied asylum on that basis.

**Judicial and administrative review must be accessible to all asylum seekers to guarantee procedural fairness and accountable decision-making.**

### Guidelines and Training

Whether it is in the context of administrative or judicial decision-making, an absence of guidelines on adjudicating LGBTIQ claims continues to produce inconsistent, stereotyped and capricious decisions. The United Nations High Commissioner for Refugees’ (UNHCR) most updated guidelines on sexual orientation and gender identity refugee claims identifies that guidelines must address both substantive (i.e. defining persecution and the particular social group) and procedural (i.e. interviewing and use of country information) elements.<sup>48</sup>

Recently, the UK and US has developed guidelines to address sexual orientation and gender identity decision-making in a refugee context. All the advocates who worked to assist in their development (such as Power in the UK and Neilson in the US) identified that guidelines had facilitated more nuanced and effective decision-making.<sup>49</sup> In particular, the guidelines have eschewed stereotypes, and offered more nuanced differentiated between sexual orientation, sex and gender identity and the institutional challenges LGBTIQ asylum seekers face when disclosing personal information.

<sup>46</sup> See Kristin A. Bresnahan, ‘The Board of Immigration Appeals’s New “Social Visibility” Test for Determining “Membership of a Particular Social Group” in Asylum Claims and its Legal and Policy Implications’ (2011) 29 *Berkeley Law Review* 649.

<sup>47</sup> *Castro-Martinez v Holder* (2010) 641 F.3d 1103 (9<sup>th</sup> Cir. 2011).

<sup>48</sup> See UNHCR, ‘Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ (October 2012),

<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=50348afc2> (accessed 17 March 2013).

<sup>49</sup> Refugee, Asylum and International Operations Directorate (RAIO), ‘Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims: Training Module’ (November 2011),

<http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTTC%20Lesson%20Plans%20and%20Training%20Programs/RAIO-Training-March-2012.pdf> (accessed 10th June 2013), UK Border Agency (UKBA), ‘Sexual Orientation Issues in the Asylum Claim’ (October 2010),

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/sexual-orientation-gender-ident?view=Binary> (accessed 5<sup>th</sup> May 2013), and UK Border Agency (UKBA), ‘Gender Identity Issues in the Asylum Claim’ (June 2011),

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/genderissuaintheasylum.pdf?view=Binary> (accessed 5<sup>th</sup> May 2013).

Additionally, both the UK and US guidelines have emphasised the domestic/familial context (i.e. non-state agents) in which persecution is experienced while urging caution when suggesting asylum seekers could relocate to other parts of the country to avoid persecution and/or seek domestic protection. TLC Staff Attorney Matthew Wood adds that for transgender or gender non-conforming people, there is no universal desire for surgical transition or medical intervention. Whether for personal, social or economic reasons, decision-makers should be aware that applicants can express their gender even without any hormonal or anatomical changes.

Guidelines, however, do not eliminate all problems in decision-making. Dillane argues that training is crucial to effective implementation. Neilson (US) and Power (UK) have undertaken training with their respective government bodies, and have noted that training has been instrumental in giving decision-makers a better understanding of disparate LGBTIQ identities, intimacies, cultural differences, and experiences of trauma. For example, given that bisexual identities are often erased, legal scholar Sean Rehaag urges greater attention to the specific ways bisexual refugees are persecuted (i.e. they may be subject to violence because they are perceived to be sexually “confused” or “transiting” to homosexuality).<sup>50</sup>

While administrative decision-makers in the UK are required to undertake training on LGBTIQ issues, judicial officers are only voluntarily encouraged to do so. Given the important role both merits and judicial review plays in assessing mixed questions of law and fact, cultural sensitivity training can better assist judges in reviewing the legality (or sometimes even the ‘reasonableness’) of bureaucratic decisions.

Hayley Nelson cautions that particular attention must be paid to the ‘invisibility’ of female applicants, who face enormous social and familial pressures that inhibit their ability to seek asylum on the basis of their sexual orientation. Whether a female asylum seeker hesitates in immediately disclosing their sexual orientation or lodges an alternative protection claim, careful consideration should be given to the cultural conditions that coerce women into remaining passive or silent with respect to their asylum claim.<sup>51</sup>

My study of the UK and US experience reveals that a proactive approach to addressing deficiencies in granting protection to LGBTIQ refugees has enormously improved decision-making.

**Guidelines must be developed to explicitly address sexual orientation and gender identity claims without relying on abstract stereotypes.**

**All decision-makers (including judicial officers) must be provided with LGBTIQ sensitivity training.**

<sup>50</sup> Rehaag, see above n38, p. 87.

<sup>51</sup> See Jenni Millbank, ‘Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation’ (2003) 18 *Georgetown Immigration Law Journal* 71.

## Part IV: Political Advocacy and Policy Change

*I think having gay-friendly literature, like having a flag on your door so that people can see it. It's like a really small strategy that, you know, firstly, somebody might recognize it. But second, if they don't, it might be a way of promoting conversation. I think if you have an opportunity to have these conversations, any slight opening to get staff to a level where they feel really comfortable to go there in a respectful manner.<sup>52</sup>*

- Anonymous

### Audit, Analysis and Assessment

Anecdotally, the Australian Department of Immigration and Citizenship (DIAC) has noted an increase in sexual orientation (and to a lesser extent gender identity) asylum claims. Despite these anecdotal statements, DIAC does not currently aggregate data on sexual orientation and gender identity asylum claims. In addition to this, since only about half of all RRT decisions are published, it is difficult to gauge changing patterns of LGBTIQ people seeking asylum in Australia.

While now restructured, the former UKBA was one of the few government agencies that collates data on the numbers of sexual orientation and gender identity claims. International officer Jasmine O'Connor from Stonewall UK notes that in addition to collecting data, the UKBA undertakes an audit of cases from vulnerable groups to improve decision-making quality.

Reviewing statistics and cases on an ongoing basis allows administrators to identify errors in primary decision-making, improve use of sexual orientation and gender identity adjudication guidelines, and encourage greater care when formulating reasons for a grant or refusal of a protection claim.

**Data and decisions relating to sexual orientation and gender identity asylum claims must be collected and reviewed.**

### Policy Directives and Operational Guidance

Operational guidance notes and/or policy directives in the UK and US note the need to consider country information and adjudication guidelines when making decisions. Unfortunately, as Dillane argues, the lack of direct citation in decisions means it is difficult to assess what reference (if any) a decision-maker has made to available guidelines. Encouraging direct references to the guidelines will improve transparency and allow other decision-makers to see how guidelines are being applied to individual cases.

<sup>52</sup> ORAM, 'Opening Doors: A Survey of NGO Attitudes Towards LGBTI Refugees and Asylum Seekers' (June 2012), <http://www.oraminternational.org/images/stories/PDFs/oram-opening-doors.pdf> (accessed 7th June 2013), p. 22.



Jobson adds that non-adversarial contexts of decision-making make it easier for asylum seekers to disclose their narratives. Preference should be given to sensitive and supportive questioning that guards against the demand to respond to prolonged and invasive questions often found in courtroom cross-examination.

Operational guidance notes are crucial in allowing decision-makers to appreciate the unique circumstances of LGBTIQ persecution and the complexities associated with identity/identification. Historically, international refugee jurisprudence has privileged 'public' definitions of persecution. In doing so, the notion of surrogate protection has only extended where the persecution is performed, condoned or systemically ignored by the state. What this definition fails to understand, however, is the unique experiences of torture and trauma faced by LGBTIQ asylum seekers. Given the intimate dimensions of sexual life and the insistence on gender role conformity, many LGBTIQ asylum seekers often experience harm perpetrated by their family or friends, in addition to state actors.

In order to manage their sexual visibility, same-sex attracted asylum seekers often internalise homophobia, self-harm, remain secretive or pursue heterosexual identities to 'pass' in their respective cultural contexts. Alternatively, gender non-conforming asylum seekers may keep their identifications and expressions secret, and seek to 'fit' in their sex assigned at birth to avoid further harassment or violence. Such a pervasive climate of fear can generate significant psychological harm – and irrespective of physical injury – can meet the threshold of persecution.<sup>53</sup> Recognising the physical and psychological harm occurring in the home is crucial to understanding the unique nature of persecution facing those who are 'queer'.

Moreover, Shidlo and Nealy note that policy guidance should note the complex (and mutually constitutive) relationship between sexual orientation and gender identity and persecution. Shidlo argues that the intensity and invidiousness of policing of sexuality or gender identity in domestic space from an early age instills feelings of sexual shame and coerces secrecy. With this in mind, it is unsurprising then, as social workers Leah Weinzeimer and Elizabeth McInnes identify, that asylum seekers are often reticent to immediately disclose their sexual or gender identifications to government officials or bureaucracies, or feel uncomfortable discussing their intimate, emotional, or erotic practices. For transgender applicants, Wood adds that there needs to be greater care given to recognising the preferred gender identity of an applicant even where it conflicts with government documentation. Given that asylum seekers have to transit through a range of legal, social, medical and policy arenas while have their claims processed, 'coming out' becomes an ongoing emotional burden that is constantly negotiated.<sup>54</sup>

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<sup>53</sup> James Hathaway and Jason Pobjoy 'Queer Cases Make Bad Law' (2012) 44 *NYU Journal of International Law and Politics* 315 at 362. See UK Border Agency (UKBA), 'Gender Identity Issues in the Asylum Claim' (June 2011), <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/genderissu eintheasylum.pdf?view=Binary> (accessed 5<sup>th</sup> May 2013).

<sup>54</sup> Gail Mason, *The Spectacle of Violence: Homophobia, gender and knowledge* (2002), pp. 80-82.

### Law Reform

Australia currently proscribes the consideration of sur place claims. Such claims are condemned on the basis that an applicant has engaged in ‘self-serving’ conduct to bolster their claim for asylum.<sup>55</sup> Such an assumption is problematic on two fronts. Firstly, it ignores the current evidentiary demand on LGBTI applicants to authenticate their sexuality by reference to their participation in local clubs or community spaces. Secondly, it suggests that ‘coming out’ or making one’s gender expressions more visible in the asylum country is a disingenuous attempt to get a protection visa rather than a legitimate expression of identity.<sup>56</sup>

No bar on consideration of sur place claims exists in the UK and US. In fact, the US enables asylum applications to be filed after the one-year deadline due to changed circumstances arising due to “changed” circumstances of the applicant (i.e. they have come out and would now risk persecution if returned home).<sup>57</sup>

Following the UK and US, Australia should remove legislative and policy impediments that prohibit the consideration of sur place claims.

**Sur place claims should be considered.**

### Programs and Research

Improving human rights documentation is crucial to assisting LGBTIQ asylum seekers. Decision-makers must be wary of making assumptions that the absence of documented violence or discrimination means it is not a systemic problem. Amnesty International notes that the unwillingness to protect against homophobic and transphobic violence combined with the lack of reporting mechanisms mean that the LGBTIQ experiences of persecution are obscured by a cultural climate of “indifference” and “silence.”<sup>58</sup>

Power and Lo identify there have been very few asylum cases relating to intersex in both the UK and the US. Power notes that in one case she is aware of, an intersex applicant was granted asylum at the primary interview due to their experience of abuse and social dislocation from their local community. Intersex issues continue to be subject to invisibility in a number of asylum countries (evinced by the lack of intersex mention in a number of protection guidelines). Tamar-Mattis adds that the absence of legal or administrative recognition of intersex people, means caseworkers and advocates are often unable to understand the nuances of intersex issues (as distinct from sexual orientation and gender identity refugee claims). In order to remedy the lack of recognition, further research in this area is essential.

<sup>55</sup> See section 91R(3), *Migration Act 1958* (Cth).

<sup>56</sup> Nicole LaViolette, ‘UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary’ (2010) 22(2) *International Journal of Refugee Law* 173, p. 203.

<sup>57</sup> See section 208(D), *Immigration and Nationality Act 1952* (US).

<sup>58</sup> Amnesty International, ‘Crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity’ (June 2001), <http://www.amnesty.org/en/library/asset/ACT40/016/2001/en/bb63ae8f-d961-11dd-a057-592cb671dd8b/act400162001en.pdf> (accessed 8<sup>th</sup> June 2013), pp. 8-9.

Staff Attorney Blaine Bookey from the UC Hastings Center for Gender and Refugee Studies notes that the provision of technical and documentary assistance for attorneys (as distinct from direct advocacy services) is key to improving asylum litigation. Specifically, the Center has been able to collate and thematise case information (i.e. expert affidavits, legal briefs, country condition reports, administrative or judicial decisions etc) to assisting individual litigators. Bookey emphasises that the qualitative technical assistance has been instrumental for non-asylum litigators navigating the complex terrain of refugee legal precedents, policies and practices. Tamar-Mattis elaborates that where intersex cases are considered, the absence of general country information evidence should encourage decision-makers and advocates to seek expert testimony and support from relevant community organisations (i.e. AIC).

All advocates maintained that building collaborative relationships between NGOs and the government sector was key to improving support for LGBTIQ asylum seekers. ORAM's leading survey on refugee NGOs identified that even though an overwhelming majority believed LGBTIQ refugees deserved protection, many lacked the infrastructure to offer targeted support.<sup>59</sup> While supporting organisations working on LGBTI issues is essential, ORAM's Executive Director Neil Grungas cautions against intervening in local spaces where networks are operating autonomously and effectively. Moreover, as UKLGIG and LCHR identify, providing safer spaces for LGBTIQ asylum seekers is not just about organisational leadership or 'top-down' approaches, but also about allowing LGBTIQ refugee social networks to develop within local communities.

**Further research on intersex claims is needed.**

**Peer support networks should be facilitated.**

**Funding should be made available to community organisations to develop specific programs to address the needs of LGBTIQ asylum seekers.**

<sup>59</sup> ORAM, 'Opening Doors: A Survey of NGO Attitudes Towards LGBTI Refugees and Asylum Seekers' (June 2012), <http://www.oraminternational.org/images/stories/PDFs/oram-opening-doors.pdf> (accessed 7th June 2013), pp. 26-27.

## CONCLUSIONS AND RECOMMENDATIONS

Given the increasing numbers of LGBTIQ people facing persecution around the world, providing effective durable protection solutions for refugees is an enormously complex task (see Appendix III). However, it is not a challenge that should be dismissed. Advocates and caseworkers have been instrumental in securing support, recognition and resettlement for sexual and gender minorities refugees. While increasing awareness of such asylum issues has been promising, there are significant obstacles that must be addressed in order to ensure justice for those seeking protection from persecution.

LGBTIQ asylum seekers are not a homogenous group. Community and policy infrastructure should be culturally sensitive to the differences within the diverse LGBTIQ communities. Specifically, casework and policy approaches to the issue should recognise: varied experiences of persecution; disparate sexual or gender identifications; and the limits on disclosure due to pervasive secrecy, shame and stigma associated with a person's sexual orientation, gender identity, or intersex differences.

In order to improve the ongoing advocacy, casework and decision-making in this area, the following recommendations must be carefully developed and implemented. Collaboration between community workers, advocates, policy makers, and decision-makers is key to ensuring the success of these recommendations.

- **Open-ended interviews are needed to allow asylum seekers the opportunity to share their unique narratives.** All interviews with LGBTIQ asylum seekers must not rely on a chronological or prescriptive series of questions when exploring questions of identity and persecution. Asylum seekers must be provided appropriate space to discuss: their experiences of being 'different' in their country of origin; how they relate to these differences; how these differences have evolved; and what harms they have experienced because of their sexual or gendered differences.
- **Training must be provided to all translators, advocates, and caseworkers.** Many asylum seekers are hesitant to disclose highly personal information about their sexual or gender identity to translators who are part of their local communities. Translators also often lack specific vocabularies to discuss LGBTIQ issues or are hesitant to discuss explicit issues relating to sexual orientation or gender identity. In addition, legal demands for the immediate disclosure of sexual or gender persecution or to the need to 'queer' their demeanour can further traumatise asylum seekers. Mistranslation and the misappropriation of asylum narratives can impugn the applicant's credibility and effectively undermine the entire claim for asylum.

- **Evidentiary requirements must be clearly circumscribed.** Given the intensely personal nature of sexual or gender identifications, and the stigmas associated with being against the ‘norm’, it is unreasonable to expect LGBTIQ asylum seekers will have disclosed this information to others or that they should provide pornographic evidence of their sexual practices. Correspondingly, updated country information reports and tailored expert testimony should be sought when seeking to corroborate claims for persecution.
- **Legal and counselling support should be made available.** Refugee law is enormously complex to navigate, and many LGBTIQ asylum seekers lodge claims for protection based on other grounds, failing to realise that sexual orientation or gender identity claims are valid. Additionally, given that many LGBTIQ asylum seekers have experienced significant trauma, including sexual violence and family abuse, counselling should be made available to assist with emotional wellbeing and to help them outline their experiences of persecution more clearly for decision-makers.
- **Detention should only be used as a matter of last resort.** Many asylum seekers in detention experience violence and harassment from others in detention because of their sexual orientation or gender identity. Instead of relying on solitary confinement as a ‘protective’ measure – a practice that exacerbates their mental health issues – LGBTIQ asylum seekers should be released into the community on an appropriate visa while their claim is being processed.
- **Applications requiring discussion of sexual orientation and gender identity must not be expedited.** Given the enormous difficulties in disclosing personal identifications, articulating experiences of trauma, and providing corroborating evidence, asylum seekers (and their advocates) must be given appropriate time to prepare their cases to encourage more considered adjudication.
- **Guidelines must be developed to explicitly address sexual orientation and gender identity claims without relying on abstract stereotypes.** Mirroring the UK and US, who have developed sexual orientation and gender identity guidelines, Australia must develop its own specific set of guidelines to assist adjudicators. These guidelines must recognise that sexual orientation and gender identity are both dynamic and culturally specific. They are not matters reducible to popular culture consumption, sexual activity, or recognised pathologies.
- **All decision-makers (including judicial officers) must be provided with LGBTIQ sensitivity training.** In order to ensure effective implementation of guidelines and policy directives, all decision-makers (including judges), should be provided with specialist training to facilitate better decision-making.



- **Sound merits review decisions should be published and used as a persuasive or precedential guide for primary decision-makers.** All merits review decisions should be made publicly available. Relevant tribunals and immigration officers should also regularly refer to exemplar merits review decisions to better ensure consistency when making decisions.
- **Judicial and administrative review must be accessible to all asylum seekers to guarantee procedural fairness and accountable decision-making.** Courts must be able to review administrative process to ensure applicants are given an adequate hearing and the assessment of evidence and law is done reasonably.
- **Data and decisions relating to sexual orientation and gender identity asylum claims must be collected and reviewed.** In order to properly assess trends in sexual orientation and gender identity based asylum claims, statistics and decisions should be subject to ongoing review by the Australian Department of Immigration and Citizenship (DIAC).
- **Sur place claims should be considered.** LGBTIQ asylum seekers should not be legislatively penalised for pursuing their life in Australia in a manner that gives rise to a well-founded fear of persecution simply because it occurred after they had left their country of origin.
- **Further research on intersex claims is needed.** Despite increasing recognition of sexual orientation and gender identity based asylum claims, intersex refugee issues remain largely invisible at a legal and policy level Australia.
- **Peer support networks should be facilitated.** Peer support networks run by LGBTIQ refugees can greatly assist asylum seekers by providing an opportunity to network and socialise, while providing a more appropriate (though not necessarily universal) avenue for gathering evidence of an asylum seeker's sexual orientation and/or gender identity and expression.
- **Funding should be made available to community organisations to develop specific programs to address the needs of LGBTIQ asylum seekers.** Community organisations play a key role in supporting asylum seekers from all backgrounds, but little exists to specifically address sexual minority and gender identity issues. Funding is necessary to assist these organisations to develop relevant programs to make it easier for asylum seekers to express their claims.

With public debates on refugees and asylum seekers becoming increasingly politicised, it is crucial that both law and policy in this area be based on facts, not fears or cultural assumptions. Whether it relates to casework or decision-making, a holistic approach that empowers asylum seekers in order to navigate the varied social, psychological, and legal demands when undertaking refugee processing is crucial.

## *CONTACT*

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(Badge, Amnesty International Australia)

## APPENDIX

### APPENDIX I: OPINION EDITORIAL

(Source: *The Vine*, 11<sup>th</sup> July 2012: <http://www.thevine.com.au/life/news/LGBT-asylum-seekers/>)

#### *Asylum seekers either too gay, or not gay enough*

What does Madonna, Oscar Wilde, Greco-Roman wrestling, clubbing at Stonewall and sexual promiscuity have in common?

Not much really, other than that refugee decision-makers use these cultural tropes to determine whether a refugee is “genuinely” gay and subject to a well-founded fear of persecution.

Since 1992, Australia has recognised that sexual minorities of a particular country can be recognised as a “particular social group” for the purposes of seeking asylum under the *Refugee Convention 1951* and the *1967 Protocol*.

While most of us would find it difficult to answer intrusive questions about our sexual activity, in refugee cases, the demand to map a comprehensive sexual history can be rather absurd.

In one case from 2010, a gay asylum seeker from Lebanon lamented:

*Although I was happy to finally be in a country where I could be open about my homosexuality, it does not mean that overnight I would turn into a promiscuous person willing to engage in homosexual activities with any man that I met.*

Apparently, being gay is necessarily synonymous with wanting to be sexually active. That also translates into proving that you like frequenting venues on Oxford Street or maybe even reading some Oscar Wilde before bed.

Lesbian refugees often face a different challenge: they are denied credibility because they do not conform to norms of public promiscuity and group association. In a 2008 case, a female asylum seeker from Mongolia was disbelieved because her experiences of intimacy were not seen as conducive to that of a “real” relationship. The Refugee Review Tribunal (RRT) said:

*I accept that the applicant has a girlfriend and that she has had a close relationship with this friend since [year] I have doubts as to whether their relationship is a lesbian relationship as the evidence as to how they first met and their lack of involvement in the lesbian community is of concern. Further the applicant gave little details of the nature of the relationship and I felt she was being evasive as to the real basis of their friendship.*

While the applicant in this case was found to be a refugee, the association between her claim to a lesbian identity and the lack of involvement in the public “lesbian community” in her country of origin limited her credibility. As the applicant did not travel with her partner and chose not to come out publicly, the RRT characterised such intimacy as platonic rather than sexual or romantic.

However, if you are too scripted, then you are considered to be as rehearsed as a “Kabuki actor.” In fact, s91R(3) of our *Migration Act 1958* enables decision-makers to discount any activity undertaken in Australia that is deemed to be self-serving for an asylum claim.

In 2011, a lesbian asylum seeker from Uganda had her claim rejected, because her relationship with another woman was considered suspect. According to the Department of Immigration and Citizenship delegate, she “had merely adopted the persona of a homosexual” for a protection visa. The applicant, however, responded:

*I have kept my homosexuality private in Uganda because I fear for my life. It is for this reason that I did not directly associate with or join lesbian groups.*

Is it that hard to believe that in a country attempting to further criminalise homosexuality and where support groups for sexual minorities are consistently raided, that someone would be silent about not being heterosexual?

What a catch-22: either you are too gay, or you are not gay enough.

So how do we approach casework and decision-making in a way that does justice to the voices of refugees, rather than seeking to appropriate their experiences to fit within our “neat” stereotypes?

While there is no perfect policy panacea to the problems of mendacity, I have received a Churchill Fellowship this year to research how specialist LGBTI refugee casework models have developed overseas can assist advocates and decision-makers here in Australia.

Most of us would laugh at the ongoing use of stereotypes. Yet, for refugees who are persecuted for their sexual orientation or gender identity, this cannot be a matter for our entertainment.

Queerness is not reducible to pop culture references or consumption. Our experiences of being lesbian, gay, bisexual, transgender or intersex (LGBTI) is specific to our cultural and geographical context, and that means it is not always contingent on our love of Lady Gaga.

Incorrect status determinations are dangerous because they can facilitate the return of refugees to places where their life or liberty is threatened.

With an increasing number of asylum claims based on sexual orientation or gender identity being processed in Australia, decision-makers have a challenging obligation to ensure that such claims are treated with the appropriate cultural sensitivity.

As a newly appointed Churchill Fellow, I hope that furthering my research in this area will help facilitate some justice to the disparate voices of LGBTI refugees seeking protection here in Australia.

**Senthorun Raj is a 2012 Churchill Fellow.**



## APPENDIX II: SEXUAL ORIENTATION AND GENDER IDENTITY EXPERIENCE METRICS

(Source: Research Institute Without Walls, 2011)

### SEXUAL ORIENTATION AND GENDER IDENTITY ASSESSMENT IN LGBT REFUGEES AND ASYLEES

(Ahola and Shidlo, 2011)

	Timeline				Change in status between arrival to U.S. and today
	In country of origin	On arrival to U.S.	1 Year after arrival to U.S.	Today	
<b>Attraction</b>					
To whom are you sexually attracted?	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, when did the change start? (mo/yr): _____ Has the change become stable? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, when? (mo/yr): _____
<b>Fantasies</b>					
About whom do you have sexual fantasies?	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, when did the change start? (mo/yr): _____ Has the change become stable? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, when? (mo/yr): _____
<b>Behavior</b>					
With whom have you had sex?	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, when did the change start? (mo/yr): _____ Has the change become stable? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, when? (mo/yr): _____
<b>Emotional Preference</b>					
Whom do you fall in love with or have crushes on?	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Women <input type="checkbox"/> Men <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, when did the change start? (mo/yr): _____ Has the change become stable? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, when? (mo/yr): _____
<b>Community</b>					
With whom do you feel comfortable socializing?	<input type="checkbox"/> Lesbian(s) <input type="checkbox"/> Gay Men <input type="checkbox"/> Bisexual(s) <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Lesbian(s) <input type="checkbox"/> Gay Men <input type="checkbox"/> Bisexual(s) <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Lesbian(s) <input type="checkbox"/> Gay Men <input type="checkbox"/> Bisexual(s) <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Lesbian(s) <input type="checkbox"/> Gay Men <input type="checkbox"/> Bisexual(s) <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Persons	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, when did the change start? (mo/yr): _____ Has the change become stable? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, when? (mo/yr): _____
Check all that apply.					

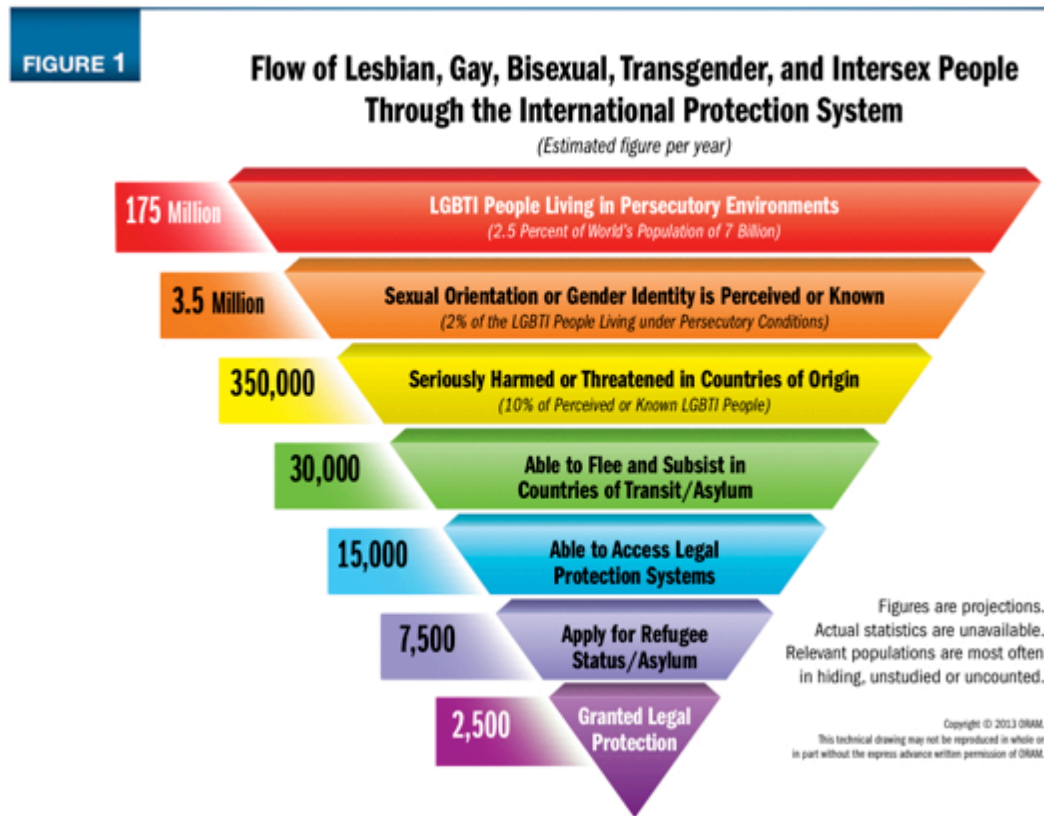
	Timeline				Change in status between arrival to U.S. and today
	In country of origin	On arrival to U.S.	1 Year after arrival to U.S.	Today	
<b>Self Identification (Private)</b>					
How do you identify yourself (to yourself)?	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, when did the change start? (mo/yr): _____ Has the change become stable? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, when? (mo/yr): _____
<b>Self Identification (To LGBT Persons)</b>					
How do you identify yourself to LGBT persons?	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, when did the change start? (mo/yr): _____ Has the change become stable? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, when? (mo/yr): _____
<b>Self Identification (To Heterosexual Persons)</b>					
How do you identify yourself to heterosexual persons?	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Lesbian <input type="checkbox"/> Gay Man <input type="checkbox"/> Bisexual <input type="checkbox"/> Heterosexual <input type="checkbox"/> Transgender Person	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, when did the change start? (mo/yr): _____ Has the change become stable? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, when? (mo/yr): _____
<b>Additional Comments:</b> Some transgender persons may not identify as transgender, but rather only by their gender identity (i.e. female or male). Please indicate in this section if your transgender interviewee rejects the identity of transgender.					

First Name: \_\_\_\_\_ Last Name: \_\_\_\_\_

Interviewer: \_\_\_\_\_ Date: \_\_\_\_\_

### APPENDIX III: FLOW OF LGBTI PEOPLE THROUGH THE INTERNATIONAL PROTECTION SYSTEM

(Source: Organisation for Refugee Asylum & Migration, 2013)



## APPENDIX IV: OPINION EDITORIAL

(Source: *The Guardian*, 23<sup>rd</sup> July 2013:

<http://www.guardian.co.uk/commentisfree/2013/jul/23/gay-asylum-seekers-papua-new-guinea>.)

### What will happen to gay asylum seekers in Papua New Guinea?

*If I return as the leader of the government and prime minister, I will be very clear of one thing: this party and government will not be lurching to the right on the question of asylum seekers.*

– Kevin Rudd in 2010

For many Australians, these words strike us with considerable irony. In 2010, prior to losing the Labor leadership, prime minister Kevin Rudd denounced a policy shift to the “right” when it came to asylum seekers. This was the same leader who led a government to victory on the basis that offshore processing would be disbanded in favour of more humane and cost effective community-based processing.

Such hope, of course, was cruelly crushed following Rudd's announcement to send all asylum boat arrivals to Papua New Guinea (PNG) last Friday.

Much has been written about the endemic violence in PNG and the absence of effective legal infrastructure to support refugees. However, little has yet been said about another important question: how will lesbian, gay, bisexual, transgender, and intersex (LGBTI) asylum seekers fare in a place where their identity is a cause for criminal sanction?

PNG criminalises homosexuality with imprisonment for up to 14 years. The criminal code – largely mirroring many other colonial laws – punishes acts that are deemed “unnatural offences.” With pervasive cultural attitudes that consider gay and lesbian people to be both pathological and perverse, it is unsurprising that such laws specifically prohibit expressions of same-sex relationships.

Under these new proposals, both LGBTI asylum seekers and refugees who arrive by boat would have to contend with a legal system that deems their behaviour immoral and their identities criminal. There is no indication whether PNG would, under their laws, consider such claims to be valid at all. Even here in Australia, where there are no criminal punishments and sexual orientation or gender identity claims are valid, “coming out” can be fraught with anxiety.

Can you imagine then having to disclose that you are being persecuted for being gay, when the place you are seeking asylum in believes you should be locked up for it?

As refugee lawyers Jenni Millbank and Eddie Bruce-Jones point out, criminalising same-sex relationships itself can amount to persecution. Even if the laws are not enforced, they make sexual and gender minorities subject to extortion, abuse and harassment. When turning to the police risks further violence, LGBTI people are forced to occupy positions of secrecy. Locked back into the proverbial closet for fear of being harmed.

On one hand, you risk stigma, punishment and/or rejection by revealing that your sexual orientation or gender identity is the basis of your claim. Alternatively, you can remain silent, and be returned to the country where you faced a well-founded fear of persecution. Either way, it is an impossible Catch-22.

Let's not forget about the challenges that arise after you are recognised as a refugee too. How would you fare as a person resettled in a country where you could never express who you were for fear of being prosecuted?

ORAM International, the leading advocacy organisation for LGBTI refugees, recently recommended that resettlement countries like Australia work to ensure that refugees are quickly and carefully resettled within safe communities. Sadly, this will no longer be an option for those who arrive by boat seeking protection. In an attempt to "save lives" and/or "smash the people smugglers' business model" – depending on which political rhetoric is being invoked at the time – LGBTI asylum seekers will be sacrificed.

We have to ask ourselves: is this the kind of future for Australia that we want to be building?

Elections come and go. Policies shift and change. Human rights abuses, unfortunately, continue to persist globally – 78 countries continue to criminalise same-sex relationships. Whether people manage to get on a boat or not, the absence of safe and legal ways to seek refuge means people will languish either in their home or transit country. Out of sight, out of mind.

Hours after the announcement, foreign minister Bob Carr tweeted: "I promise to stand against homophobia. Always." Sadly, that promise seems exclude refugees fleeing homophobia.

For a party that claims to treat asylum seekers with "dignity and compassion" and aims for a world where LGBTI people are "safe, valued, and respected," the decision to banish asylum seekers arriving by boat to PNG is an extremely odd way to show it.



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