

# Fleeing persecution: experience of LGBTI asylum seekers in Australia

**Back to LGBTI Committee publications (/PPID/Constituent/LGBTI\_Issues/Publications.aspx)**

Roman Konig

Herbert Smith Freehills, Sydney, New South Wales

**[roman.konig@hsf.com](mailto:roman.konig@hsf.com) (mailto:roman.konig@hsf.com)**

Nathan Eastwood

Clifford Chance, Sydney, New South Wales

**[nathan.eastwood@cliffordchance.com](mailto:nathan.eastwood@cliffordchance.com) (mailto:nathan.eastwood@cliffordchance.com)**

## *Introduction*

In many societies, many Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people are subject to serious human rights abuses for not conforming to culturally established norms on sexuality or gender. As a result, LGBTI asylum seekers are prone to facing complex challenges arising from discrimination, homophobia, biphobia and transphobia in their country of origin. This may include experiences of sexual and physical violence, lack of police protection, arbitrary arrest, detention or extortion and exclusion from or interrupted access to services, especially where same-sex relations remain criminalised. Such issues are commonly accompanied by higher levels of social isolation and disconnection from family, community and other support mechanisms. Given such underlying factors, the difficulties of LGBTI asylum seekers in navigating Australia's complex immigration laws have rendered this an area ripe for legislative reform.

## *Current Australian position*

The experience of LGBTI asylum seekers navigating Australia's immigration laws has given rise to numerous factual accounts of neglect, stereotyping and a general distrust towards the unique circumstances faced by such applicants. Australia is party to the 1951 Refugee Convention, which imposes an obligation on member states to offer protection to those seeking asylum due to a well-founded fear of persecution in their home countries as a result of being a member of a particular social group.<sup>[1]</sup> Australia recognised an individual's sexual orientation as constituting membership of a social group for the purpose of assessing an asylum application in *Re Gustavo Carlos Saavedra Morato v the Minister of Immigration, Local Government and Ethnic Affairs* [1992] FCA 637. Such progress was further enshrined into law by the High Court of Australia in *S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, which held that Australia could not withhold granting asylum from LGBTI asylum seekers on the basis they could hide their sexual orientation and therefore prevent any undue harm being brought upon themselves.

## *Administrative Appeals Tribunal*

However, while the abovementioned case law enshrines general principles of law that protect the rights of LGBTI asylum seekers, the way in which many claims, and especially those that end up in the appeals process highlights how this remains an area rife of stereotyping, and unpredictable application of the law. In particular, focus has been drawn on the Australian Administrative Appeals Tribunal's (AAT) role.<sup>[2]</sup> While a general suggestion that the AAT's role is straightforward should be dispensed with, especially in a situation where the application for a protection visa is almost solely based on the applicant telling the truth, nevertheless, criticisms centre on AAT officials' lack of qualifications and training in LGBTI asylum seeker issues. There has been particular focus on the way in which LGBTI asylum seekers have been questioned on Western-centric perceptions of what, stereotypically speaking, constituted LGBTI pop culture, in addition to other more overt questioning regarding an individual's hobbies, habits or other activities they make partake in.<sup>[3]</sup> Various occurrences of such lines of questioning by the AAT have been recorded over the years. For instance, in a 2004 case, the then iteration of the AAT (being the Migration Review Tribunal) questioned an asylum seeker on their knowledge of Western-centric LGBTI pop culture phenomena such as Madonna, Bette Midler and Oscar Wilde.<sup>[4]</sup> While this may be excused as being from, at least from an LGBTI rights perspective, a different era, more recent cases fail to provide any further reassurances that LGBTI asylum seekers are being treated with due process. In 2016, a man from Bangladesh was rejected, in part, as he was unable to correctly pronounce or spell the name of an Oxford Street venue he had attended, which according to Tribunal documents referred to the nightclub as a 'day venue'.<sup>[5]</sup>

Such encounters with the AAT harm the prospects of LGBTI asylum seekers in being able to share their experiences, and may ultimately hinder their prospects of success in lodging a successful appeal. It is particularly noteworthy that beyond appeals to the Federal Court of Australia (FCA), no further safeguards or review mechanisms exist to protect LGBTI asylum seekers from AAT decisions. The scope to overturn AAT decisions is therefore narrow, even in situations where the FCA may believe that the AAT has made an incorrect adverse finding as the FCA is limited to reviewing questions of law. The majority of LGBTI asylum seekers also do not contest AAT decisions.<sup>[6]</sup> Factual scenarios as determined by the AAT cannot be challenged, which can lead to applicants' circumstances not able to be further considered once established.<sup>[7]</sup> This may result in outcomes where a specific applicant, who may not have felt comfortable at the time of their AAT hearing due to a combination of personal circumstances and inappropriate lines of questioning, can be faced with a potentially adverse outcome for their case upon appealing to the FCA.

### *Department of Home Affairs*

Notwithstanding the above, the Department of Home Affairs (DHA), being the department responsible for assessing asylum claims has produced a training manual for staff members regarding best practice when it comes to assessing LGBTI asylum seeker claims. It outlines that 'officers must ensure they have an accurate understanding of LGBTI characteristics and issues in the context of the applicant's country of origin information, in the same way they do for any other claim' and that 'they must not allow their personal feelings, attitudes, stereotypic views, religious views or assumptions influence their interviewing or assessment of onshore protection or offshore humanitarian visa applications for claims related to sexual orientation or gender identity'. A list of 'inappropriate lines of enquiry' has also been produced by the DHA as part of this manual, examples of questions officers should not ask being:

- whether the applicant can change their behaviour to conform or avoid harm;
- whether the applicant can prove they are LGBTI; and
- any and all questions about details of sexual activities.

It is nevertheless apparent that such best practice has not necessarily been adhered to beyond the DHA's ambit, with the immigration appeals process being a key outlier particularly given that such training has solely been provided to the DHA. Specific types of guidelines that may guide the AAT's development in this area are also specified in the UNHCR Handbook, which outlines that 'if the applicant's account appears credible, he [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt'.<sup>[8]</sup> Such guidelines should be enshrined into AAT policy, and develop into the underlying considerations of the AAT's decision-making process when assessing

LGBTI asylum seeker claims.

## *Legislative reform*

The pervasive issues faced by LGBTI asylum seekers when navigating the AAT processes highlights a clear need for enhanced guidelines in this area. It is clear that specific, targeted changes to the *Migration Act 1958* (the Migration Act) are required to minimise the specific risks faced by LGBTI asylum seekers. Numerous recommendations have been brought forward that are consistent with reforming the immigration system to one that more closely assists Australia in fulfilling its aforementioned international obligations.

One of the key changes should be to the Migration Act in order to enshrine protections against resettling LGBTI asylum seekers in countries where LGBTI identities or practices are either illegal, or where there is a deep hostility towards LGBTI people. This is particularly important in situations where a refused application may stem from an erroneous line of questioning. It is therefore imperative that the government legislate reform that enhances Australia's non-refoulement obligations under international law, which in general terms, prevents Australia from returning asylum seekers to a country in which they face a real risk of a violation of their fundamental human rights.<sup>[9]</sup> At present, the principle of non-refoulement is primarily derived from four international treaties, these having no direct legal effect within Australia unless they have been incorporated into domestic law by an Act of Parliament.<sup>[10]</sup> The consequences of this non-incorporation into domestic law is such that Australia is under no legal obligation through which any LGBTI asylum seeker can ensure that they are not forcibly removed from the country following an unfavourable finding; a decision that may have been made on a factually flawed line of reasoning by the relevant decision-maker.

In the absence of this, a clear need for reforming the assessment processes for protection claims by recently arrived LGBTI asylum seekers to bring them in line with best practice and international law has emerged. The abovementioned DHA standards are a beginning point from which best practice can be expanded into other relevant departmental and appeals bodies, most notably into the AAT. A nuanced understanding of LGBTI experiences thereby assists in creating a fairer, and more equitable immigration appeals system. This should be a system in which individual applicants are more likely to be afforded the opportunity to present their case in a way that allows them to feel comfortable, minimising the chances of applicants either concealing information, or alternatively, disclosing personal information that should not factor in a decision-makers' process when assessing such claims.

## *Conclusion*

The need for law reform in the area of LGBTI asylum seekers has been made clear. Practices around appeals processes indicate that this area is ripe for reform, in order to assist in effectively protecting and supporting LGBTI asylum seekers going forward in rebuilding their lives in Australia.

[1] (file:///ibant16fsvm/DTPData/Publications/Committee%20output/PPID/LGBTI/2021/Edited/Edited%20-%20Australia%20LGBT%20Asylum%20Seekers.docx#\_ednref1) The Refugee Convention, 1951, Art 2.

[2] (file:///ibant16fsvm/DTPData/Publications/Committee%20output/PPID/LGBTI/2021/Edited/Edited%20-%20Australia%20LGBT%20Asylum%20Seekers.docx#\_ednref2) See: [www.smh.com.au/lifestyle/not-gay-enough-the-bizarre-hoops-asylum-seekers-have-to-leap-through-20171128-gzu1vq.html](http://www.smh.com.au/lifestyle/not-gay-enough-the-bizarre-hoops-asylum-seekers-have-to-leap-through-20171128-gzu1vq.html) (<https://www.smh.com.au/lifestyle/not-gay-enough-the-bizarre-hoops-asylum-seekers-have-to-leap-through-20171128-gzu1vq.html>).

[3] (file:///ibant16fsvm/DTPData/Publications/Committee%20output/PPID/LGBTI/2021/Edited/Edited%20-%20Australia%20LGBT%20Asylum%20Seekers.docx#\_ednref3) *Ibid*.

[4] (file:///ibant16fsvm/DTPData/Publications/Committee%20output/PPID/LGBTI/2021/Edited/Edited%20-%20Australia%20LGBT%20Asylum%20Seekers.docx#\_ednref4) *Ibid.*

[5] (file:///ibant16fsvm/DTPData/Publications/Committee%20output/PPID/LGBTI/2021/Edited/Edited%20-%20Australia%20LGBT%20Asylum%20Seekers.docx#\_ednref5) *Ibid.*

[6] (file:///ibant16fsvm/DTPData/Publications/Committee%20output/PPID/LGBTI/2021/Edited/Edited%20-%20Australia%20LGBT%20Asylum%20Seekers.docx#\_ednref6) *Ibid.*

[7] (file:///ibant16fsvm/DTPData/Publications/Committee%20output/PPID/LGBTI/2021/Edited/Edited%20-%20Australia%20LGBT%20Asylum%20Seekers.docx#\_ednref7) See: [www.fedcourt.gov.au/digital-law-library/seminars/tax-bar-association/jennifer-batrouney](http://www.fedcourt.gov.au/digital-law-library/seminars/tax-bar-association/jennifer-batrouney) (<https://www.fedcourt.gov.au/digital-law-library/seminars/tax-bar-association/jennifer-batrouney>).

[8] (file:///ibant16fsvm/DTPData/Publications/Committee%20output/PPID/LGBTI/2021/Edited/Edited%20-%20Australia%20LGBT%20Asylum%20Seekers.docx#\_ednref8) *SZSSQ v MIBP* [2013] FCCA 1762 at [38], [48].

[9] (file:///ibant16fsvm/DTPData/Publications/Committee%20output/PPID/LGBTI/2021/Edited/Edited%20-%20Australia%20LGBT%20Asylum%20Seekers.docx#\_ednref9) HREOC, Submission No 13, p3.

[10] (file:///ibant16fsvm/DTPData/Publications/Committee%20output/PPID/LGBTI/2021/Edited/Edited%20-%20Australia%20LGBT%20Asylum%20Seekers.docx#\_ednref10) Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p40.

## Similar topics

**LGBTI** (/Search/Taxonomy.aspx?Taxonomy=LGBTI&TaxonomyUid=f66a6abb-abcf-4137-96fd-eb87a3947b64), **Newsletters** (/Search/Taxonomy.aspx?Taxonomy=Newsletters&TaxonomyUid=319939b0-dcbe-4420-b79e-30e32824ed07)