

CLAIMS TO REFUGEE PROTECTION ON THE BASIS OF SEXUAL ORIENTATION: TIME TO CHANGE THE DEFINITION?

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I INTRODUCTION

In the past 30 years, a growing body of literature has critically reviewed the distinct challenges faced by asylum seekers when claiming protection from persecution on the basis of their sexual orientation ('SO claimants'). A small number of comprehensive studies have reviewed the published reasons for refugee status determinations ('RSDs'), often in appeal decisions, in five core jurisdictions including Australia, New Zealand, Canada, the United Kingdom, and the United States of America.¹ A growing number of smaller studies from a range of non-legal disciplines have also revealed the broader psychological and sociological implications of seeking refuge from persecution, including SO claims in Turkey,² France,³ Germany,⁴ and Brazil

¹ See, eg, Catherine Dauvergne and Jenni Millbank, 'Burden by Proof: How the Australian Refugee Review Tribunal has Failed Lesbian and Gay Asylum Seekers' (2005) 31 *Federal Law Review* 299 ('Burdened by Proof'); Janna Weßels 'Sexual orientation in Refugee Status Determination' (2012) Working Paper Series No. 74 *Refugee Studies Centre*; Jenni Millbank, 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' (2009a) 13(2-3) *The International Journal Of Human Rights* 391 ('From Discretion to Disbelief'); Jenni Millbank, 'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009b) 21(1) *International Journal of Refugee Law* ('Ring of Truth'); Ghassan Kassisieh, 'From Lives of Fear to Lives of Freedom: A review of Australian refugee decisions on the basis of sexual orientation' (2008) *Gay & Lesbian Rights Lobby, Glebe* ('From Lives of Fear').

² Elif Sari, 'Lesbian refugees in transit: the making of Authenticity and legitimacy in Turkey' (2020) 24(2) *Journal of Lesbian Studies* 140.

³ Florent Chossière, 'Refugeeness, Sexuality, and Gender: Spatialized Lived Experiences of Intersectionality by Queer Asylum Seekers and Refugees in Paris' (2021) 3(634009) *Frontiers in Human Dynamics* 1.

⁴ Moira Dustin and Nina Held, 'In or Out? A queer intersectional approach to 'particular social group' membership and credibility in SOGI asylum claims in Germany and the UK' (2018) (2) *Genius* 74; Mengia Tschalaer,

and Spain.⁵ Collectively, these studies have identified a raft of distinct challenges faced by SO claimants that make it disproportionately difficult to gain protection, and make RSD a needlessly uncomfortable and inequitable experience. Given that the definition of a 'refugee' in the 1951 Convention Relating to the Status of Refugees ('Refugee Convention') does not explicitly refer to sexual orientation as a reason for seeking protection,⁶ this article examines whether this definitional silence is the root of the challenges faced by SO claimants, and whether amending the definition would be an effective solution.

Most of the comprehensive studies that revealed the extent of challenges faced by SO claimants are now outdated by more than ten years. Therefore, there is a current and constant need to review up-to-date decision-making to assess the challenges that SO claimants currently face, and to track the development of identified issues against the responses launched to target them. This article responds to this need by examining 11 publicly available decisions from the Australian Administrative Appeals Tribunal,⁷ handed down in the first six months of 2021. These decisions give a critical insight into current decision-making practices and issues facing SO claimants in Australia. This article argues that amending the refugee definition is not the most appropriate or targeted method of resolving the issues that SO claimants face, and instead may divert attention away from the poor and misguided decision-making that places SO claimants at greater risk of failing to secure protection.

This article will proceed as follows. After providing some contextual background and explaining the methodology of the study, this article examines on what grounds SO claimants commonly base their claims, given that sexual orientation is not mentioned in the refugee definition. Second, it discusses issues of credibility, with specific regard to the use of stereotypes, picture evidence, and the issues of inconsistency and delay. It then examines the challenge of meeting the definitional requirements of persecution and

'Victimhood and femininities in black lesbian asylum cases in Germany' (2020) 47(15) *Journal of Ethnic Migration Studies* 3531.

⁵ Vitor Lopes Andrade 'Refugee status determination and local integration of asylum seekers and refugees on the basis of sexual orientation in Brazil and Spain' (2018) *Genius* (2) 88.

⁶ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*') art 1A(2).

⁷ The process of selecting these Case Studies is explained below in 'Methodology'.

protection, and the issues of 'discretion reasoning' and country information. This article concludes with brief comments on the existing interpretive guidance available to decision-makers in assessing SO claims.

II BACKGROUND

People of diverse sexual orientation continue to face distinct and significant threats to their rights, dignity, and livelihoods in many countries across the world and are driven to seek asylum elsewhere out of necessity. To gain refugee protection in another country, all claimants must meet the definition of a 'refugee' in Article 1A of the Refugee Convention, a definition which state parties to the convention are not permitted to derogate from or alter in their own country. Under this definition, a refugee is a person who is outside their country of origin because they have a well-founded fear of being persecuted in that country, and they are unable to be adequately protected from that persecution.⁸ Further, the person's fear of persecution must be for at least one of five reasons (known as the 'Convention grounds'), which are race, religion, nationality, membership of a particular social group, and political opinion. This definition does not explicitly refer to sexual orientation as a reason for seeking protection, attracting the question of whether the definition remains fit-for-purpose in its ability to protect people of diverse sexual orientation. It is true that the refugee definition, and the broader refugee framework itself, was created to deal with the very specific context of mass human displacement post-WW2. However, the international community signified its commitment to retaining the refugee framework to respond to evolving causes of displacement by ratifying the 1967 Protocol Relating to the Status of Refugees, which removed the temporal and geographical limitations of the original refugee definition.⁹

Since 1967, there have been significant international developments towards recognising and protecting the rights of people of diverse sexual orientation, and it is important that the refugee framework continues to be fit for the purpose of protecting them from persecution. The academic community has given modest but meaningful attention to the distinct challenges faced by SO claimants. In particular, the seminal studies by Jenni Millbank and Catherine Dauvergne provide the first comprehensive insight into the inequities SO

⁸ *Refugee Convention* (n 6) art 1A.

⁹ Protocol Relating to the Status of Refugees, opened for signature 19 December 1966, 606 UNTS 267 (entered into force 4 October 1967).

claimants suffer when claiming protection.¹⁰ Further research conducted by La Violette,¹¹ Weßels,¹² and Kassisieh¹³ have also been vital to our understanding of the extent of these issues across the globe.

Collectively, these studies have revealed that SO claimants are more likely to: be the subject of adverse credibility assessments; undergo invasive and inappropriate questioning during RSD; be at a disadvantage due to a lack of documentary evidence and reliable country information to support their claim; and be expected to live up to decision-makers' stereotypes about how truthful SO claimants should express (or conceal) their sexual orientation. While the scope of this article does not extend to canvassing all the issues identified in the literature, it will demonstrate that there remain a significant range of issues that will not be easily, nor totally, remedied by a change in the refugee definition. Instead, the resolution of these issues will depend on more nuanced interpretation and appropriate implementation of the definition throughout RSD.

III METHODOLOGY

A Case Studies

The findings presented in this article are based on 11 publicly-released decisions ('Case Studies') of the Migration and Refugee Division of the Australian Administrative Tribunal ('the Tribunal') that were handed down in the first six months of 2021.¹⁴ An initial pool of cases was created by searching the AustLII database of 2021 Tribunal decisions for the term 'sexual'. This pool was narrowed to those that discussed sexual orientation directly as part of a claim to protection. The resulting 11 cases are appeals against primary decisions that the claimant was not owed protection, and

¹⁰ See, eg, *Burdened by Proof* (n 1); *Discretion to Disbelief* (n 1); *Ring of Truth* (n 1).

¹¹ See, eg, Nicole LaViolette, 'Independent human rights documentation and sexual minorities: an ongoing challenge for Canadian refugee determination process' (2009) 13(2-3) *The International Journal of Human Rights* 437.

¹² Weßels (n 1).

¹³ *From Lives of Fear* (n 1).

¹⁴ A full list of the 11 cases appears in an Appendix to this article, including the case reference number, the claimant's country of origin and gender, and the result of the decision.

where the Tribunal then had cause to directly consider whether the applicant was owed protection on the basis of sexual orientation.

Of the 11 claimants studied, ten were male and one was female. Pakistan was the country of origin in three of the cases, while the rest of the claimants originated from singularly represented countries in South-East Asia, the Middle East, and Africa. 73% of claimants were successful in their appeal, resulting in their case being referred back to the primary decision-maker with the Tribunal's direction that the claimant satisfies the refugee definition and engages Australia's protection obligations. Three claimants were unsuccessful in their appeal, resulting in the Tribunal reaffirming the original decision that the claimant was not a refugee that Australia owed protection.

B Study Limitations

The findings presented in this article provide insight into Tribunal-level decision-making in Australia. They do not provide insight into further judicial review by the courts and provide only limited insight into primary decision-making. Due to the underrepresentation of female claimants in the Case Studies, this article focuses primarily on the experience of gay men. It provides limited insight into the experiences of homosexual women or bisexual people. Although previous studies have often reviewed SO claims alongside claims based on gender identity, this article focuses on SO claims only. Despite these limitations, the findings presented in this article provide valuable insight into the operationalisation of the refugee definition in current Australian decision-making at the Tribunal level regarding male SO claims to protection.

IV PARTICULAR SOCIAL GROUP

Any individual claiming refugee protection must show that they have a well-founded fear of persecution for reasons of one of the five Convention grounds, being 'race, religion, nationality, membership of a particular social group, or political opinion'.¹⁵ As noted above, fearing persecution on the basis of one's sexual orientation is not listed as grounds for seeking protection. Arguably, the definition should be amended to explicitly include sexual orientation – although this may not be necessary. Most often, SO claimants claim protection under the particular social group ('PSG') ground, which requires decision-makers to be satisfied that: (1) a PSG exists; and (2)

¹⁵ *Refugee Convention* (n 6) art 1A(2).

the claimant is a member of that group. Globally, the first decision recognising homosexual people as a PSG appeared in the 1990s,¹⁶ and in Australia in the mid-1990s.¹⁷ Since then, decision-makers have much more readily accepted the existence of homosexual people as a PSG.

In each of the Case Studies, the Tribunal readily recognised variations of PSGs connected by characteristics of sexual orientation. Most claimants identified as male, and the Tribunal tended to define the relevant PSG on the axis of gender. For example, 'gay men...in Indonesia',¹⁸ 'homosexual men in Lebanon',¹⁹ and 'men who have sex with men'.²⁰ A small number of decisions identified gender-neutral groups such as 'homosexuals in Ghana'²¹ and 'LGBTI persons more generally'.²² One decision recognised the intersection of religion and sexual orientation, accepting the claimant's membership of a PSG defined as 'Muslim homosexual men in Malaysia'.²³

Previously, decision-makers had been slow to recognise bisexual people as a PSG.²⁴ However, in Case Study 2018109, the Tribunal recognised 'bisexuals' and 'men perceived to be homosexual or bisexual in Malawi' as PSGs.²⁵ Due to the low number of reported decisions based on bisexual orientation, it is not yet clear whether bisexual claimants continue to face more significant difficulty in proving the existence of a relevant PSG.

All the studied claimants succeeded in establishing a relevant PSG whose members share the characteristic of diverse sexual orientation, indicating that it is no longer as contentious an issue as it once was for SO claimants. This corresponds with the findings of other studies, which more recently

¹⁶ Connor Cory, 'The LGBT Asylum Seeker: Particular Social Groups and Authentic Queer Identities' 20(3) *Georgetown Journal of Gender and the Law* 577, 578.

¹⁷ *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 111 ALR 417; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331.

¹⁸ Case Study 1713126.

¹⁹ Case Study 2010192.

²⁰ Case Study 2018109.

²¹ Case Study 1711688.

²² Case Study 2018109.

²³ Case Study 1709239.

²⁴ William Berthelot, 'Sexual Orientation And Gender Identity As A Basis For Refugee Claims In Australia' [2020] *UNSW Law Journal Student Series* No 20-01, 5.

²⁵ Case Study 2018109 [85].

have tended not to give the issue much discussion at all.²⁶ Therefore, amending the refugee definition to explicitly include 'sexual orientation' as a Convention ground would not significantly assist gay male claimants in Australia at this stage. It may, however, remove any remaining doubt as to the position of lesbian and bisexual claimants in asserting sexual orientation as a valid PSG.

SO claimants are much more likely to have their claim dismissed on the basis that they do not share membership of the PSG,²⁷ often culminating in the decision-maker questioning whether the claimant is *actually* homosexual or bisexual. Millbank observes that SO claims 'rest largely upon [the] personal testimony' of the claimant, which often cannot be evidenced with external documentary proof.²⁸ The following section will consider the extensive issues SO claimants face in satisfying decision-makers of their credibility and proving membership of the relevant PSG.

V CREDIBILITY AND QUESTIONING

A Credibility

The believability of any claim to protection is incredibly important. SO claimants have faced significant difficulty in having their stories believed because of the sentiment that, as one tribunal member put it, 'the claim of being homosexual is in many ways an easy one to make, and a difficult one to dispute'.²⁹ As a result of this sentiment, SO claimants face distinct challenges in satisfying decision-makers of the veracity of their claims, and unsuccessful claims will often result from a negative assessment of the claimant's credibility.³⁰ Negative credibility assessments often result in the decision-maker disbelieving that the claimant is indeed gay or bisexual – meaning the claimant does not share membership of a relevant PSG, and is therefore determined not to be a refugee.³¹

²⁶ For example, the issue was not canvassed in detail in a more recent comprehensive study by Ghassan Kassisieh, *From Lives of Fear* (n 1).

²⁷ *Ring of Truth* (n 1).

²⁸ *Ibid* 5.

²⁹ *RRT N97/16114* (2 November 1998) in Kristen L. Walker, 'Sexuality and Refugee Status in Australia' (2000) 12(2) *International Journal of Refugee Law* 175, 185.

³⁰ Walker (n 29) 185; *Ring of Truth* (n 1) 4.

³¹ *Ring of Truth* (n 1) 4.

This section examines how decision-makers approach credibility assessments including factors such as the use of stereotypes, picture evidence, and issues of inconsistency and delay. These issues are examined to demonstrate that it is the *implementation* of the refugee definition in the RSD process that creates distinct challenges for SO claimants; allocating significant resources to design a new definition, and gain international agreement for its implementation, is not a targeted or comprehensive solution to these problems.

B Stereotypes

SO claimants are often subject to unfair decision-making because, in assessing a claimant's very personal experiences, decision-makers are (consciously or subconsciously) affected by inappropriate and unevidenced 'heterosexist biases, pre-conceived conceptions or stereotypes'.³² Decision-makers often assess claims against the extent to which they fit pre-determined narratives of what 'gay life' looks like³³ - narratives that are often conjured from the perspective of a white, cisgender, heterosexual male. These narratives do not take account of the intersections of gender identity, culture, socioeconomic status, and religion, and their effect on the experiences of people of diverse sexual orientation.³⁴ A plethora of examples could be given to demonstrate this critique, including instances in which decision-makers have disbelieved an SO claimant because the claimant was unaware of the works of prominent homosexual writers,³⁵ unable to articulate the legal and political issues faced by queer minorities,³⁶ or unfamiliar with the details of prominent queer celebrations such as Mardi Gras.³⁷ These determinations are undoubtedly inappropriate and unrealistic. They impose unfounded stereotypes of what it means to be gay or bisexual onto SO claimants, thereby creating an unfair onus on SO claimants to live up to these ideals. A much more appropriately nuanced approach would recognise that there is no single external indicator of sexual orientation, and that

³² Weßels (n 1) 31.

³³ *Ring of Truth* (n 1) 11; *WAAG v. Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 191 (30 Aug 2002) [23].

³⁴ Moira Dustin and Nina Held, 'In or Out? A queer intersectional approach to 'particular social group' membership and credibility in SOGI asylum claims in Germany and the UK' (2018) (2) *Genius* 74, 80.

³⁵ *WAAG v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCATrans 475 (19 November 2003) [6].

³⁶ *Lazlo v Canada* [2004] RPDD No. 334 (18 March 2004) [6].

³⁷ *SZTGV v Minister for Immigration and Border Protection* (2015) 318 ALR 450, 475.

expressions of sexual orientation are influenced by the uniqueness of the claimants themselves and their surroundings.

Decisions have continued to be unjustly affected by stereotype despite the UNHCR,³⁸ the United Nations agency responsible for monitoring the implementation of the Refugee Convention, specifically warning decision-makers not to rely on 'stereotypes or assumptions', recognising that 'not all LGBTI individuals look or behave according to stereotypical notions'.³⁹ However, a direction not to let a decision be affected by stereotypes is very different to equipping decision-makers with the skills needed to detect their influence. It could be argued that the 'lack of definitive boundaries' of the PSG Convention ground enables decision-makers to search for claims that fit their preconceived notions of how an SO claimant's sexuality should manifest itself in public and private life.⁴⁰ However, giving more structural boundary to the refugee definition risks imposing a rigid and ostensibly universal understanding of sexual orientation, which would fail to recognise the unending ways in which people express and live out their sexual orientation.

To a certain extent, stereotypes did influence the reasoning presented in the Case Studies. In Case Study 2013019, the Tribunal noted that seeking out gay community groups in Sydney was 'not a pre-requisite for establishing [the applicant's] homosexuality of course' but went on to view the claimant's failure to do so unfavourably.⁴¹

In Case Study 1718354, the Tribunal asked the applicant for evidence regarding his participation in nightlife as an aspect of 'gay social life' in Sydney. Without any justifiable legislative or evidentiary basis, the Tribunal became fixated as to what qualifies as a 'gay venue', importing an inappropriate view that gay people engage in nightlife activities exclusively at venues that appear to attract, or hold themselves out to cater for, specifically gay clientele.⁴² This view lacks critical nuance and does not consider the reality that 'gay venues' in places such as Oxford Street (as cited

³⁸ United Nations High Commissioner for Refugees.

³⁹ 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, UN Doc HCR/GIP/12/09 (23 October 2012) art 49.

⁴⁰ Cory (n 16) 586.

⁴¹ Case Study 2013019 [110].

⁴² Case Study 1718354 [78].

in the Tribunal's reasons), which are increasingly gentrified, may not be truly welcoming spaces for people of diverse cultures and backgrounds to express their sexuality authentically and without fear of being ostracised. Further, the same Tribunal member inappropriately grounded his understanding of whether a venue was a 'gay venue' to limited 'web searches' and 'website information',⁴³ which are inherently biased advertising materials and not reliable reflections of reality. This example further demonstrates how decision-makers import their own preconceived notions of how SO claimants should express and experience their own sexual orientation into the consideration of SO claims.⁴⁴

However, the same Tribunal member did show a minimal level of self-awareness of the underpinning stereotypical assumptions of how queer identities manifest: 'I accept that gay nightlife is not for everybody, not even for every gay person ...'⁴⁵

These examples demonstrate the continued effect of stereotypes on SO claims, creating inappropriate and unfair expectations for SO claimants to meet. This issue would not be appropriately addressed by amending the refugee definition. More precisely, it depends on the decision-maker's own level of understanding of the plurality of queer lived experiences and, most importantly, decision-makers' ability to detect the assumptions and biases that affect their own decisions. While not all decision-makers currently possess and employ these skills in practice, it is positive to see the Tribunal, in Case 2018109, make specific reference to the need for greater understanding of the diversity of experiences that lead SO claimants to claim protection:

The Tribunal recognises that there can be a diversity of individual experiences of sexuality and differences related to culture, socio-economic and education background and other factors. The Tribunal needs to be sensitive and appropriate in the manner in which it explores these issues and the benefit of the doubt should be given to an applicant who is generally credible but unable to substantiate all of his or her claims.⁴⁶

Appreciating the diversity of experiences is a helpful step towards fairer decision-making, although it certainly is not a complete solution. Left unchecked, biases and stereotypes could affect all decision-making,

⁴³ Ibid.

⁴⁴ Weßels (n 1) 33.

⁴⁵ Case Study 1718354 [118].

⁴⁶ Case Study 2018109 [64].

irrespective of whether the refugee definition is amended. Therefore, a more effective strategy to combat these biases and stereotypes is to focus on educating decision-makers on the lives of SO claimants and improving their critical self-awareness so they can self-detect and correct biases in their decision-making.

C Picture Evidence

An individual's sexual orientation is a very personal matter and can be a very difficult topic to discuss during RSD.⁴⁷ SO claimants are 'rarely able to provide conclusive documentary or witness evidence to confirm their sexual orientations'⁴⁸ and, therefore, often face an 'unsurmountable burden of proof'.⁴⁹ Even so, there has been no shortage of instances whereby decision-makers ask claimants completely inappropriate questions to 'prove' their sexual orientation, including questions regarding 'explicit sexual acts...explicit sexual imagery or intrusive physical testing'.⁵⁰ With little other documentary evidence to prove their claim, SO claimants are often forced to rely on pictures to evidence their claims. These pictures often depict extremely intimate and private moments between a claimant and their partner(s). However, even when SO claimants do produce picture evidence, decision-makers often regard them as 'self-serving or staged'.⁵¹

The issue of picture evidence, and credibility assessment more broadly, has been given attention by various pieces of interpretive guidance. However, these supplementary materials are often inadequate and unenforceable due to their non-binding nature. Credibility guidelines produced by the Australian government are used by the Tribunal to remind members that discussing SO claims can be quite embarrassing and uncomfortable for claimants. However, they do not prohibit sexually explicit questions or suggest more appropriate topics or methods of questioning.⁵² UNHCR Guidelines specifically prohibit claimants from being expected or asked to

⁴⁷ LaViolette (n 11) 441; *Ring of Truth* (n 1) 5.

⁴⁸ LaViolette (n 11) 440.

⁴⁹ Sheldon Magardie, 'Is the Applicant Really Gay?' Legal Responses to Asylum Claims Based on Persecution Because of Sexual Orientation' (2003) (55) *Agenda: Empowering Women for Gender Equity* 81, 82.

⁵⁰ Jenni Millbank, 'Sexual Orientation and Gender Identity in Refugee Claims' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Law* (Oxford University Press, 2020) 761.

⁵¹ *Ring of Truth* (n 1) 17.

⁵² *Ibid* 10.

present documentary or photographic evidence of intimate acts,⁵³ although these guidelines are not binding on Australian decision-makers.

Five of the studied claimants relied on picture evidence to evidence their claims. In Case Study 2013019, the claimant presented photographs of himself and his partner. However, they were not given any positive weight because the 'lack of intimacy apparent in the photo [did] nothing in the eyes of the Tribunal to establish there is any physical or emotional relationship between [them]'.⁵⁴

In Case Study 1724111, the Tribunal emphasised the lack of intimate photos presented: 'They have no photos of being affectionate together such as holding hands or kissing in front of some landmark'.⁵⁵ These comments assume that the claimant and their partner have the privilege of being openly intimate in public; people being persecuted because they are gay or bisexual rarely have such a luxury, hence the need to seek asylum elsewhere.

However, even when claimants did present intimate pictures, the Tribunal tended not to attribute them any positive weight. In Case Study 1724111, the claimant offered to show the Tribunal intimate pictures of him and another man, to which the Tribunal member commented:

I informed [the claimant] he was not obliged to show any graphic images. I also put to him that graphic photographs, even depicting arousal and/or sexual activity, might not necessarily be probative or even have any weight at all on their own, as they can easily be staged, and he indicated that he understood this.⁵⁶

Ultimately, no positive weight was given to the photographs.⁵⁷ It is certainly positive to observe one instance in which the Tribunal respected the dignity of the claimant by, in accordance with UNHCR guidance,⁵⁸ making clear to him that explicit images of private moments are not necessary to prove his claim. However, beyond this case, picture evidence remains some of the only documentary evidence available to SO claimants and it continues to be relied upon. This is especially the case given that the remaining elements of many claimants' personal testimonies continue to be disbelieved or discredited. So

⁵³ UNHCR (n 39) art 64.

⁵⁴ Case Study 2013019 [111].

⁵⁵ Case Study 1724111 [64].

⁵⁶ Case Study 1718354 [85].

⁵⁷ Ibid [121].

⁵⁸ UNHCR (n 39) 64.

long as SO claimants are faced with the challenge of ‘proving’ their sexual orientation with little documentary evidence and so long as their personal testimony is not given appropriate weight and credibility, amending the refugee definition will not provide claimants with improved prospects of seeking protection whilst having their human dignity respected and protected.

D Inconsistency and Delay

Decision-makers may view an SO claimant’s credibility unfavourably if the narrative presented through their claim appears inconsistent with the claimant’s prior statements or submissions. SO claimants face a distinct challenge in this regard as they are often required to recount their entire journey of coming to know and accept their sexuality, which often ranges back to events in the claimant’s childhood. A claimant’s ability to recall these events in detail is adversely impacted by the passage of time and the potentially traumatic effect of these events.⁵⁹ Further, Australian law requires decision-makers to draw unfavourable credibility inferences if claims or evidence are not raised before the primary decision-maker, and if there is no reasonable explanation for the delay.⁶⁰

Decision-makers have characterised claimants as inconsistent and uncredible for failing to raise the topic of their sexual orientation at the first opportunity.⁶¹ Such a result is highly problematic as SO claimants may hesitate to raise this topic for a number of valid reasons, including: their discomfort in discussing such a personal topic in the presence of unfamiliar authority figures; apprehension of adverse reactions from decision-makers; and fear that their disclosure will not be confidential and have repercussions if the information is discovered by family, friends, and state authorities.⁶² Unfortunately, decision-makers do not always accept these circumstances as reasonable explanations for a claimant’s delay, instead viewing delay as evidence of untruthfulness.

In Case Study 2013019, the claimant delayed making an SO claim until after his protection visa application was refused ‘because he was more confident’ in doing so.⁶³ The Tribunal was concerned with the lateness of his claim and its truthfulness, although this was not an unreasonable position to take given

⁵⁹ *Ring of Truth* (n 1) 13.

⁶⁰ *Migration Act 1958* (Cth) s 423A.

⁶¹ *From Lives of Fear* (n 1) 20.

⁶² *Ibid* 20; Magardie (n 49) 82.

⁶³ Case Study 2013019 [41].

the Tribunal ultimately found, on other appropriate evidence, that the claimant lacked credibility.⁶⁴

SO claimants may also delay discussing their sexual orientation because they were unaware of its relevance to their claim. It could be argued that claimants do not realise they may claim protection on the basis of their sexual orientation as it is not explicitly included as a Convention ground in the refugee definition. However, this is more likely to be a result of SO claimants not receiving sound legal advice and representation, or any at all, throughout the RSD process.

In Case Study 2010192, the claimant originally based his claim for protection on religious grounds, and only later admitted to falsifying these claims on the basis that he was scared of what would happen if he revealed his sexual orientation.⁶⁵ He explained that he 'had no idea that he could discuss his sexuality' and 'did not know that he could claim protection on the basis of his sexuality'.⁶⁶ The Tribunal took an appropriately nuanced approach in accepting the claimant's hesitation, given that he had only recently become comfortable with his sexual orientation himself and was not legally represented.⁶⁷ This result corresponds with Millbank's conclusion that 'although delay was relatively commonly place in sexuality claims, it was rarely a major factor in negative determinations'.⁶⁸

Although not appearing ubiquitously in the Case Studies, inconsistency and delay continue to be a live issue in the determination of SO claims. Clearly, the refugee definition's silence on sexual orientation has contributed to claimants being unaware of the relevance of their sexual orientation to RSD. However, rather than amending the definition, a more constructive approach lies in ensuring claimants have greater access to legal representation who can alert them to the relevance of sexual orientation to their claim and assist them in preparing credible evidence to substantiate their claim.

⁶⁴ Ibid [106]-[107].

⁶⁵ Case Study 2010192 [107].

⁶⁶ Ibid [109].

⁶⁷ Ibid [184].

⁶⁸ *Ring of Truth* (n 1) 14.

VI PERSECUTION AND PROTECTION

A Persecution

All claimants are required to establish that they have a well-founded fear of 'persecution', although the Refugee Convention does not define what persecution entails. According to non-binding UNHCR guidance, persecution may include 'serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm'. Further guidance specific to LGBTI claimants recognises that cumulative instances of discrimination may constitute persecution, as would physical, psychological, and sexual violence.⁶⁹ Even with this additional guidance, the interpretation of 'persecution' has varied across jurisdictions and is often difficult for SO claimants to satisfy. Often, decision-makers have considered whether homosexuality is criminalised in the country of origin, but have required those offences to be enforced in practice to amount to persecution.⁷⁰ Slowly, it has been accepted that unenforced laws may still be persecutory as they 'drive and enable other persecutory conduct', such as harassment and discrimination against homosexual people at the hands of police.⁷¹ Further, decision-makers have been slow to recognise many of the harms that SO claimants face from family and community members in more private settings.⁷²

In seven of the Case Studies, the Tribunal considered whether homosexual activities and relationships were criminalised in the claimant's country of origin. The Tribunal appropriately accepted that the law could discriminate against SO claimants less directly than enforcing criminal offences.⁷³ For example, in four of the Case Studies, the Tribunal gave weight to the fact that anti-discrimination legislation in the claimant's country of origin did not include protections for LGBTI people based on their sexual orientation.⁷⁴ In Case Study 2018109, the Tribunal accepted evidence that, despite a ten-year-long moratorium on the prosecution of same-sex activity offences in Malawi, LGBTI persons 'continue to be vulnerable to a range of abuses,

⁶⁹ UNHCR (n 39).

⁷⁰ *From Lives of Fear* (n 1) xiii.

⁷¹ Millbank (n 50) 764.

⁷² *Ring of Truth* (n 1) 4.

⁷³ See, eg, Case Study 1713126 [21].

⁷⁴ See, eg, Case Study 2010192 [217].

discrimination and serious physical harassment' in a 'punitive legal environment'.⁷⁵

In Case Study 2010192, the Tribunal accepted that persecution could include 'physical harassment, ill-treatment, serious psychological harm and lack of access to medical services',⁷⁶ and recognised that the harm may be inflicted by 'traditional and conservative' family members of the claimant.⁷⁷ In Case Study 1709239, the Tribunal accepted the claimant's fear of persecution with regards to 'threats, prosecution, stigma and violence'.⁷⁸ These decisions show some level of improvement in how persecution is characterised in SO claims; however, caution should be applied before making more generalised conclusions given the extent to which previous studies have highlighted the prominence of this issue. Decision-makers should be agile in their interpretation of persecution and pay particular attention to the specific ways in which SO claimants may experience persecution.

B Discretion

Previously, many SO claims have been dismissed on the basis that the claimant could avoid the risk of persecution by living 'discreetly' and concealing their sexual orientation – referred to as 'discretion reasoning'. More recently, however, the growing influence of international human rights norms has resulted in discretion reasoning being decisively rejected in many international jurisdictions. In Australia, discretion reasoning was rejected by the High Court in 2002,⁷⁹ and in 2015 the *Migration Act 1958* (Cth) was amended to specifically prohibit decision-makers from requiring claimants to alter or conceal their sexual orientation to avoid the risk of persecution.⁸⁰ It is now more widely accepted that concealing one's sexual orientation can, in itself, constitute persecution due to the psychological

⁷⁵ Case Study 2018109 [97].

⁷⁶ Case Study 2010192 [220].

⁷⁷ Ibid.

⁷⁸ Case Study 1709239 [37].

⁷⁹ *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 129; *Appellant S396/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 (9 December 2003).

⁸⁰ *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) s 7.

harm associated with living 'in the closet' and living with the constant threat of being 'outed'.⁸¹

In four of the Case Studies, the Tribunal made specific reference to and appropriately applied provisions of the *Migration Act 1958* (Cth)⁸² to the effect that it did not expect applicants to be 'discrete' or conceal their sexual orientation to avoid the risk of persecution. Of course, it is implied in all successful RSDs that the claimant is not expected to hide their sexual orientation to avoid persecution. In Case Study 2007537, the Tribunal accepted that the claimant would live openly as a homosexual man if returned to Nepal and would therefore be at risk of persecution if family and community members came to learn of his homosexuality.⁸³ In Case Study 1709239, the Tribunal accepted that the claimant 'would return [to Malaysia] as a Muslim homosexual man living openly in a same-sex relationship' and, as such, face the risk of persecution.⁸⁴

While this study only examined a small number of cases, the trend shows a positive development in reducing the incidence of discretion reasoning. It is an important example of how national legislatures can successfully correct grossly inappropriate interpretations of the refugee definition in their own jurisdiction.

C Protection

All claimants must be able to show that they are unable or unwilling to avail themselves of the protection of their country of origin – if adequate protection measures exist, they will not be considered a refugee.⁸⁵ SO claimants face distinct challenges in meeting this requirement because of factors, including the tendency for decision-makers to 'emphasise evidence that describes progress in the social situation of sexual minorities rather than information that suggests problems with state protection'.⁸⁶ Further, decision-makers have been criticised for unreasonably expecting SO claimants to seek protection from police when the claimant is particularly

⁸¹ *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, referred to in Case Study 1713126 [47].

⁸² *Migration Act 1958* (Cth) s 5J(3)(vi).

⁸³ Case Study 2007537 [158].

⁸⁴ Case Study 1709239 [33].

⁸⁵ *Refugee Convention* (n 6) art 1A(2).

⁸⁶ LaViolette (n 11) 457.

vulnerable to harm from non-state actors, such as ‘familial, workplace and community-based hostilities, ostracism and discrimination’.⁸⁷

Positively, in Case Study 1711688, the Tribunal accepted evidence that ‘LGBTI persons [in Ghana] may also be afraid to go to the police due to the risk of social stigma, harassment, intimidation and extortion by police officers’, and therefore found that it would be unreasonable to expect an LGBTI person to seek protection from state authorities if they fear such conduct.⁸⁸

In Case Study 1709239, the Tribunal accepted evidence that, despite there being a ‘general improvement in the human rights situation in Malaysia’, the LGBTI community remained at risk and had been the subject of adverse comments made publicly by current government officials,⁸⁹ as well as being subject to arrest, harassment, and violence at the hands of state authorities.⁹⁰ This is one instance in which the Tribunal gave due consideration to evidence of the specific persecutory risks that SO claimants remain exposed to despite an overall improvement in circumstances.

However, the Tribunal did not always appropriately weigh competing evidence. In Case Study 2007537, the Tribunal concluded that even though the lesbian claimant might suffer ‘harassment, discrimination and negative attitudes’,⁹¹ this did not cumulatively amount to persecution. In coming to this decision, the Tribunal inappropriately emphasised evidence that the government was ‘tak[ing] steps towards recognising the legal rights of the LGBTI community’.⁹² The Tribunal failed to seek appropriate evidence that LGBTI rights were being protected in practice. Instead, it homogenised the experience of the entire LGBTI community by concluding that the lesbian claimant was not at risk of persecution on the basis of evidence that largely emphasised the positive development rights of *transgender* people,⁹³ which was not directly relevant to the claimant’s circumstances. While determining that the claimant was not at risk of persecution, the Tribunal concurrently accepted evidence that the Nepalese government had not acted on an order

⁸⁷ From *Lives of Fear* (n 1) xiii.

⁸⁸ Case Study 1711688 [19].

⁸⁹ Case Study 1709239 [39].

⁹⁰ Ibid [40].

⁹¹ Case Study 2007537 [158].

⁹² Ibid [155] (emphasis added).

⁹³ Ibid.

from the Nepalese Supreme Court to abolish laws that discriminated against LGBTI people.⁹⁴

These two decisions show that Tribunal members do not always weigh available country information appropriately and, on balance, tend to overemphasise positive improvements rather than persistent challenges and issues. The undesirable result cannot be attributed solely to the fact that 'persecution' is undefined in the refugee definition and is therefore unlikely to be resolved through a definitional change. Instead, it stems from the lack of quality, targeted country information to substantiate SO claims, which will now be considered.

D Country Information

Decision-makers heavily rely on independent information about the SO claimant's country of origin to 'assess the claimant's credibility and the plausibility of the claimant's account of persecution'.⁹⁵ This evidence is referred to as 'country information'. Already, SO claimants persistently face significant challenges in proving their claims without any external documentary evidence. They are further disadvantaged to the extent that quality external country information is not readily available to support their claim. Further, decision-makers have been observed to have a strong bias in favour of country information prepared by government agencies,⁹⁶ whereas information prepared by human rights organisations and other LGBTI-focused local non-government organisations are sometimes 'dismissed as biased and unreliable'.⁹⁷

The Case Studies demonstrate the Tribunal's strong preference for country information prepared by governments, especially the Australian Department of Foreign Affairs and Trade (DFAT). Nine of the 11 Case Studies considered country information prepared by DFAT and, in two of the Case Studies, turned to reports from the UK Home Office where DFAT reports were unavailable.⁹⁸ In fact, each of the decisions made identical references to the Refugee Law Guidelines and Complementary Protection Guidelines, which require the Tribunal to take account of DFAT country information reports. However, while many of the cases did consider evidence from other sources including human rights organisations and some

⁹⁴ Ibid.

⁹⁵ LaViolette (n 11) 438.

⁹⁶ Weßels (n 1) 37.

⁹⁷ LaViolette (n 11) 441.

⁹⁸ Case Study 2018109; Case Study 1701222.

media articles, there was a tendency to give government sources more weight.

However, country information produced by government is not perfect or without its own biases. Kassisieh expresses great concern that DFAT country information is not publicly available or open to scrutiny unless reproduced in publicly reported decisions.⁹⁹ Millbank and Dauvergne express similar concerns regarding the quality and generality of DFAT's advice, especially given that they found that it 'was almost universally negative to the applicant's case'.¹⁰⁰ The preference for relying on government sources disadvantages SO claimants as human rights organisations and local LGBTI non-government organisations often have a more intimate understanding of the reality of the persecutory threats that queer minorities face.¹⁰¹ By not giving their evidence due weight in proceedings, SO claimants suffer an increased burden to prove their claim.

Country information will remain imperative so long as the process of RSD operates on the premise that 'refugee claimants tell lies'.¹⁰² Amending the refugee definition will not solve the issue of having to judge the veracity of SO claims against the generally known factual circumstances of the claimant's country of origin. Instead, decision-makers should be guided to seek and give greater weight to appropriate non-government sources whilst also exercising an appropriate level of caution in accepting the conclusions of government sources.

E Internal Flight Alternative

While not stated in the Refugee Convention, many countries, including Australia, require claimants to show that the risk of persecution relates to the entire country of origin, such that it is not possible to relocate internally to avoid the risk of persecution.¹⁰³ If this internal flight alternative ('IFA') exists, the claimant is expected to pursue that alternative instead of seeking asylum in another country. The consideration of IFAs have been of increasing importance in decision-making as '[s]ocial, political and legal progress' relating to the acceptance of queer people 'is sometimes highly localised in a state'.¹⁰⁴ Metropolitan areas may provide pockets of progressive

⁹⁹ *From Lives of Fear* (n 1).

¹⁰⁰ *Burdened by Proof* (n 1) 313-314.

¹⁰¹ LaViolette (n 11) 443.

¹⁰² *Burdened by Proof* (n 1) 308.

¹⁰³ In Australia, the relevant provision is *Migration Act 1958* (Cth) s 36(2B).

¹⁰⁴ LaViolette (n 11) 460.

communities that are safer for queer minorities, whereas rural and regional areas tend to remain conservative – although this is not always the case. Decision-makers have been criticised for treating IFA as ‘opportunities for re-concealment’ of the claimant’s sexual orientation, rather than opportunities for the claimant to live out their sexual orientation freely in a safe environment and without the risk of persecution.¹⁰⁵

Evidently, the Tribunal determined that no IFA existed in the eight successful decisions studied. In many of the cases, this was dealt with quite swiftly. For example, in Case Study 1715202, the Tribunal determined that the claimant could safely relocate to another part of Pakistan but found it would be unreasonable to require him to do so as he would face severe discrimination and significant difficulties to accessing vital treatment for HIV and maintaining employment.¹⁰⁶

Two of the unsuccessful cases determined that the claimant did not have a well-founded fear of persecution, and therefore the Tribunal did not progress to consider IFA.¹⁰⁷ In the third unsuccessful case, the Tribunal determined that the claimant could not relocate within India but could avoid the risk of persecution by moving to Nepal.¹⁰⁸ Positively, these decisions demonstrate appropriate considerations of IFA, although the author hesitates to conclude that it is no longer a live issue for SO claimants more broadly.

VII INTERPRETIVE GUIDANCE

Finally, it is necessary to briefly comment on the importance of existing guidance for decision-makers in interpreting the refugee definition, given it has significant potential to shape the implementation of the definition more favourably and equitably to SO claimants. The UNHCR is clearly cognisant of the specific barriers to successful SO claims and has released multiple soft

¹⁰⁵ Millbank (n 50) 768.

¹⁰⁶ Case Study 1715202 [47]-[57].

¹⁰⁷ Case Study 2013019; Case Study 1718354.

¹⁰⁸ Case Study 2007537. In coming to this decision, the Tribunal relied on *Migration Act 1958* (Cth) s 36(3). This section provides that a person who otherwise meets the definition of a refugee will not engage Australia’s protection obligations if they are a national of country other than Australia or their country of origin and can move there without having a similar fear of persecution.

law tools to assist decision-makers in interpreting the refugee definition.¹⁰⁹ While the UNHCR guidance is non-binding and imperfect,¹¹⁰ it certainly provides helpful guidance for decision-makers to treat SO claims more appropriately, sensitively, and equitably. Disappointingly, UNHCR guidance specific to sexual orientation claims¹¹¹ was only referred to explicitly in a single Case Study.¹¹²

UNHCR materials are supplemented by other decision-making guides, including from Kaleidoscope Australia,¹¹³ the Australian Government,¹¹⁴ and the International Commission of Jurists.¹¹⁵ The relevant Australian guidelines, however, provide no specific guidance on the substantive legal issues or considerations relevant to sexual orientation.¹¹⁶

Given that the definition of a refugee has largely remained static since its inception, these interpretive guidelines have been effective to the extent that this and other studies have identified positive developments in the treatment of SO claims. As such, the continued focus on interpretive guidelines is warranted, as well as further training to educate decision-makers on the multiplicity of ways and timings in which people come to learn of, express, and live out their sexual orientation. This education should equip decision-makers with a deep understanding of the intersectionality of forces shaping SO claimants' lives, including gender identity, culture, ethnicity, socioeconomic status, religion, and family and social environments. It is also important to encourage critical self-reflection so decision-makers are better aware of their own biases and stereotypical assumptions.¹¹⁷ On balance, all of these suggestions represent more fruitful avenues for improving the

¹⁰⁹ UNHCR (n 39).

¹¹⁰ 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.

¹¹¹ UNHCR (n 39).

¹¹² Case Study 1718354 [16].

¹¹³ Kaleidoscope Australia 'Looking Through the Kaleidoscope: A Guide to Best Practice in Determining Applications for Refugee Status Based on Sexual Orientation, Gender Identity and Intersex Grounds'.

¹¹⁴ Department of Immigration and Border Protection, 'Facilitator Guide: Annexure 5: Assessing claims related to sexual orientation and gender identity', released under the Freedom of Information Act 1982.

¹¹⁵ International Commission of Jurists (2016) 'Practitioner's Guide No 11: Refugee Status Claims Based on Sexual Orientation and Gender Identity'.

¹¹⁶ *From Lives of Fear* (n 1) 15.

¹¹⁷ *Ring of Truth* (n 1) 29.

situation for SO claimants than efforts focused on securing international agreement to amend the refugee definition. This is especially true given SO claimants are not the only group of people who will be affected by such a change.

VIII CONCLUSIONS

In conclusion, SO claimants continue to face distinct challenges in gaining protection, however, they would not benefit significantly from a change in the refugee definition. Instead, it is the inappropriate interpretation and implementation of this definition and unsound RSD procedures that have been the sources of great unfairness towards SO claimants. While there remain a significant range of issues for SO claimants, the findings presented in this article reveal encouraging improvements in the ability of SO claimants to access protection, which have been driven by focusing on refining the interpretation of the refugee definition and improving its implementation. To build on these positive developments, UNHCR guidance should be used as a base to inform Australian guidance and decision-making. Critically, all decision-makers should receive comprehensive and updated training regarding the plurality of ways that SO claimants live out and express their sexual orientations – such training should be completed regularly. This will ensure that decision-makers are equipped with the imperative skill of critical self-awareness, so they are conscious of the biases and assumptions they import to RSD. More comprehensive measures should be implemented to ensure all SO claimants are provided with access to quality legal representation to provide sound advice and advocate for their rights during the RSD process. Rather than directing efforts to amending the refugee definition, these initiatives represent a much more effective approach to addressing the unjust obstacles SO currently face whilst seeking protection from persecution.

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X APPENDIX – Case Studies

CASE REFERENCE	COUNTRY OF ORIGIN	GENDER OF CLAIMANT	RESULT
1713126	Indonesia	Male	Successful
1724111	Pakistan	Male	Successful
2013019	Iran	Male	Unsuccessful
1715202	Pakistan	Male	Successful
2010192	Lebanon	Male	Successful
1709239	Malaysia	Male	Successful
1718354	Pakistan	Male	Unsuccessful
2007537	India	Female	Unsuccessful*
1711688	Ghana	Male	Successful
2018109	Malawi	Male	Successful
1701222	Uganda	Male	Successful
Total		91% male	27% unsuccessful
		9% female	73% successful

* The Tribunal accepted the applicant had a well-founded fear of persecution in India on the basis of being a homosexual woman. However, the applicant was ultimately unsuccessful as the Tribunal determined that she could travel to Nepal to avoid the risk of persecution, and therefore Australia's protection obligations were not engaged.